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**Reader Aids**

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

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

## CFR PARTS AFFECTED IN THIS ISSUE

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

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# Presidential Documents

**Title 3—**

## The President

**Presidential Determination No. 2015–09 of July 10, 2015**

## Designation of the Republic of Tunisia as a Major Non-NATO Ally

**Memorandum for the Secretary of State**

Consistent with the authority vested in me as President by section 517 of the Foreign Assistance Act of 1961, as amended (the ''Act''), I hereby designate the Republic of Tunisia as a major Non-NATO Ally of the United States for the purposes of the Act and the Arms Export Control Act.

You are authorized and directed to publish this determination in the *Federal Register.*

THE WHITE HOUSE,
*Washington, July 10, 2015*

[FR Doc. 2015–18193
Filed 7–22–15; 8:45 am]
Billing code 4710–10

# Rules and Regulations

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

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

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 319

### Foreign Quarantine Notices

*CFR Correction*

In Title 7 of the Code of Federal Regulations, Parts 300 to 399, revised as of January 1, 2015, on page 372, in § 319.56–57, paragraph (c)(2) is correctly reinstated to read as follows:

**§ 319.56–57 Sand pears from China.**

* * * * *

(c) * * *

(2) Packinghouses must have a tracking system in place to readily identify all sand pears that enter the packinghouse destined for export to the United States back to their place of production.

* * * * *

[FR Doc. 2015–18071 Filed 7–22–15; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

### 7 CFR Part 1412

### Agriculture Risk Coverage, Price Loss Coverage, and Cotton Transition Assistance Programs

*CFR Correction*

In Title 7 of the Code of Federal Regulations, Parts 1200 to 1599, revised as of January 1, 2015, on page 516, in § 1412.45, in paragraph (b)(3), the term ''P&CP'' is replaced with the term ''planted''.

[FR Doc. 2015–18072 Filed 7–22–15; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2015–2906; Directorate Identifier 2014–SW–068–AD; Amendment 39–18213; AD 2015–15–04]**

**RIN 2120–AA64**

## Airworthiness Directives; Bell Helicopter Textron, Inc.

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Bell Helicopter Textron, Inc. (Bell), Model 204B, 205A, 205A–1, and 212 helicopters. This AD requires removing a certain part-numbered main rotor (M/R) blade grip (grip) from service. This AD is prompted by an error in a parts manufacturer approval (PMA) that incorrectly allows installation of the grips on the Bell Model 212. The actions specified in this AD are intended to prevent grip failure, separation of the M/R blade, and subsequent loss of control of the helicopter.

**DATES:** This AD becomes effective August 7, 2015. We must receive comments on this AD by September 21, 2015.

**ADDRESSES:** You may send comments by any of the following methods:

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

**Examining the AD Docket**

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the economic 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 Timken service information identified in this AD, contact Timken Alcor Aerospace Technologies, Inc., Aftermarket Customer Service, 3110 N. Oakland, Mesa, AZ 85215; telephone 1–480–606–3130; email *timkenaftermarketsales@timken.com;* or at *http://www.timken.com/en-us/solutions/aerospace/aftermarket/Pages/default.aspx.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

**FOR FURTHER INFORMATION CONTACT:** Scott Franke, Aviation Safety Engineer, Fort Worth Aircraft Certification Office, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5170; email *scott.franke@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, we invite you 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 resulted from adopting this AD. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time. We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. We will consider all the comments we receive and may conduct additional rulemaking based on those comments.

**Discussion**

We are adopting a new AD for Bell Model 204B, 205A, 205A–1, and 212 helicopters with a grip part number (P/N) ASI–4011–121–113 installed. This AD requires removing any grip from service if the grip is currently or has ever been installed on a Bell Model 212 helicopter, or if it is unknown whether the grip has ever been installed on a Model 212 helicopter. This AD also prohibits installing grip P/N ASI–4011–121–113 on any helicopter if the grip has ever been installed on a Bell Model 212 helicopter. This AD is prompted by an error in the PMA that allows installing the subject grip on the Bell Model 212.

Grip P/N ASI–4011–121–113 is currently produced by Timken Alcor Aerospace Technologies, Inc., under a PMA as a replacement grip for Bell P/N 204–011–121–113. This approval incorrectly listed grip P/N ASI–4011–121–113 as eligible for installation on Bell Model 212 helicopters. The PMA has been revised to remove that eligibility. This grip was previously produced and sold as a replacement grip for Bell P/N 204–011–121–113 by Air Services International of Scottsdale, AZ, as P/N ASI–4011–121–113. The actions required in this AD are intended to prevent installation of an unapproved grip, which could result in grip failure, separation of the M/R blade, and subsequent loss of control of the helicopter.

**FAA's Determination**

We are issuing this AD because we evaluated all known relevant information and determined that the unsafe condition described previously is likely to exist in other products of these same type designs.

**Related Service Information**

We reviewed Timken T–700 Service Bulletin, Revision B, dated October 20, 2014. The service bulletin specifies the airworthiness life limitations and inspection interval schedule for various Timken Alcor Aerospace Technologies, Inc., replacement parts and articles.

**AD Requirements**

This AD requires, within 5 hours time-in-service (TIS), removing any grip P/N ASI–4011–121–113 from service if the grip is currently or has ever been installed on a Bell Model 212 helicopter. This AD also prohibits installing a grip P/N ASI–4011–121–113 on any helicopter if the grip is currently or has ever been installed on a Bell Model 212 helicopter.

**Differences Between This AD and the Service Information**

The Timken service bulletin provides the airworthiness limitations and inspection intervals for various life limited parts, including grip P/N ASI–4011–121–113. This AD only applies to helicopters with grip P/N ASI–4011–121–113 and requires removing the grip from service if it is currently or has ever been installed on a Bell Model 212 helicopter.

**Costs of Compliance**

We estimate that this AD could affect 130 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. It takes about 20 work-hours to replace two M/R grips per helicopter. We estimate an average labor rate of $85 per work-hour, and a required parts cost of approximately $56,385 for two grips. Based on these figures, we estimate a total cost of $58,085 per helicopter and $7,551,050 for the U.S. fleet.

**FAA's Justification and Determination of the Effective Date**

Providing an opportunity for public comments prior to adopting these AD requirements would delay implementing the safety actions needed to correct this known unsafe condition. Therefore, we find that the risk to the flying public justifies waiving notice and comment prior to the adoption of this rule because the unsafe condition can adversely affect control of the helicopter and the required corrective actions must be accomplished within 5 hours TIS.

Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice and opportunity for public comment before issuing this AD are impracticable and contrary to the public interest and that good cause exists for making this amendment effective in less than 30 days.

**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 would not have federalism implications under Executive Order 13132. This 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, 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 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.

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

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

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

**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):

**2015–15–04 Bell Helicopter Textron, Inc. (Bell):** Amendment 39–18213; Docket No. FAA–2015–2906; Directorate Identifier 2014–SW–068–AD.

**(a) Applicability**

This AD applies to the following helicopters, certificated in any category:

(1) Bell Model 204B, 205A, and 205A–1 helicopters, with a main rotor (M/R) blade grip (grip) part number (P/N) ASI–4011–121–

113 installed, if the grip was ever installed on a Model 212 helicopter or if it is unknown whether a grip was ever installed on a Model 212 helicopter; and

(2) Bell Model 212 helicopters, with a grip P/N ASI–4011–121–113 installed.

**(b) Unsafe Condition**

This AD defines the unsafe condition as installation of a grip that does not meet type design. This condition could result in grip failure, separation of the M/R blade, and subsequent loss of control of the helicopter.

**(c) Effective Date**

This AD becomes effective August 7, 2015.

**(d) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

**(e) Required Actions**

(1) Within 5 hours time-in-service, remove each grip from service.

(2) Do not install a grip listed in paragraph (a) of this AD on any helicopter.

**(f) Alternative Methods of Compliance (AMOC)**

(1) The Manager, Fort Worth Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Scott Franke, Aviation Safety Engineer, Fort Worth Aircraft Certification Office, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5170; email *scott.franke@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

**(g) Additional Information**

Timken T–700 Service Bulletin, Revision B, dated October 20, 2014, which is not incorporated by reference, contains additional information about the subject of this AD. For Timken service information identified in this AD, contact Timken Alcor Aerospace Technologies, Inc., Aftermarket Customer Service, 3110 N. Oakland, Mesa, AZ 85215; telephone 1–480–606–3130; email *timkenaftermarketsales@timken.com;* or at *http://www.timken.com/en-us/solutions/aerospace/aftermarket/Pages/default.aspx.* You may review a copy of this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

**(h) Subject**

Joint Aircraft Service Component (JASC) Code: 6620, Main Rotor Blade Grip.

Issued in Fort Worth, Texas, on July 13, 2015.

**Bruce E. Cain,**

*Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2015–17953 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 73

**[Docket No. FAA–2014–0640; Airspace Docket No. 14–ACE–4]**

**RIN 2120–AA66**

## Modification of Restricted Areas R–4501A, R–4501B, R–4501C, R–4501D, R–4501F, and R–4501H; Fort Leonard Wood, MO

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

**ACTION:** Final rule; correction.

**SUMMARY:** This action corrects a final rule published in the **Federal Register** on May 26, 2015 by adding one set of geographic latitude/longitude coordinates that was inadvertently omitted from the restricted area R–4501H boundary description.

**DATES:** Effective date 0901 UTC, August 20, 2015.

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

**SUPPLEMENTARY INFORMATION:**

### History

A final rule was published in the **Federal Register** on May 26, 2015 (80 FR 29941), that established a single ceiling of one restricted area (R–4501B), added exclusions to three restricted areas (R–4501C, R–4501F, and R–4501H) to prevent overlapped restricted areas being active at the same time, made administrative changes to the title of two restricted areas (R–4501A and R–4501B), and made administrative changes to the using agency information of six restricted areas (R–4501A–D, R–4501F, and R–4501H) in Fort Leonard Wood, MO. Subsequent to publication, the FAA determined that one set of geographic latitude/longitude coordinates was inadvertently omitted from the R–4501H boundary description. This correction inserts the set of geographic latitude/longitude coordinates back into the R–4501H boundary description to retain the lateral boundary of the restricted area as it existed prior to the published final rule.

### Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, in Docket No. FAA–2014–0640, the boundary description for restricted area R–4501H, as published in the **Federal Register** on May 26, 2015 (80 FR 29941), FR Doc. 2015–12627, modifying the restricted areas at Fort Leonard Wood, MO, is corrected as follows:

**§ 73.45 (Amended)**

On page 29942, column 2, line 57, after the words ''Reservation boundary;'' insert ''to lat. 37°46′45″ N., long. 92°01′41″ W.;''.

Issued in Washington, DC, on July 16, 2015.

**Gary A. Norek,**

*Manager, Airspace Policy and Regulations Group.*

[FR Doc. 2015–18012 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 95

**[Docket No. 31030; Amdt. No. 521]**

## 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, August 20, 2015.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Dunham, 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 July 17, 2015.

**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, August 20, 2015.

## 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 521 effective date August 20, 2015]

| FROM | TO | MEA | MAA |
|---|---|---|---|
| **§ 95.3000 LOW ALTITUDE RNAV ROUTES** | | | |
| **§ 95.3293 RNAV ROUTE T293 is Amended To Read in Part** | | | |
| CHUTT, AL WP | NFTRY, GA WP | 2500 | 17500 |

| FROM | TO | MEA |
|---|---|---|
| **§ 95.6001 VICTOR ROUTES—U.S** | | |
| **§ 95.6169 VOR FEDERAL AIRWAY V169 is Amended To Read in Part** | | |
| TOBE, CO VOR/DME | HUGO, CO VOR/DME | 8100 |
| **§ 95.6181 VOR FEDERAL AIRWAY V181 is Amended To Read in Part** | | |
| OMAHA, IA VORTAC | NORFOLK, NE VOR/DME | 3600 |
| **§ 95.6452 ALASKA VOR FEDERAL AIRWAY V452 is Amended To Read in Part** | | |
| GALENA, AK VOR/DME | HORSI, AK FIX.<br>E BND<br>W BND | <br>*8000<br>*4000 |
| *4000—GNSS MEA | | |
| **§ 95.6456 ALASKA VOR FEDERAL AIRWAY V456 is Amended To Read in Part** | | |
| BINAL, AK FIX | TANIE, AK FIX | #*14000 |
| *3400—MOCA<br>#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE | | |
| **§ 95.6489 ALASKA VOR FEDERAL AIRWAY V489 is Amended To Read In Part** | | |
| GALENA, AK VOR/DME | HORSI, AK FIX.<br>E BND<br>W BND | <br>*8000<br>*4000 |
| *4000—GNSS MEA | | |

| FROM | TO | MEA |
|---|---|---|
| HORSI, AK FIX | ROSII, AK FIX. | |
| | NE BND | *6000 |
| | SW BND | *8000 |
| *4000—MOCA | | |
| ROSII, AK FIX | TANANA, AK VOR/DME. | |
| | NE BND | 3400 |
| | SW BND | 6000 |

**§ 95.6508 ALASKA VOR FEDERAL AIRWAY V508 is Amended To Read in Part**

| | | |
|---|---|---|
| AKGAS, AK FIX | SPARREVOHN, AK VOR/DME. | |
| | W BND | 6000 |
| | E BND | 12000 |

| AIRWAY SEGMENT | | CHANGEOVER | |
|---|---|---|---|
| FROM | TO | DISTANCE | FROM |

**§ 95.8003 VOR FEDERAL AIRWAY Changeover Point V181 is Amended To Add Changeover Point**

| | | | |
|---|---|---|---|
| OMAHA, IA VORTAC | NORFOLK, NE VOR/DME | 51 | OMAHA |

[FR Doc. 2015–18083 Filed 7–22–15; 8:45 am]
BILLING CODE 4910–13–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 46

**[Docket No. RM15–3–000; Order No. 812]**

## Revisions to Public Utility Filing Requirements

**AGENCY:** Federal Energy Regulatory Commission, Energy.

**ACTION:** Final rule.

**SUMMARY:** The Commission is revising its regulation to eliminate the requirement to submit FERC–566 (Annual Report of a Utility's 20 Largest Customers) for regional transmission organizations, independent system operators, and exempt wholesale generators. The Commission is also revising its regulations to eliminate the requirement to submit FERC–566 for public utilities that have not made any reportable sales under FERC–566 in any of the three preceding years. Further, the Commission is eliminating the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address.

**DATES:** This rule will become effective October 6, 2015.

**FOR FURTHER INFORMATION CONTACT:**

Mary LaFave (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6060

Lina Naik (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8882

**SUPPLEMENTARY INFORMATION:**

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**Order No. 812—Final Rule**

1. In this final rule, the Commission revises part 46 of its regulations to eliminate the requirement to submit FERC–566 (Annual Report of a Utility's 20 Largest Customers) for regional transmission organizations (RTOs), independent system operators (ISOs), and exempt wholesale generators (EWGs). The Commission also revises its regulations to eliminate the requirement to submit FERC–566 for public utilities that have not made any reportable sales under FERC–566 in any of the three preceding years. Further, the Commission is eliminating the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address.

**I. Discussion**

2. Section 305(c) of the FPA requires, among other things, that, on or before January 31 of each calendar year, each public utility shall publish a list, pursuant to rules prescribed by the Commission, of any company, firm, or organization that is one of the 20 purchasers of electric energy which purchased (for purposes other than resale) one of the 20 largest annual amounts of electric energy sold by such public utility (or by any public utility which is part of the same holding company system) during any one of the three calendar years immediately preceding the filing date.[1]

3. The Commission implemented Congress's mandate in part 46 of the Commission's regulations.[2] Section 46.3 of the regulations thus provides, in relevant part, that, on or before January 31 of each year, each public utility shall compile a list of purchasers of electric energy (other than for resale), and shall identify each purchaser by name and principal business address, and shall submit the list to the Secretary and make the list publicly available. The list identifies each purchaser who, during any of the three preceding calendar years, purchased (for purposes other than resale) from a public utility one of the 20 largest amounts of electric energy by such public utility, and the public utility is required to notify each purchaser which has been identified on the list.[3]

4. In a Notice of Proposed Rulemaking (NOPR) issued on December 18, 2014, the Commission proposed to revise its regulations to reduce the regulatory burden of compliance on public utilities, while meeting the statutory standards set forth in the FPA. Specifically, the Commission proposed to eliminate the requirement to submit FERC–566 for RTOs, ISOs, and EWGs, as well as public utilities that have not made any reportable sales in any of the three preceding years. The Commission further proposed to eliminate the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address.[4]

*A. RTOs and ISOs*

1. Commission Proposal

5. The Commission proposed to eliminate the requirement to submit FERC–566 for RTOs and ISOs. The Commission stated that the statute expressly seeks to acquire information about purchasers of electric energy who purchased ''for purposes other than resale.'' [5] The Commission noted that, by their nature, RTOs and ISOs are focused primarily on sales of electric energy for resale.

2. Comments

6. The ISO/RTO Council,[6] South Central MCN, LLC (South Central MCN) and Midcontinent MCN, LLC (Midcontinent MCN), Edison Electric Institute (EEI), International Transmission Company d/b/a ITC Transmission, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, and ITC Great Plains, LLC (collectively ITC), and Financial Marketers Coalition support the proposed rule to eliminate the requirement that RTOs and ISOs submit FERC–566.

7. South Central MCN and Midcontinent MCN support eliminating the requirement that RTOs and ISOs submit FERC–566, but recommend that the Commission also extend the exemption to all transmission-only companies (transcos) such as South Central MCN and Midcontinent MCN. South Central MCN and Midcontinent MCN state that, like RTOs and ISOs, transcos, by their nature, do not make any retail sales of electricity and do not have any retail customers. Accordingly, transcos will not have reportable sales under FERC–566 and should be exempted from the filing requirement.

8. Similarly, EEI recommends that the Commission extend the reporting exemption to cover qualifying facilities (QFs). EEI states that QFs engage in sales primarily or exclusively at wholesale. EEI submits that eliminating the reporting requirement on QFs would ease the administrative burden for both them and the Commission.

9. In addition, EEI encourages the Commission to clarify that public utilities participating in RTO and ISO markets are also exempt from the FERC–566 filing requirement as to all transactions conducted in those markets. EEI submits that the RTO and ISO markets are essentially wholesale in nature and participants in those markets will, by definition, be engaging only in non-reportable sales in the markets. Finally, EEI notes that the Commission should correct the proposed regulatory text in section 46.3(a)(2) by replacing ''Regional Transmission Operators'' with ''Regional Transmission Organizations.''

10. Powerex Corp. (Powerex) argues that the Commission should expand its exemptions from FERC–566 reporting to include public utilities that have a *de minimis* market presence in making sales to purchasers ''for purposes other than resale.'' Powerex asserts that this would recognize that many public utility sellers are almost exclusively engaged in wholesale sales. Specifically, Powerex proposes that the Commission establish a *de minimis* threshold for exemption from filing FERC–566 if the seller makes 4,000,000 megawatt-hours (MWhs) or less of annual non-wholesale sales (based on an average of the non-wholesale sales it made in the preceding three years). Powerex claims that this is the *de minimis* market presence threshold that the Commission adopted for non-public utilities in its decision to exclude certain non-public utilities from the requirement to submit Electric Quarterly Reports (EQR).

3. Commission Determination

11. The Commission will adopt the proposed exemption of RTOs and ISOs from the requirement to file FERC–566. We also revise proposed section 46.3(a)(2) by replacing ''Regional Transmission Operators'' with ''Regional Transmission Organizations.'' We find that the revised regulation will reduce the regulatory burden of compliance on RTOs and ISOs.

12. We decline to grant the clarification requested by EEI that public utilities participating in RTO and ISO markets are exempt from the FERC–566 filing requirement as to all

[1] 16 U.S.C. 825d(c).

[2] 18 CFR part 46.

[3] 18 CFR 46.3.

[4] *Revisions to Public Utility Filing Requirements,* 79 FR 78,739 (Dec. 31, 2014), FERC Stats. & Regs., Proposed Regs. ¶ 32,704 (2014).

[5] 16 U.S.C. 825(c)(2)(D).

[6] The ISO/RTO Council is comprised of Alberta Electric System Operator; California Independent System Operator Corporation; Electric Reliability Council of Texas, Inc.; Independent Electricity System Operator; ISO New England Inc.; Midcontinent Independent System Operator, Inc.; New York Independent System Operator, Inc.; PJM Interconnection, L.L.C.; and Southwest Power Pool, Inc.

transactions conducted in those markets. Such utilities may well also make sales ''for purposes other than for resale,'' and the statutory directive encompasses such utilities and such sales.[7] Adopting EEI's suggestion would virtually eliminate the filing requirement, contrary to the statute. We also decline to grant EEI's request to exempt QFs from the requirement to file FERC–566. QFs, in fact, may make sales ''for purposes other than for resale,'' and the statutory directive encompasses such utilities and such sales. Moreover, in its regulations exempting QFs from certain provisions of the FPA, the Commission specifically excluded FPA section 305(c). Specifically, section 292.601(c) states that ''[a]ny qualifying facility . . . shall be exempt from all sections of the Federal Power Act, except: . . . Sections 305(c).'' [8] We are not persuaded to change that regulation at this time.

13. Likewise, we decline to extend the exemption to transcos. We agree with South Central MCN and Midcontinent MCN that transcos by their nature would be unlikely to make retail sales. Unlike RTOs and ISOs, however, transcos are not defined in the Commission's regulations and as such, are not as easily identified. Further, a transco may also—at any time—readily shift its business strategy to encompass making sales for purposes other than for resale. And, in any event, if a transco does not, in fact, make any sales for purposes other than resale, the burden is minimal, particularly given the further change that we adopt below to eliminate the reporting obligation when a public utility makes no reportable sales for the preceding three years.

14. We also decline to establish a *de minimis* threshold for exemption from filing FERC–566. The language of the statute does not appear to permit the Commission to establish the kind of exemption Powerex seeks. Further, while Powerex claims that this is the *de minimis* market presence threshold the Commission adopted for non-public utilities in its decision to exclude certain non-public utilities from the requirement to submit EQRs, such reports were not expressly required by the statute but instead were established by the Commission. Thus, the Commission has far greater leeway in allowing exemptions from EQR reporting requirements.

*B. EWGs*

1. Commission Proposal

15. The Commission proposed to eliminate the requirement to submit FERC–566 for EWGs. The Commission noted that, by definition, EWGs do not have retail customers.[9] Because the statute seeks to acquire information about purchasers of electric energy who purchased for purposes other than for resale, *i.e.,* for retail, EWGs should not be required to submit FERC–566.

2. Comments

16. The NRG Companies (NRG), Financial Marketers Coalition, South Central MCN and Midcontinent MCN, ITC, and EEI support the proposed elimination of the requirement that EWGs submit FERC–566. NRG states that eliminating the obligation to have EWGs file a blank form will remove an administrative burden on companies, will be consistent with directives in the Government Paperwork Elimination Act to reduce the information collection burden, and will not have any impact on the reporting of actual customers to the Commission.

3. Commission Determination

17. The Commission will adopt the proposed exemption. We find that the revised regulation will reduce the regulatory burden of compliance on EWGs, who definitionally cannot make sales for purposes other than for resale.[10]

*C. Public Utilities That Have not Made Reportable Sales in Preceding Three Years*

1. Commission Proposal

18. The Commission proposed to eliminate the requirement to submit FERC–566 for those public utilities that have not made any reportable sales in any of the three preceding years. The Commission stated that section 305(c) requires public utilities to publish a list of purchasers; it does not require a report of the absence of purchasers.

2. Comments

19. NRG, ITC, South Central MCN and Midcontinent MCN, Financial Marketers Coalition and EEI support the proposed rule to eliminate the requirement to submit FERC–566 for public utilities that have not made any reportable sales in any of the three preceding years. NRG states that, of its over 100 public utilities, less than 10 typically have retail customers in any given year, and, therefore, for the majority of its public utilities, NRG does not have customers to report on FERC–566. ITC states that, as independent electric transmission companies, its operating companies have never made reportable sales. EEI agrees that public utilities that have only wholesale sales in the three year period covered by each annual FERC–566 should not be required to file the report. NRG, ITC, South Central MCN and Midcontinent MCN, and EEI variously assert that it makes no sense to file a report when there is no reportable information, that there is no benefit to the Commission or parties in indicating no reportable sales, and that such an exemption will promote administrative efficiency.

20. In addition, EEI states that the Commission should clarify proposed section 46.3(a)(4) in one respect. EEI states that, by stating that any public utility without ''reportable sales'' in the three year period is exempt from filing FERC–566, the Commission should specify that it means to exempt any public utility with ''no sales or only wholesale sales'' in the three year period.

21. EEI also states that because section 305(c)(2) applies only to public utilities and their sales, it recommends that the Commission clarify that only public utilities within a holding company system need to file FERC–566, and only sales by such utilities within the holding company system need to be considered in compiling the report.

22. Powerex states that there is uncertainty as to the types of transactions that fall within the Commission's Part 46 reporting requirements regarding sales of electric energy to purchasers ''for purposes other than for resale.'' Powerex submits that the Commission should clarify how public utilities should identify sales to purchasers ''for purposes other than for resale'' for inclusion in FERC–566. Powerex states that, as a marketer, it generally does not have information on whether its purchasers subsequently resold the power they purchased from Powerex. Powerex states that, out of an abundance of caution and to ensure compliance, in its FERC–566 submissions it submits an overly-inclusive listing of purchasers it believes have end-use facilities and would otherwise be required to possess, but do not appear to currently have, Commission authorization to make market-based rate wholesale sales.

[7] Insofar as EEI may be concerned about sales made in those markets, to the extent those sales may be sales for resale, such sales would not be themselves reportable in any event. Only sales for purposes other than for resale are reportable.

[8] 18 CFR 292.601(c)(4).

[9] The Commission's regulations define an EWG as any person that is ''engaged . . . *exclusively* in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities *and selling electric energy at wholesale.*'' 18 CFR 366.1 (emphasis added).

[10] *See supra* note 10.

3. Commission Determination

23. The Commission will adopt the proposed regulation, but will clarify it in accordance with the suggestion by EEI, by replacing ''public utilities that have no reportable sales as defined in section (b)'' with ''public utilities that have either no reportable sales as defined in paragraph (b) or only sales for resale.'' We find that this revised regulation will reduce the regulatory burden of compliance on public utilities that have no reportable sales.

24. We decline to grant the clarification requested by EEI that only public utilities within a holding company system need to file FERC–566, and only the sales by such utilities within the holding company system need to be considered in compiling the report. FPA section 305(c) applies to all public utilities, not just public utilities within a holding company system.

25. We disagree with Powerex that there is uncertainty as to the types of transactions that fall within the Commission's Part 46 reporting requirements regarding sales of electric energy to purchasers ''for purposes other than for resale.'' Section 305(c) of the FPA requires that each public utility shall publish a list of any company, firm, or organization that, during any one of the three calendar years preceding the filing date, was one of the 20 purchasers of electric energy ''which purchased (for purposes other than for resale) one of the 20 largest annual amounts of electric energy sold by such public utility (or by any public utility which is part of the same holding company system)'' during any one of those three years.[11]

*D. Identification Requirement*

1. Commission Proposal

26. The Commission proposed to eliminate the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address. The Commission noted that the regulations currently require that each public utility identify each purchaser on the list of the 20 largest purchasers by name and principal business address, but that it may not be necessary to have such detailed information about residential customers.

2. Comments

27. Financial Marketers Coalition, South Central MCN and Midcontinent MCN, EEI and ITC support the proposed rule to eliminate the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address.

28. Contending that the current regulations go beyond the statutory requirements, EEI states that the Commission should eliminate the need to report residential customers by clarifying that public utilities need report only any ''company, firm, or organization'' that falls within the 20 highest-volume purchasers in any of the preceding three years. EEI also states that the Commission should eliminate from section 46.3 the requirement to notify and include the address of each of the purchasers listed in FERC–566. EEI further states that the Commission should eliminate the requirement at section 46.3(e) to submit revised FERC–566 by March 1 of each year if the January 31 filing was based on estimated data. EEI submits that this filing is not required by statute, is unnecessary, and adds to the reporting burden. EEI states that, if the Commission does not eliminate the requirement altogether, the Commission should specify that revised reports need to be filed only if new data available by March 1 would make a material difference in the report.

29. EEI also states that the Commission should clarify that despite the ''aggregation'' provision at section 46.3(c), public utilities can treat individual stores or other facilities within a family of stores or parent company as separate customers rather than having to be batched, if the stores or facilities purchase or pay for their electricity separately rather than as a group through the parent company.

3. Commission Determination

30. The Commission will adopt the proposed regulation to eliminate the requirement for public utilities submitting FERC–566 to identify individual residential customers by name and address. Instead we will allow public utilities to identify individual residential customers as ''Residential Customer,'' and provide a zip code in lieu of an address. We find that the revised regulation will reduce the regulatory burden of compliance on public utilities.

31. We agree with EEI that the requirement that public utilities notify the 20 largest purchasers, currently found in section 46.3 of the regulations, is unnecessary. Thus, we eliminate this requirement from the regulations.

32. However, we decline to grant the clarification requested by EEI that public utilities need not report residential customers but rather need report only any ''company, firm, or organization'' that falls within the 20 highest-volume purchasers in any of the preceding three years. EEI seeks to draw a distinction not made by the statute, because, although the statute requires public utilities to report ''any company, firm, or organization'' which was one of the 20 largest purchasers of electric energy, an individual residential customer could, in fact, be a business structured as a sole proprietorship or some other ownership structure; this could explain why a residential customer is one of the public utility's 20 largest purchasers.

33. We also disagree with EEI that public utilities may treat individual stores or other facilities within a family of stores or under a parent company as separate customers rather than having to be batched, if the stores or facilities purchase or pay for their electricity separately rather than as a group through the parent company. The statute requires the reporting of ''purchasers'' of electric energy, not accounts. Therefore, even if a family of stores or other facilities within a family pay for their electric energy separately, it would be appropriate to aggregate them in accordance with the statute and section 46.3(c) of the Commission's regulations.[12]

34. We also decline to grant EEI's request that we eliminate the requirement to submit revised FERC–566 reports by March 1 of each year if the January 31 filing was based on estimated data. Although not specifically required by statute, the regulation helps ensure that the data collected is accurate.

## II. Information Collection Statement

35. The Paperwork Reduction Act (PRA) requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB's regulations,[13] in turn, require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these

[11] 16 U.S.C. 825d(c).

[12] Even if we were to adopt such a change, it would not reduce the reporting from 20 purchasers to some lesser number. While some purchasers might drop off the list as a result, others that were previously the 24th or 27th largest purchasers, for example, would then effectively move up the list to within the 20 largest purchasers. In short, who is on the list might change, but the number of purchasers reported would not change.

[13] 5 CFR part 1320.

collections of information unless the collections of information display a valid OMB control number.

36. The Commission is submitting the proposed modifications to its information collection to OMB for review and approval in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.[14] In the NOPR, the Commission solicited comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

37. The Commission did not receive any comments specifically addressing the burden estimates provided in the NOPR. The Commission did receive comments on eliminating or further modifying filing requirements; those comments and the Commission's responses are addressed above. *Public Reporting Burden:* The burden and cost estimates below are based on the estimated reduction in burden for: (a) Entities that would no longer have to file the annual report of twenty largest purchasers, (b) filers that would no longer have to identify individual residential customers by name and address, and (c) filers that would no longer be required to notify the 20 largest purchasers appearing on the list. The Commission estimates the current annual report requires (on average) six hours to prepare and to file. Implementation of this Final Rule will reduce the number of filings (due to the discontinuance of filings from the six RTOs/ISOs and an additional 880 filers that report no purchasers, including EWGs, and reduce the average number of hours per filing for the remaining filers (due to the elimination of the name and address for residential customers, and notification to the 20 largest purchasers).

38. The following table provides the current OMB-approved burden estimate, as well as the estimated burden reductions being implemented by this Final Rule:

FERC–566, ESTIMATED BURDEN

[Rounded]

| Respondent category | Number of respondents (1) | Annual number of responses per respondent (2) | Total number of responses (1)*(2) = (3) | Average burden hours & cost per response [15] (4) | Annual burden hours & total annual cost [16] (3)*(4) = (5) |
|---|---|---|---|---|---|
| **Current OMB-Approved Burden Estimate, before Implementation of Final Rule in RM15–3** | | | | | |
| All Filers | 1,082 | 1 | 1,082 | 6 | 6,492 |
| **Elimination of Selected Filings, due to Final Rule in RM15–3** | | | | | |
| Elimination of filings by RTOs/ISOs. | 6 | 1 | elimination of 6 | (elimination) −6 hrs.; −$432. | (elimination) −36 hrs.; −$2,592 |
| Elimination of Filings by Filers with No Purchasers (including EWGs). | 880 | 1 | elimination of 880 | (elimination) −6 hrs.; −$432. | (elimination) −5,280 hrs.; −$380,160 |
| **Burden Reduction of Remaining Filings, due to Final Rule in RM15–3** | | | | | |
| Elimination of Name & Address for Residential. Customers [17]. | 29 | 1 | 29 | (reduction) −0.25 hrs.; −$18. | (reduction) −7.25 hrs.; −$522 |
| Elimination of Requirement to Notify 20 Largest Purchasers [18]. | 196 | 1 | 196 | (reduction) −0.5 hrs.; −$36. | (reduction) −98 hrs.; −$7,056 |
| Total Reduction (rounded), due to implementation of RM15–3). | 886 | 1 | (elimination) −886 | | (elimination of filings and reduction of hours) −5,421 hrs.; −$390,312 |
| Net Total, after implementation of RM15–3 [19]. | 196 | 1 | 196 | 5.46 hrs.; $393.34 | 1,071 hrs.; $77,094 |

*Title:* Annual Report of Twenty Largest Purchasers (FERC–566).

[14] 44 U.S.C. 3507(d).

[15] The estimates for cost per response are derived using the following formula: Burden Hours per Response * $72.00/hour = Cost per Response. The $72.00/hour is based on the average salary plus

Continued

*Action:* Revision to existing collection.

*OMB Control No:* 1902–0114.

*Respondents:* Business or other for profit, and not for profit institutions.

*Frequency of Responses:* Annually.

*Necessity of the Information:* The Commission is required by the Federal Power Act to collect information on public utilities' twenty largest retail purchasers. This information helps the Commission understand electric energy markets and transactions, in order to better safeguard public and private interests. Upon review, the Commission finds that, as described above, certain entities no longer need to make the annual filing, and other filers will be able to eliminate certain data and notification requirements.

*Internal review:* The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

39. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, email: *DataClearance@ferc.gov,* phone: (202) 502–8663, fax: (202) 273–0873].

40. Comments concerning the information collection proposed in this Final Rule and the associated burden estimates, should be sent to the Commission in this docket and may also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov.* Please refer to OMB Control Number 1902–0114 in your submission to OMB.

benefits for a Commission employee for Fiscal Year 2015. We assume that industry respondents earn at a rate similar to Commission employees.

[16] Total Annual Burden Hours * $72.00/hour.

[17] The Commission estimates that approximately 29 (or 15%) of the 196 filers have residential customers. Each of those 29 filers is estimated to save 0.25 hours annually due to elimination of the requirement for name and address of residential purchasers.

[18] The Commission estimates that each of the 196 filers will save 0.5 hours annually, due to elimination of this requirement.

[19] After implementation of this Final Rule, the Commission estimates the remaining 196 filers will each have an average annual burden of 5.46 hours per filing (a reduction from the previous estimate of 6 hours). Twenty-nine of the 196 filers will annually each have 5.25 hours of burden, and 167 of the 196 filers will each have 5.5 hours of burden. The estimated total annual burden for all of the 196 filers will be 1,071 hours (rounded).

## III. Environmental Analysis

41. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[20] The collection of information has been categorically excluded from such analysis under section 380.4(a)(5) of the Commission's regulations, however.[21] Thus, no such analysis is required.

## IV. Regulatory Flexibility Act Certification

42. The Regulatory Flexibility Act of 1980 (RFA) [22] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) revised its size standard (effective January 22, 2014) for electric utilities from a standard based on megawatt hours to a standard based on the number of employees including affiliates.[23]

43. This Final Rule revises the Commission's regulations to eliminate some filings and to reduce reporting burdens for others. Specifically, the Commission is eliminating the requirement to submit FERC–566 for RTOs and ISOs, EWGs, and those public utilities that did not make retail sales in the preceding three years. The Commission estimates that, on average, each of those 886 entities that will no longer have to file the FERC–566 will have an annual reduction in cost of $432.

44. The Commission is also reducing the burden for the remaining 196 filers because they will no longer have (a) to identify individual residential customers by name and address, and (b) to provide notification to the 20 largest purchasers. The Commission estimates that each of the remaining 196 filers will have an average annual reduction in cost of $38.66 per year.

45. Accordingly, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

## V. Document Availability

46. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

47. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

48. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

## VI. Effective Date and Congressional Notification

49. These regulations are effective October 6, 2015. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule is being submitted to the Senate, House of Representatives, Government Accountability Office, and Small Business Administration.

## List of Subjects in 18 CFR Part 46

Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Issued: July 16, 2015.

**Kimberly D. Bose,**

*Secretary.*

In consideration of the foregoing, the Commission amends Part 46, Chapter I, Title 18, *Code of Federal Regulations,* as follows.

## PART 46—PUBLIC UTILITY FILING REQUIREMENTS AND FILING REQUIREMENTS FOR PERSONS HOLDING INTERLOCKING POSITIONS

■ 1. The authority citation for Part 46 continues to read as follows:

**Authority:** 16 U.S.C. 792–828c; 16 U.S.C. 2601–2645; 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 142.

■ 2. Section 46.3 is amended as follows:

[20] *Regulations Implementing National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[21] 18 CFR 380.4(a)(2)(ii).

[22] 5 U.S.C. 601–12.

[23] SBA Final Rule on ''Small Business Size Standards: Utilities,'' 78 FR 77343 (Dec. 23, 2013).

■ a. Paragraph (a) is revised.
■ b. Paragraph (d) is removed, and paragraph (e) is redesignated as (d).

**§ 46.3 Purchaser list.**

(a)(1) *Compilation and filing list.* On or before January 31 of each year, except as provided below, each public utility shall compile a list of the purchasers described in paragraph (b) of this section, and subject to paragraph (a)(5) of this section, shall identify each purchaser by name and principal business address. The public utility must submit the list to the Secretary of the Commission in accordance with filing procedures posted on the Commission's Web site at *http://www.ferc.gov* and make the list publicly available through its principal business office.

(2) Notwithstanding paragraph (a)(1) of this section, public utilities that are defined as Regional Transmission Organizations, as defined in § 35.34(b)(1) of this chapter, and public utilities that are defined as Independent System Operators, as defined in § 35.46(d) of this chapter, are exempt from the requirement to file.

(3) Notwithstanding paragraph (a)(1) of this section, public utilities that meet the criteria for exempt wholesale generators, as defined in § 366.1 of this chapter, and are certified as such pursuant to § 366.7 of this chapter, are exempt from the requirement to file.

(4) Notwithstanding paragraph (a)(1) of this section, public utilities that have either no reportable sales as defined in paragraph (b) or only sales for resale in any of the three preceding years are exempt from the requirement to file.

(5) Notwithstanding paragraph (a)(1) of this section, individual residential customers on the list should be identified as ''Residential Customer,'' and with a zip code in lieu of an address.

* * * * *

[FR Doc. 2015–17950 Filed 7–22–15; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2015–0502]**

**RIN 1625–AA00**

## Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** At various times throughout the month of August, the Coast Guard will enforce certain safety zones located in the Captain of the Port Buffalo Zone. This action is necessary and intended for the safety of life and property on navigable waters during this event. During each enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo.

**DATES:** The regulations in 33 CFR 165.939(a)(30) will be enforced on August 15 and 16, 2015 from 9 a.m. to 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice of enforcement, call or email Petty Officer Willie Diaz, Waterways Management Division, Coast Guard Sector Buffalo, 1 Fuhrmann Blvd., Buffalo, NY 14203; Coast Guard telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** The Coast Guard will enforce the Safety Zones; Annual Events in the Captain of the Port Buffalo Zone listed in 33 CFR 165.939(a)(30) for the following events:

(1) *Thunder on the Niagara Hydroplane Boat Races, North Tonawanda, NY;* The safety zone listed in 33 CFR 165.939(a)(30) will be enforced from 9 a.m. to 5 p.m. on August 15, 2015 and August 16, 2015.

Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within these safety zones during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or his designated representative. Those seeking permission to enter one of these safety zones may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter one of these safety zones shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that one of these safety zones need not be enforced for the full duration stated in this notice of enforcement he or she may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Dated: June 15, 2015.

**B.W. Roche,**

*Captain, U.S. Coast Guard, Captain of the Port Buffalo.*

[FR Doc. 2015–18074 Filed 7–22–15; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R03–OAR–2014–0759; FRL–9930–96–Region–3]**

## Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; 2011 Base Year Emissions Inventories for the Washington DC-MD-VA Nonattainment Area for the 2008 Ozone National Ambient Air Quality Standard

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to approve the 2011 base year carbon monoxide (CO) emissions inventories submitted by the District of Columbia, State of Maryland, and Commonwealth of Virginia (collectively, the States) for the Washington, DC-MD-VA nonattainment area (the DC Area or Area) for the 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS). EPA is approving the 2011 CO base year emissions inventories for the 2008 8-hour ozone NAAQS for the DC Area in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This rule is effective on September 21, 2015 without further notice, unless EPA receives adverse written comment by August 21, 2015. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R03–OAR–2014–0759 by one of the following methods:

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

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2014–0759, Cristina Fernandez, Associate Director,

Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

*Instructions:* Direct your comments to Docket ID No. EPA–R03–OAR–2014–0759. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittals are available at the District of Columbia Department of the Environment, Air Quality Division, 1200 1st Street NE., 5th floor, Washington, DC 20002; the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Powers, (215) 814–2308, or by email at *powers.marilyn@epa.gov*.

**SUPPLEMENTARY INFORMATION:**



## I. Background

On May 13, 2015 (80 FR 27276), EPA published a direct final rulemaking action (DFRN) approving the 2011 base year emissions inventories submitted by the District of Columbia Department of the Environment (DDOE), the Maryland Department of the Environment (MDE), and the Virginia Department of Environmental Quality (VADEQ) for the DC Area for the 2008 8-hour ozone NAAQS. *See* EPA Docket ID number EPA–R03–OAR–2014–0759 Direct Final Rule-1. The May 13, 2015 DFRN took action on the base year inventories submitted by the States for nitrogen oxides ($NO_X$) and volatile organic compounds (VOC), but inadvertently did not take action on the CO base year inventories that were also part of the States' submittal. This rulemaking takes action on the CO inventories.

## II. Summary of SIP Revision

On July 17, 2014, DDOE and VADEQ submitted their 2011 base year inventories, and on August 4, 2014, MDE submitted its base year inventories. As noted, the submissions included 2011 CO inventories, which include emissions estimates that cover the general source categories of stationary point sources, stationary nonpoint sources, nonroad mobile sources, and onroad mobile sources.

The emissions inventory is developed by the incorporation of data from multiple sources. States were required to develop and submit to EPA a triennial emissions inventory according to the Consolidated Emissions Reporting Rule (CERR) for all source categories (*i.e.,* point, nonpoint, nonroad mobile, and on-road mobile). The States developed the point source emissions inventory using actual emissions directly reported by electric generating unit (EGU) and non-EGU sources in the Area. For nonpoint source emissions, emissions were estimated by multiplying an emission factor by a known indicator of activity for each source category in the county (or county-equivalent). Nonroad mobile source emissions were determined using the EPA's NONROAD2008 model. Onroad mobile source emissions were developed using the EPA's highway mobile source emissions model MOVES 2010a. More information regarding EPA's review and analysis of the CO inventories for CAA requirements is available in the technical support document (TSD) that is located in the docket for this rulemaking action.

## III. Final Action

EPA is approving the 2011 base year CO emissions inventories submitted by the District of Columbia, Maryland, and Virginia for the DC Area for the 2008 8-hour ozone NAAQS as revisions to the States' respective SIPs. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register,** EPA is publishing a separate document that will serve as the proposal to approve the SIP revisions if adverse comments are filed. This rule will be effective on September 21, 2015 without further notice unless EPA receives adverse comment by August 21, 2015. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

## IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws

when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts . . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.'' Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

## V. Statutory and Executive Order Reviews

### *A. General Requirements*

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

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

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

### *B. Submission to Congress and the Comptroller General*

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

### *C. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 21, 2015. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action.

This action approving the 2011 CO emissions inventories for the DC Area for the 2008 ozone NAAQS 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, Nitrogen oxides, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 10, 2015.

**William C. Early,**

*Acting Regional Administrator, Region III.*

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 J—District of Columbia

■ 2. In § 52.474, paragraph (f) is revised to read as follows:

**§ 52.474 Base Year Emissions Inventory.**

* * * * *

(f) EPA approves as a revision to the District of Columbia State Implementation Plan the 2011 base year emissions inventory for the District of Columbia portion of the Washington, DC-MD-VA 2008 8-hour ozone nonattainment area submitted by the District Department of the Environment on July 17, 2014. The 2011 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are carbon monoxide (CO), nitrogen oxides ($NO_X$) and volatile organic compounds (VOC).

### Subpart V—Maryland

■ 3. In § 52.1075, paragraph (o) is revised to read as follows:

**§ 52.1075 Base year emissions inventory.**

* * * * *

(o) EPA approves as a revision to the Maryland State Implementation Plan the 2011 base year emissions inventory for the Maryland portion of the Washington, DC-MD-VA 2008 8-hour ozone nonattainment area submitted by the Maryland Department of Environment on August 4, 2014. The 2011 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are carbon monoxide (CO), nitrogen oxides ($NO_X$) and volatile organic compounds (VOC).

### Subpart VV—Virginia

■ 4. In § 52.2425, paragraph (g) is revised to read as follows:

**§ 52.2425 Base Year Emissions Inventory.**

* * * * *

(g) EPA approves as a revision to the Virginia State Implementation Plan the 2011 base year emissions inventory for the Virginia portion of the Washington, DC-MD-VA 2008 8-hour ozone nonattainment area submitted by the Virginia Department of Environmental Quality on July 17, 2014. The 2011 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are carbon monoxide (CO), nitrogen oxides ($NO_X$) and volatile organic compounds (VOC).

[FR Doc. 2015–17974 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R01–OAR–2010–0460; A–1–FRL–9930–94–Region 1]**

## Approval and Promulgation of Air Quality Implementation Plans; Rhode Island; Control of Volatile Organic Compounds From Adhesives and Sealants

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Rhode Island. This revision includes a regulation adopted by Rhode Island that establishes and requires Reasonably Available Control Technology (RACT) for volatile organic compound (VOC) sources of emissions from miscellaneous adhesives and sealants. The intended effect of this action is to approve these requirements into the Rhode Island SIP. This action is being taken in accordance with the Clean Air Act.

**DATES:** This direct final rule will be effective September 21, 2015, unless EPA receives adverse comments by August 24, 2015. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R01–OAR–2010–0460 by one of the following methods:

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

2. *Email: arnold.anne@epa.gov.*

3. *Fax:* (617) 918–0047.

4. *Mail:* Docket Identification Number EPA–R01–OAR–2010–0460, Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912.

5. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

*Instructions:* Direct your comments to Docket ID No EPA–R01–OAR–2010–0460. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov*, or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA

recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact 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 legal holidays.

In addition, copies of the state submittal are also available for public inspection during normal business hours, by appointment at the State Air Agency; Office of Air Resources, Department of Environmental Management, 235 Promenade Street, Providence, RI 02908–5767.

**FOR FURTHER INFORMATION CONTACT:** David Mackintosh, Air Quality Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912, telephone number (617) 918–1584, fax number (617) 918–0584, email *mackintosh.david@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.



## I. Background

In 1997, EPA revised the health-based National Ambient Air Quality Standard (NAAQS) for ozone, setting it at 0.08 parts per million (ppm) averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially with regard to children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma. On April 30, 2004, pursuant to the Federal Clean Air Act (the Act, or CAA), 42 U.S.C. 7401 *et seq.*, EPA designated portions of the country as being in nonattainment of the 1997 8-hour ozone NAAQS (69 FR 23858). The entire State of Rhode Island was designated as nonattainment for ozone and classified as moderate. The entire State of Rhode Island is also part of the Ozone Transport Region (OTR) under Section 184(a) of the CAA. Sections 182(b)(2) and 184 of the CAA compel states with moderate and above ozone nonattainment areas, as well as areas in the OTR respectively, to submit a revision to their applicable State Implementation Plan (SIP) to include provisions to require the implementation of reasonable available control technology (RACT) for sources covered by a Control Techniques Guideline (CTG) and for all major sources. A CTG is a document issued by EPA which establishes a ''presumptive norm'' for RACT for a specific VOC source category.

EPA has determined that States which have RACT provisions approved in their SIPs for the 1-hour ozone standard have several options for fulfilling the RACT requirements for the 8-hour ozone NAAQS. If a State meets certain conditions, it may certify that previously adopted 1-hour ozone RACT controls in the SIP continue to represent RACT control levels for purposes of fulfilling 8-hour ozone RACT requirements. Alternatively, a State may establish new or more stringent requirements that represent RACT control levels, either in lieu of, or in conjunction with, a certification. In addition, a State may submit a negative declaration if there are no CTG sources or major sources of VOC and NOx emissions in lieu of, or in addition to, a certification. See Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2 (the Phase 2 Rule) (70 FR 71612; November 29, 2005).

As noted in the EPA's Phase 2 ozone implementation rule, the RACT submittal for the 1997 8-hour ozone standard was due from Rhode Island on September 16, 2006. (See 40 CFR 51.916(b)(2).) On March 24, 2008 (73 FR 15416), EPA issued a finding of failure to submit to Rhode Island for the 1997 8-hour ozone RACT requirement. This finding started an 18-month sanctions clock, as well as a 24 month Federal Implementation Plan (FIP) clock. On April 30, 2008, the RI DEM submitted a SIP revision which included an attainment demonstration, a RACT demonstration, and a reasonable further progress plan for the 8-hour ozone NAAQS. EPA determined the SIP revision complete on May 30, 2008, stopping the 18-month sanctions clock.

## II. Rhode Island's SIP Revision

On October 27, 2009, the Rhode Island Department of Environmental Management (DEM) submitted a SIP revision to EPA. This SIP revision included Rhode Island's new Air Pollution Control (APC) Regulation No. 44, ''Control of Volatile Organic Compounds from Adhesives and Sealants.'' Then, on March 25, 2015, Rhode Island DEM submitted a SIP revision containing a minor revision to APC Regulation No. 44 to address a typographical error in the regulation.

## III. EPA's Evaluation of Rhode Island's SIP Revision

Rhode Island's APC Regulation No. 44, ''Control of Volatile Organic Compounds from Adhesives and Sealants,'' is based on the OTC Model Rule for Adhesives and Sealants. APC Regulation No. 44 includes all of the approaches to controlling VOC emissions found in EPA's CTG for Miscellaneous Industrial Adhesives (EPA 453/R–08–005, September 2008): VOC content limits for adhesives and cleaning solvents; work practices; record keeping; air pollution control equipment requirements; surface preparation requirements; and spray gun cleaning requirements. Rhode Island's rule is also more comprehensive than the CTG, since it establishes VOC content limits for sealants and sealant primers (in addition to adhesives as covered by the CTG), regulates sellers and manufacturers, not just appliers, of regulated adhesives, adhesive primers and sealants, and contains a VOC composite vapor pressure limit for cleaning materials. The exemptions of APC Regulation No. 44 are similar to those recommended in the CTG. While

there are minor differences in the named adhesive categories (and emission limits) included in the CTG and APC Regulation No. 44, those differences are inconsequential compared to the broader applicability of APC Regulation No. 44 noted above.

The March 25, 2015, SIP revision corrects the header on page 1 to identify the regulation as ''No. 44'' and not ''No. 33.''

## IV. Final Action

EPA is approving, and incorporating into the Rhode Island SIP, Rhode Island's APC Regulation No. 44, ''Control of Volatile Organic Compounds from Adhesives and Sealants.''

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective September 21, 2015 without further notice unless the Agency receives relevant adverse comments by August 24, 2015.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on September 21, 2015 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

## V. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the [State Agency Regulations] described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

## VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive 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 Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, 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 and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 21, 2015. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

## List of Subjects in 40 CFR Part 52

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

Dated: June 18, 2015.

**H. Curtis Spalding,**

*Regional Administrator, EPA New England.*

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart OO—Rhode Island

■ 2. In § 52.2070, the table in paragraph (c), EPA-Approved Rhode Island Regulations, is amended by adding an entry in numerical order for Air Pollution Control Regulation 44 to read as follows:

**§ 52.2070 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED RHODE ISLAND REGULATIONS

| State citation | Title/subject | State effective date | EPA approval date | Explanations |
|---|---|---|---|---|
| * * | * | * * | * | * |
| Air Pollution Control Regulation 44. | Control of Volatile Organic Compounds from Adhesives and Sealants. | 06/04/2009 | 07/23/2015 [Insert **Federal Register** citation] | |
| * * | * | * * | * | * |

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[FR Doc. 2015–17852 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 535

### Medium- and Heavy-Duty Vehicle Fuel Efficiency Program

*CFR Correction*

In Title 49 of the Code of Federal Regulations, Parts 400 to 571, revised as of October 1, 2014, on page 146, § 535.9 is reinstated to read as follows:

**§ 535.9 Enforcement approach.**

(a) *Compliance.* (1) NHTSA will assess compliance with fuel consumption standards each year, based upon EPA final verified data submitted to NHTSA for its heavy-duty vehicle fuel efficiency program established pursuant to 49 U.S.C. 32902(k). NHTSA may conduct verification testing throughout a given model year in order to validate data received from manufacturers and will discuss any potential issues with EPA and the manufacturer.

(2) Credit values in gallons are calculated based on the final $CO_2$ emissions and fuel consumption data submitted by manufacturers and verified/validated by EPA.

(3) NHTSA will verify a manufacturer's credit balance in each averaging set for each given model year. The average set balance is based upon the engines or vehicles performance above or below the applicable regulatory subcategory standards in each respective averaging set and any credits that are traded into or out of an averaging set during the model year.

(i) If the balance is positive, the manufacturer is designated as having a credit surplus.

(ii) If the balance is negative, the manufacturer is designated as having a credit deficit.

(4) NHTSA will provide written notification to the manufacturer that has a negative balance for any averaging set for each model year. The manufacturer will be required to confirm the negative balance and submit a plan indicating how it will allocate existing credits or earn, and/or acquire by trade credits, or else be liable for a civil penalty as determined in paragraph (b) of this section. The manufacturer must submit a plan within 60 days of receiving agency notification.

(5) Credit shortfall within an averaging set may be carried forward only three years, and if not offset by earned or traded credits, the manufacturer may be liable for a civil penalty as described in paragraph (b) of this section.

(6) Credit allocation plans received from a manufacturer will be reviewed and approved by NHTSA. NHTSA will approve a credit allocation plan unless it determines that the proposed credits are unavailable or that it is unlikely that the plan will result in the manufacturer earning sufficient credits to offset the subject credit shortfall. If a plan is approved, NHTSA will revise the respective manufacturer's credit account accordingly by identifying which existing or traded credits are being used to address the credit shortfall, or by identifying the manufacturer's plan to earn future credits for addressing the respective credit shortfall. If a plan is rejected, NHTSA will notify the respective manufacturer and request a revised plan. The manufacturer must submit a revised plan within 14 days of receiving agency notification. The agency will provide a manufacturer one opportunity to submit a revised credit allocation plan before it initiates civil penalty proceedings.

(7) For purposes of this regulation, NHTSA will treat the use of future credits for compliance, as through a credit allocation plan, as a deferral of civil penalties for non-compliance with an applicable fuel consumption standard.

(8) If NHTSA receives and approves a manufacturer's credit allocation plan to earn future credits within the following three model years in order to comply with regulatory obligations, NHTSA will defer levying civil penalties for non-compliance until the date(s) when the manufacturer's approved plan indicates that credits will be earned or acquired to achieve compliance, and upon receiving confirmed $CO_2$ emissions and fuel consumption data from EPA. If the manufacturer fails to acquire or earn sufficient credits by the plan dates, NHTSA will initiate civil penalty proceedings.

(9) In the event that NHTSA fails to receive or is unable to approve a plan for a non-compliant manufacturer due to insufficiency or untimeliness,

NHTSA may initiate civil penalty proceedings.

(10) In the event that a manufacturer fails to report accurate fuel consumption data for vehicles or engines covered under this rule, noncompliance will be assumed until corrected by submission of the required data, and NHTSA may initiate civil penalty proceedings.

(b) *Civil penalties.* (1) *Generally.* NHTSA may assess a civil penalty for any violation of this part under 49 U.S.C. 32902(k). This section states the procedures for assessing civil penalties for violations of § 535.5. The provisions of 5 U.S.C. 554, 556, and 557 do not apply to any proceedings conducted pursuant to this section.

(2) *Initial determination of noncompliance.* An action for civil penalties is commenced by the execution of a Notice of Violation. A determination by NHTSA's Office of Enforcement of noncompliance with applicable fuel consumption standards utilizing the certified and reported $CO_2$ emissions and fuel consumption data provided by the Environmental Protection Agency as described in this part, and after considering all the flexibilities available under § 535.7, underlies a Notice of Violation. If NHTSA Enforcement determines that a manufacturer's averaging set of vehicles or engines fails to comply with the applicable fuel consumption standard(s) by generating a credit shortfall, the chassis, vehicle or engine manufacturer, as relevant, shall be subject to a civil penalty.

(3) *Numbers of violations and maximum civil penalties.* Any violation shall constitute a separate violation with respect to each vehicle or engine within the applicable regulatory averaging set. The maximum civil penalty is not more than $37,500.00 per vehicle or engine. The maximum civil penalty under this section for a related series of violations shall be determined by multiplying $37,500.00 times the vehicle or engine production volume for the model year in question within the regulatory averaging set. NHTSA may adjust this civil penalty amount to account for inflation.

(4) *Factors for determining penalty amount.* In determining the amount of any civil penalty proposed to be assessed or assessed under this section, NHTSA shall take into account the gravity of the violation, the size of the violator's business, the violator's history of compliance with applicable fuel consumption standards, the actual fuel consumption performance related to the applicable standards, the estimated cost to comply with the regulation and applicable standards, the quantity of vehicles or engines not complying, and the effect of the penalty on the violator's ability to continue in business. The ''estimated cost to comply with the regulation and applicable standards,'' will be used to ensure that penalties for non-compliance will not be less than the cost of compliance.

(5) *NHTSA enforcement report of determination of non-compliance.* (i) If NHTSA Enforcement determines that a violation has occurred, NHTSA Enforcement may prepare a report and send the report to the NHTSA Chief Counsel.

(ii) The NHTSA Chief Counsel will review the report prepared by NHTSA Enforcement to determine if there is sufficient information to establish a likely violation.

(iii) If the Chief Counsel determines that a violation has likely occurred, the Chief Counsel may issue a Notice of Violation to the party.

(iv) If the Chief Counsel issues a Notice of Violation, he or she will prepare a case file with recommended actions. A record of any prior violations by the same party shall be forwarded with the case file.

(6) *Notice of violation.* (i) The Notice of Violation will contain the following information:

(A) The name and address of the party;

(B) The alleged violation(s) and the applicable fuel consumption standard(s) violated;

(C) The amount of the proposed penalty and basis for that amount;

(D) The place to which, and the manner in which, payment is to be made;

(E) A statement that the party may decline the Notice of Violation and that if the Notice of Violation is declined within 30 days of the date shown on the Notice of Violation, the party has the right to a hearing, if requested within 30 days of the date shown on the Notice of Violation, prior to a final assessment of a penalty by a Hearing Officer; and

(F) A statement that failure to either pay the proposed penalty or to decline the Notice of Violation and request a hearing within 30 days of the date shown on the Notice of Violation will result in a finding of violation by default and that NHTSA will proceed with the civil penalty in the amount proposed on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(ii) The Notice of Violation may be delivered to the party by:

(A) Mailing to the party (certified mail is not required);

(B) Use of an overnight or express courier service; or

(C) Facsimile transmission or electronic mail (with or without attachments) to the party or an employee of the party.

(iii) At any time after the Notice of Violation is issued, NHTSA and the party may agree to reach a compromise on the payment amount.

(iv) Once a penalty amount is paid in full, a finding of ''resolved with payment'' will be entered into the case file.

(v) If the party agrees to pay the proposed penalty, but has not made payment within 30 days of the date shown on the Notice of Violation, NHTSA will enter a finding of violation by default in the matter and NHTSA will proceed with the civil penalty in the amount proposed on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(vi) If within 30 days of the date shown on the Notice of Violation a party fails to pay the proposed penalty on the Notice of Violation, and fails to request a hearing, then NHTSA will enter a finding of violation by default in the case file, and will assess the civil penalty in the amount set forth on the Notice of Violation without processing the violation under the hearing procedures set forth in this subpart.

(vii) NHTSA's order assessing the civil penalty following a party's default is a final agency action.

(7) *Hearing Officer.* (i) If a party timely requests a hearing after receiving a Notice of Violation, a Hearing Officer shall hear the case.

(ii) The Hearing Officer will be appointed by the NHTSA Administrator, and is solely responsible for the case referred to him or her. The Hearing Officer shall have no other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties. The Hearing Officer shall have no duties related to the light-duty fuel economy or medium- and heavy-duty fuel efficiency programs.

(iii) The Hearing Officer decides each case on the basis of the information before him or her.

(8) *Initiation of action before the Hearing Officer.* (i) After the Hearing Officer receives the case file from the Chief Counsel, the Hearing Officer notifies the party in writing of:

(A) The date, time, and location of the hearing and whether the hearing will be conducted telephonically or at the DOT Headquarters building in Washington, DC;

(B) The right to be represented at all stages of the proceeding by counsel as set forth in paragraph (b)(9) of this section;

(C) The right to a free copy of all written evidence in the case file.

(ii) On the request of a party, or at the Hearing Officer's direction, multiple proceedings may be consolidated if at any time it appears that such consolidation is necessary or desirable.

(9) *Counsel.* A party has the right to be represented at all stages of the proceeding by counsel. A party electing to be represented by counsel must notify the Hearing Officer of this election in writing, after which point the Hearing Officer will direct all further communications to that counsel. A party represented by counsel bears all of its own attorneys' fees and costs.

(10) *Hearing location and costs.* (i) Unless the party requests a hearing at which the party appears before the Hearing Officer in Washington, DC, the hearing may be held telephonically. In Washington, DC, the hearing is held at the headquarters of the U.S. Department of Transportation.

(ii) The Hearing Officer may transfer a case to another Hearing Officer at a party's request or at the Hearing Officer's direction.

(iii) A party is responsible for all fees and costs (including attorneys' fees and costs, and costs that may be associated with travel or accommodations) associated with attending a hearing.

(11) *Hearing procedures.* (i) There is no right to discovery in any proceedings conducted pursuant to this subpart.

(ii) The material in the case file pertinent to the issues to be determined by the Hearing Officer is presented by the Chief Counsel or his or her designee.

(iii) The Chief Counsel may supplement the case file with information prior to the hearing. A copy of such information will be provided to the party no later than 3 business days before the hearing.

(iv) At the close of the Chief Counsel's presentation of evidence, the party has the right to examine respond to and rebut material in the case file and other information presented by the Chief Counsel. In the case of witness testimony, both parties have the right of cross-examination.

(v) In receiving evidence, the Hearing Officer is not bound by strict rules of evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.

(vi) At the close of the party's presentation of evidence, the Hearing Officer may allow the introduction of rebuttal evidence that may be presented by the Chief Counsel.

(vii) The Hearing Officer may allow the party to respond to any rebuttal evidence submitted.

(viii) After the evidence in the case has been presented, the Chief Counsel and the party may present arguments on the issues in the case. The party may also request an opportunity to submit a written statement for consideration by the Hearing Officer and for further review. If granted, the Hearing Officer shall allow a reasonable time for submission of the statement and shall specify the date by which it must be received. If the statement is not received within the time prescribed, or within the limits of any extension of time granted by the Hearing Officer, it need not be considered by the Hearing Officer.

(ix) A verbatim transcript of the hearing will not normally be prepared. A party may, solely at its own expense, cause a verbatim transcript to be made. If a verbatim transcript is made, the party shall submit two copies to the Hearing Officer not later than 15 days after the hearing. The Hearing Officer shall include such transcript in the record.

(12) *Determination of violations and assessment of civil penalties.* (i) Not later than 30 days following the close of the hearing, the Hearing Officer shall issue a written decision on the Notice of Violation, based on the hearing record. This may be extended by the Hearing officer if the submissions by the Chief Counsel or the party are voluminous. The decision shall address each alleged violation, and may do so collectively. For each alleged violation, the decision shall find a violation or no violation and provide a basis for the finding. The decision shall set forth the basis for the Hearing Officer's assessment of a civil penalty, or decision not to assess a civil penalty. In determining the amount of the civil penalty, the gravity of the violation, the size of the violator's business, the violator's history of compliance with applicable fuel consumption standards, the actual fuel consumption performance related to the applicable standard, the estimated cost to comply with the regulation and applicable standard, the quantity of vehicles or engines not complying, and the effect of the penalty on the violator's ability to continue in business. The assessment of a civil penalty by the Hearing Officer shall be set forth in an accompanying final order. The Hearing Officer's written final order is a final agency action.

(ii) If the Hearing Officer assesses civil penalties in excess of $1,000,000, the Hearing Officer's decision shall contain a statement advising the party of the right to an administrative appeal to the Administrator within a specified period of time. The party is advised that failure to submit an appeal within the prescribed time will bar its consideration and that failure to appeal on the basis of a particular issue will constitute a waiver of that issue in its appeal before the Administrator.

(iii) The filing of a timely and complete appeal to the Administrator of a Hearing Officer's order assessing a civil penalty shall suspend the operation of the Hearing Officer's penalty, which shall no longer be a final agency action.

(iv) There shall be no administrative appeals of civil penalties assessed by a Hearing Officer of less than $1,000,000.

(13) *Appeals of civil penalties in excess of $1,000,000.* (i) A party may appeal the Hearing Officer's order assessing civil penalties over $1,000,000 to the Administrator within 21 days of the date of the issuance of the Hearing Officer's order.

(ii) The Administrator will review the decision of the Hearing Officer de novo, and may affirm the decision of the hearing officer and assess a civil penalty, or

(iii) The Administrator may:

(A) Modify a civil penalty;

(B) Rescind the Notice of Violation; or

(C) Remand the case back to the Hearing Officer for new or additional proceedings.

(iv) In the absence of a remand, the decision of the Administrator in an appeal is a final agency action.

(14) *Collection of assessed or compromised civil penalties.* (i) Payment of a civil penalty, whether assessed or compromised, shall be made by check, postal money order, or electronic transfer of funds, as provided in instructions by the agency. A payment of civil penalties shall not be considered a request for a hearing.

(ii) The party must remit payment of any assessed civil penalty to NHTSA within 30 days after receipt of the Hearing Officer's order assessing civil penalties, or, in the case of an appeal to the Administrator, within 30 days after receipt of the Administrator's decision on the appeal.

(iii) The party must remit payment of any compromised civil penalty to NHTSA on the date and under such terms and conditions as agreed to by the party and NHTSA. Failure to pay may result in NHTSA entering a finding of violation by default and assessing a civil penalty in the amount proposed in the Notice of Violation without processing

the violation under the hearing procedures set forth in this part.

(c) *Changes in corporate ownership and control.* Manufacturers must inform NHTSA of corporate relationship changes to ensure that credit accounts are identified correctly and credits are assigned and allocated properly.

(1) In general, if two manufacturers merge in any way, they must inform NHTSA how they plan to merge their credit accounts. NHTSA will subsequently assess corporate fuel consumption and compliance status of the merged fleet instead of the original separate fleets.

(2) If a manufacturer divides or divests itself of a portion of its automobile manufacturing business, it must inform NHTSA how it plans to divide the manufacturer's credit holdings into two or more accounts. NHTSA will subsequently distribute holdings as directed by the manufacturer, subject to provision for reasonably anticipated compliance obligations.

(3) If a manufacturer is a successor to another manufacturer's business, it must inform NHTSA how it plans to allocate credits and resolve liabilities per 49 CFR part 534.

[FR Doc. 2015–18073 Filed 7–22–15; 8:45 am]

**BILLING CODE 1505–01–D**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 300

**[Docket No. 150619537–5615–01]**

**RIN 0648–BF19**

## International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Bigeye Tuna Catch Limits in Longline Fisheries for 2015

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to establish a catch limit of 3,502 metric tons (mt) of bigeye tuna (*Thunnus obesus*) for vessels in the U.S. pelagic longline fisheries operating in the western and central Pacific Ocean (WCPO) for calendar year 2015. The limit does not apply to vessels in the longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands (CNMI). Once the limit of 3,502 mt is reached in 2015, retaining, transshipping, or landing bigeye tuna caught in the area of application of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), which comprises the majority of the WCPO, will be prohibited for the remainder of the calendar year, with certain exceptions. This action is necessary for the United States to satisfy its obligations under the Convention, to which it is a Contracting Party.

**DATES:** Effective on July 23, 2015.

**ADDRESSES:** Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR) and the Programmatic Environmental Assessment (PEA), are available via the Federal e-Rulemaking Portal, at *www.regulations.gov* (search for Docket ID NOAA–NMFS–2015–0085. Those documents are also available from NMFS at the following address: Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

**FOR FURTHER INFORMATION CONTACT:** Rini Ghosh, NMFS PIRO, 808–725–5033.

**SUPPLEMENTARY INFORMATION:**

### Background on the Convention

The Convention focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS. The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the WCPO. To accomplish this objective, the Convention established the Commission on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC). The Commission includes Members, Cooperating Non-members, and Participating Territories (hereafter, collectively ''members''). The United States is a Member. American Samoa, Guam, and the CNMI are Participating Territories.

As a Contracting Party to the Convention and a Member of the Commission, the United States is obligated to implement the decisions of the Commission. The WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*) authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including implementation of the decisions of the Commission. The WCPFC Implementation Act further provides that the Secretary of Commerce shall ensure consistency, to the extent practicable, of fishery management programs administered under the WCPFC Implementation Act and the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*), as well as other specific laws (see 16 U.S.C. 6905(b)). The Secretary of Commerce has delegated the authority to promulgate regulations under the WCPFC Implementation Act to NMFS.

A map showing the boundaries of the area of application of the Convention (Convention Area), which comprises the majority of the WCPO, can be found on the WCPFC Web site at: *www.wcpfc.int/doc/convention-area-map.*

### WCPFC Decision on Tropical Tunas

At its Eleventh Regular Session, in December 2014, the WCPFC adopted Conservation and Management Measure (CMM) 2014–01, ''Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean.'' CMM 2014–01 is the most recent in a series of CMMs for the management of tropical tuna stocks under the purview of the Commission. It is a successor to CMM 2013–01, adopted in December 2013. These and other CMMs are available at: *www.wcpfc.int/conservation-and-management-measures.*

The stated general objective of CMM 2014–01 and several of its predecessor CMMs is to ensure that the stocks of bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), and skipjack tuna (*Katsuwonus pelamis*) in the WCPO are, at a minimum, maintained at levels capable of producing their maximum sustainable yield as qualified by relevant environmental and economic factors. The CMM includes specific objectives for each of the three stocks: For each, the fishing mortality rate is to be reduced to or maintained at levels no greater than the fishing mortality rate associated with maximum sustainable yield.

CMM 2014–01 went into effect February 3, 2015, and is generally applicable for the 2015–2017 period. The CMM includes provisions for purse

seine vessels, longline vessels, and other types of vessels that fish for HMS. The CMM's provisions for longline vessels include catch limits for bigeye tuna and a general provision not to increase catches of yellowfin tuna.

Paragraphs 40–42 CMM 2014–01 require WCPFC members to limit catches of bigeye tuna in the Convention Area to specified levels in each of 2015, 2016, and 2017. The applicable limits for the United States in those 3 years are 3,554 metric tons (mt), 3,554 mt, and 3,345 mt, respectively. In addition, paragraph 40 of the CMM states that any catch overage in a given year shall be deducted from the catch limit for the following year. This provision was also in CMM 2013–01, the predecessor to CMM 2014–01, so it pertains to the catch limit for 2015, as well as 2016 and 2017. No limits are required for the longline fisheries of any of the U.S. Participating Territories.

**Implementation of CMM 2014–01**

NMFS implemented the purse seine fishing effort limits specified under CMM 2014 earlier this year (see interim final rule, 80 FR 29220; published May 21, 2015). NMFS is also undertaking a separate rulemaking to implement other requirements under CMM 2014–01 for purse seine vessels for 2015 (RIN 0648–BE84). That rule would establish a framework process through which NMFS could specify limits on fishing effort and catches, as well as spatial and temporal restrictions on particular fishing activities and other requirements, in U.S. fisheries for HMS in the WCPO, to implement particular decisions of the Commission. Using that framework process, NMFS would establish specific limits for 2015, including restrictions on the use of fish aggregating devices by purse seine vessels. The rule would also implement several other unrelated WCPFC decisions and make some changes to existing regulations that implement WCPFC decisions, including the longline bigeye tuna catch limits. However, the rule would not affect the 2015 longline bigeye tuna catch limit being implemented in this final rule. Rather, it is anticipated that longline catch limits in future years would be implemented pursuant the framework and other requirements established in the separate rulemaking (RIN 0648–BE84).

**Provisions Implemented in This Action**

This final rule is limited to implementing the 2015 calendar year longline bigeye tuna catch limit for U.S. fisheries in the Convention Area, as mandated under CMM 2014–01. As stated above, the limit for 2015 is 3,554 mt less any overage of the limit applicable for 2014. The applicable limit for 2014 was 3,763 mt (see the final rule that established that limit at 78 FR 58240; published September 23, 2013). NMFS has estimated that bigeye tuna catches in the U.S. longline fishery in the Convention Area in 2014 were 3,815 mt, 52 mt more than the limit of 3,763 mt; therefore, the applicable limit for 2015 is 3,502 mt (3,554 minus 52).

The 2015 longline bigeye tuna catch limit will apply only to U.S-flagged longline vessels operating as part of the U.S. longline fisheries. The limit will not apply to U.S. longline vessels operating as part of the longline fisheries of American Samoa, the CNMI, or Guam. Existing regulations at 50 CFR 300.224(b), (c), and (d) detail the manner in which longline-caught bigeye tuna is attributed among the fisheries of the United States and the U.S. Participating Territories.

Consistent with the basis for the limits prescribed in CMM 2014–01 and with previous rules issued by NMFS to implement bigeye tuna catch limits in U.S. longline fisheries, the catch limit is measured in terms of retained catches—that is, bigeye tuna that are caught by longline gear and retained on board the vessel.

*Announcement of the Limit Being Reached*

As set forth under the existing regulations at 50 CFR 300.224(e), if NMFS determines that the limit is expected to be reached in 2015, NMFS will publish a notice in the **Federal Register** to announce specific fishing restrictions that will be effective from the date the limit is expected to be reached until the end of the 2015 calendar year. NMFS will publish the notice of the restrictions at least 7 calendar days before the effective date to provide vessel owners and operators with advance notice. Periodic forecasts of the date the limit is expected to be reached will be made available to the public, such as by posting on a Web site, to help vessel owners and operators plan for the possibility of the limit being reached.

*Restrictions After the Limit Is Reached*

As set forth under the existing regulations at 50 CFR 300.224(f), if the limit is reached, the restrictions that will be in effect will include the following:

*1. Retain on board, transship, or land bigeye tuna:* Starting on the effective date of the restrictions and extending through December 31 of 2015, it will be prohibited to use a U.S. fishing vessel to retain on board, transship, or land bigeye tuna captured in the Convention Area by longline gear, except as follows:

First, any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions can be retained on board, transshipped, and/or landed, provided that they are landed within 14 days after the restrictions become effective. A vessel that had declared to NMFS pursuant to 50 CFR 665.803(a) that the current trip type is shallow-setting is not subject to this 14-day landing restriction, so these vessels will be able to land fish more than 14 days after the restrictions become effective.

Second, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit, or if they are landed in American Samoa, Guam, or the CNMI. However, the bigeye tuna must not be caught in the portion of the U.S. EEZ surrounding the Hawaiian Archipelago, and must be landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

Third, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a vessel that is included in a specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(iv).

*2. Transshipment of bigeye tuna to certain vessels:* Starting on the effective date of the restrictions and extending through December 31 of 2015, it will be prohibited to transship bigeye tuna caught in the Convention Area by longline gear to any vessel other than a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

*3. Fishing inside and outside the Convention Area:* To help ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, the final rule establishes two additional, related prohibitions that are in effect starting on the effective date of the restrictions and extending through December 31 of 2015. First, vessels are prohibited from fishing with longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip that is in progress at the time the announced restrictions go into effect. In that exceptional case, the vessel still must land any bigeye tuna taken in the Convention Area within 14 days of the effective date of the restrictions, as described above. Second, if a vessel is used to fish using longline

gear outside the Convention Area and enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area. These two prohibitions do not apply to the following vessels: (1) Vessels on declared shallow-setting trips pursuant to 50 CFR 665.803(a); and (2) vessels operating for the purposes of this rule as part of the longline fisheries of American Samoa, Guam, or the CNMI. This second group includes vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the conditions described above, and vessels included in a specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(iv).

**Classification**

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

*Administrative Procedure Act*

There is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on this action, because prior notice and the opportunity for public comment would be impracticable and contrary to the public interest. This rule establishes a bigeye tuna catch limit for U.S. longline fisheries in the Convention Area for 2015 that is similar to limits implemented from 2009–2014. Affected entities have been subject to longline bigeye tuna catch limits in the Convention Area since 2009, and have received information regarding NMFS' estimates of the 2015 longline bigeye tuna catch in the Convention Area and the approximate date the catch limit may be reached via NMFS' Web site and other means. Allowing for advance notice and public comment on this action is impracticable because the amount of U.S. longline bigeye tuna catch in the Convention Area to date in 2015 has been greater than in prior years, and it is critical that NMFS publish the catch limit for 2015 as soon as possible to ensure that it is not exceeded, in compliance with our international legal obligations with respect to CMM 2014–01. Based on preliminary data available to date, NMFS expects that the applicable limit of 3,502 mt is likely to be reached in early August of 2015. Delaying this rule to allow for advance notice and public comment would bring a substantial risk that more than 3,502 mt of bigeye tuna would be caught by U.S. longline fisheries operating in the WCPO, constituting non-compliance by the United States with respect to the longline bigeye tuna catch limit provisions of CMM 2014–01 for calendar year 2015. Because a delay in implementing this limit for 2015 could result in the United States violating its international legal obligations with respect to the longline bigeye tuna catch limit provisions of CMM 2014–01, which are important for the conservation and management of tropical tuna stocks in the WCPO, allowing advance notice and the opportunity for public comment would be contrary to the public interest.

For the reasons articulated above, there is also good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for this rule. As described above, NMFS must implement the longline bigeye tuna catch limit provisions of CMM 2014–01 for 2015 as soon as possible, in order to ensure that the catch limit is not exceeded. The catch limit is intended to reduce or otherwise control fishing pressure on bigeye tuna in the WCPO in order to restore this stock to levels capable of producing maximum sustainable yield on a continuing basis. According to the NMFS stock status determination criteria, bigeye tuna in the Pacific Ocean is currently experiencing overfishing. Failure to immediately implement the 2015 catch limit would result in additional fishing pressure on this stock, in violation of international and domestic legal obligations.

*Executive Order 12866*

This final rule has been determined to be not significant for purposes of Executive Order 12866.

*Regulatory Flexibility Act*

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are inapplicable. Therefore, no final regulatory flexibility analysis was required and none has been prepared.

**List of Subjects in 50 CFR Part 300**

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: July 17, 2015.

**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 300 is amended as follows:

## PART 300—INTERNATIONAL FISHERIES REGULATIONS

### Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

■ 1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

**Authority:** 16 U.S.C. 6901 *et seq.*

■ 2. In § 300.224, paragraph (a) is revised to read as follows:

**§ 300.224 Longline fishing restrictions.**

(a) *Establishment of bigeye tuna catch limit.* There is a limit of 3,502 metric tons of bigeye tuna that may be captured in the Convention Area by longline gear and retained on board by fishing vessels of the United States during calendar year 2015.

* * * * *

[FR Doc. 2015–18046 Filed 7–22–15; 8:45 am]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 80, No. 141
Thursday, July 23, 2015

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.

## FEDERAL RESERVE SYSTEM

### 12 CFR Parts 225 and 252

**[Regulations Y and YY; Docket No. R–1517]**

**RIN 7100 AE 33**

## Amendments to the Capital Plan and Stress Test Rules

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

**ACTION:** Notice of proposed rulemaking with request for comment.

**SUMMARY:** The Board invites comment on a notice of proposed rulemaking to revise the capital plan and stress test rules for large bank holding companies and certain banking organizations with total consolidated assets of more than $10 billion. The proposed changes would apply beginning with the 2016 capital plan and stress test cycles. For all banking organizations, the proposal would remove the tier 1 common capital ratio requirement. For large bank holding companies, the proposal would modify the stress test capital action assumptions. For banking organizations subject to the advanced approaches, the proposal would delay the incorporation of the supplementary leverage ratio for one year and indefinitely defer the use of the advanced approaches risk-based capital framework in the capital plan and stress test rules. For bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion and savings and loan holding companies with total consolidated assets of more than $10 billion, the proposal would eliminate the fixed assumptions regarding dividend payments for company-run stress tests and delay the application of stress testing for these savings and loan holding companies for one year. The proposal would also make certain technical amendments to the capital plan and stress test rules to incorporate changes related to other rulemakings.

**DATES:** Comments must be received on or before September 24, 2015.

**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–1517, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert de V. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, 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 3515, 1801 K Street NW. (between 18th and 19th Street NW.), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Lisa Ryu, Associate Director, (202) 263–4833, Constance Horsley, Assistant Director, (202) 452–5239, Mona Touma Elliot, Manager, (202) 912–4688, Page Conkling, Senior Supervisory Financial Analyst, (202) 912–4647, Joseph Cox, Senior Financial Analyst, (202) 452–3216, or Hillel Kipnis, Financial Analyst, (202) 452–2924, Division of Banking Supervision and Regulation; Laurie Schaffer, Associate General Counsel, (202) 452–2272, Christine Graham, Counsel, (202) 452–3005, or Julie Anthony, Senior Attorney, (202) 475–6682, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Board's capital planning and stress testing regime is an annual assessment of a banking organization's capital planning and capital adequacy on a post-stress basis and a cornerstone of the Board's supervisory program for bank holding companies with total consolidated assets of $50 billion or more (large bank holding companies).[1] The Board's capital planning and stress testing regime consists of two related programs: The Comprehensive Capital Analysis and Review (CCAR), which is conducted pursuant to the Board's capital plan rule (12 CFR 225.8), and Dodd-Frank Act stress testing, which is conducted pursuant to the Board's stress test rules (subparts B, E, and F of Regulation YY). In CCAR, the Board assesses the internal capital planning processes of large bank holding companies and their ability to maintain sufficient capital to continue their operations under expected and stressful conditions. Large bank holding companies must submit annual capital plans to the Board, which the Board may object to on either quantitative or qualitative grounds. If the Board objects to a large bank holding company's capital plan, the large bank holding company may not make any capital distributions unless the Board indicates in writing that it does not object to such distributions.

Dodd-Frank Act stress testing is a forward-looking quantitative evaluation of the impact of stressful economic and financial market conditions on the capital adequacy of banking organizations.[2] As part of Dodd-Frank Act stress testing, the Board conducts supervisory stress tests of large bank holding companies, and these bank holding companies also must conduct annual and mid-cycle company-run stress tests. In addition, bank holding

[1] 12 CFR 225.8. The changes in this proposed rulemaking would also apply to nonbank financial companies supervised by the Board that become subject to the capital planning and stress test requirements as well as to U.S. intermediate holding companies of foreign banking organizations in accordance with the transition provisions of the final rule incorporating enhanced prudential standards for U.S. bank holding companies and foreign banking organizations with total consolidated assets of $50 billion or more. (79 FR 17240 (March 27, 2014)). For simplicity, this preamble discussion of proposed amendments generally refers only to large bank holding companies.

[2] *See* 12 U.S.C. 5365(i)(1) and 12 CFR part 252.

companies with total consolidated assets of more than $10 billion but less than $50 billion, savings and loan holding companies with total consolidated assets of more than $10 billion, and state member banks with total consolidated assets of more than $10 billion must conduct annual company-run stress tests.[3]

This proposal invites comment on targeted adjustments to the Board's capital plan and stress test framework that would apply for the 2016 capital plan and stress test cycles. The Board notes that is considering a broad range of issues relating to the capital plan and stress test rules, including how the rules interact with other elements of the regulatory capital rules and whether any modification may be appropriate. However, the Board does not anticipate proposing another rulemaking that would affect the 2016 capital plan and stress test cycle beyond what is contained in this proposal. The Board would propose any changes resulting from the considerations described above through a separate rulemaking. Any such changes would take effect no earlier than the 2017 capital plan and stress test cycle.

For all banking organizations, the proposal would remove the tier 1 common capital ratio requirement in the capital plan and stress test rules. For large bank holding companies, the proposal would modify the stress test capital action assumptions under the stress test rules. For banking organizations subject to the advanced approaches, the proposal would delay the incorporation of the supplementary leverage ratio for one year and indefinitely defer the use of advanced approaches in the capital plan and stress test rules.[4] For the company-run stress test rules, the proposal would eliminate the fixed dividend payment assumptions for bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion and savings and loan holding companies with total consolidated assets of more than $10 billion, and would delay the application of the company-run stress test requirements to these savings and loan holding companies for one stress test cycle. The proposal would also make certain technical amendments to the capital plan and stress test rules to incorporate changes related to other rulemakings.

## II. Proposed Revisions to the Capital Plan and Stress Test Rules for All Banking Organizations

The proposal would remove the requirement that a banking organization demonstrate its ability to maintain a pro forma tier 1 common capital ratio of five percent of risk-weighted assets under expected and stressed scenarios. When the Board adopted the tier 1 common requirement as part of the capital plan and stress test rules, the Board noted that it expected the tier 1 common ratio to remain in force until the Board adopted a minimum common equity capital requirement. In 2013, the Board revised its regulatory capital rules to strengthen the quantity and quality of regulatory capital held by banking organizations. These revisions included a new minimum common equity tier 1 capital requirement of 4.5 percent of risk-weighted assets, which was fully phased-in on January 1, 2015.[5]

The 2016 capital plan and stress test cycle is the first cycle in which banking organizations will be subject to the 4.5 percent common equity tier 1 capital ratio for each quarter of the planning horizon. The common equity tier 1 capital ratio generally is expected to be more binding than the tier 1 common ratio under the severely adverse scenario because of the regulatory capital rule's stringent capital deductions, most of which will be fully phased-in by the end of the next planning horizon. Removing the tier 1 common ratio requirement will further reduce the burden of maintaining legacy systems and processes necessary for calculating the tier 1 common ratio.

## III. Proposed Revisions to the Capital Plan and Stress Test Rules for Large Bank Holding Companies

The proposal would modify capital action assumptions in the stress test rules to allow large banking holding companies to reflect dividends associated with expensed employee compensation and issuances to fund acquisitions. The stress test rules require large bank holding companies to assume that they do not issue capital or redeem capital instruments in the second through ninth quarters of the planning horizon. The October 2014 revisions to the capital plan and stress test rules (October 2014 revisions) provided an exception to this assumption for issuances related to expensed employee compensation.[6] The proposal would make a related technical change to require a firm to assume that it pays dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year on any issuance of stock related to expensed employee compensation.

In addition, the proposal would permit a large bank holding company to assume that it issues capital associated with funding a planned acquisition. This proposed revision would align the capital action assumptions with the assumptions relating to business plan changes, which require a large bank holding company to project the effects of any planned mergers or acquisitions. Under the proposal, to the extent that a large bank holding company is required to include an acquisition in its balance sheet projections, the bank holding company could include any stock issuance associated with funding the acquisition in its stress test.

## IV. Proposed Revisions to the Capital Plan and Stress Test Rules for Banking Organizations Subject to the Advanced Approaches

### *A. Delay of Inclusion of the Supplementary Leverage Ratio*

The supplementary leverage ratio requirement applies only to banking organizations that use the advanced approaches to calculate their minimum regulatory capital requirements. For these banking organizations, the proposal would delay the incorporation of the supplementary leverage ratio in the capital plan and stress test rules for one year. Under the proposal, these banking organizations would not be required to include an estimate of the supplementary leverage ratio for the capital plan and stress test cycles

[3] 77 FR 62378 (October 12, 2012) (codified at 12 CFR part 252, subparts E and F). The stress test requirements apply to savings and loan holding companies that are subject to the minimum regulatory capital requirements in 12 CFR part 217. The Board has not applied capital requirements to savings and loan holding companies that are substantially engaged in commercial activities or insurance underwriting activities to date. The Board is currently working on developing an appropriate capital regime for those institutions.

[4] The supplementary leverage ratio requirement applies only to banking organizations subject to the advanced approaches. A banking organization is subject to the advanced approaches if it has consolidated assets of at least $250 billion or if it has total consolidated on-balance sheet foreign exposures of at least $10 billion. The proposed amendments to the company-run stress test rules apply to large bank holding companies, bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion, savings and loan holding companies with total consolidated assets of more than $10 billion, and state member banks with total consolidated assets of more than $10 billion; however, the capital plan and supervisory stress test rules only apply to large bank holding companies at this time.

[5] Banking organizations subject to the advanced approaches became subject to a minimum common equity tier 1 requirement of 4.0 percent on January 1, 2014.

[6] 79 FR 64026 (October 27, 2014).

beginning on January 1, 2016. This proposed change is appropriate in light of the October 2014 revisions, which changed the commencement date of the capital plan and stress test cycles. Prior to the timing change in the October 2014 revisions, these banking organizations would have been required to incorporate the supplementary leverage ratio into the stress test cycle beginning on October 1, 2016 (*i.e.,* in the sixth quarter of the 2017 stress testing and capital planning cycle). As a result of the timing change, however, these banking organizations would be required to incorporate the supplementary leverage ratio into the upcoming stress test cycle beginning January 1, 2016 (*i.e.,* in the ninth quarter of the 2016 stress testing and capital planning cycle).

To provide adequate time to develop the required systems necessary to project the supplementary leverage ratio, the proposal would not require these banking organizations to demonstrate compliance with the supplementary leverage ratio for purposes of the 2016 capital plan and stress test cycles.

*B. Deferral of the Introduction of the Advanced Approaches*

Under the current capital plan and stress test rules, banking organizations that use the advanced approaches to calculate their minimum regulatory capital requirements must project their risk-weighted assets using both the standardized and the advanced approaches. Several banking organizations have noted that the use of advanced approaches in the capital plan and stress test rules would require significant resources and would introduce complexity and opacity. In light of the concerns raised by these banking organizations, and pending a broader review of how the capital plan and stress test rules interact with the regulatory capital rules as described above, the proposal would delay until further notice the use of the advanced approaches for calculating risk-based capital requirements for purposes of the capital plan and stress test rules.

## V. Proposed Revisions to Stress Test Rules for Certain Bank Holding Companies and Savings and Loan Holding Companies With Total Consolidated Assets of $10 Billion or More

For bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion and savings and loan holding companies with total consolidated assets of more than $10 billion, the proposal would eliminate the fixed dividend assumptions for company-run stress tests and would delay the application of the company-run stress testing requirements to these savings and loan holding companies for one stress test cycle.

*A. Elimination of Fixed Dividend Assumptions*

The proposal would eliminate the requirement that bank holding companies with total consolidated assets of more than $10 billion but less than $50 billion and savings and loan holding companies with total consolidated assets of more than $10 billion incorporate fixed assumptions regarding dividends in their stress tests. These bank holding companies and savings and loan holding companies would instead be required to incorporate their own dividend payment assumptions consistent with internal capital needs and projections.

Currently, the stress test rules require these bank holding companies and savings and loan holding companies to make the same capital action assumptions in their stress tests that apply to large bank holding companies. These capital action assumptions require these bank holding companies and savings and loan holding companies to assume they maintain their common stock dividend at a steady rate over the planning horizon, continue payments on other regulatory capital instruments at their stated dividend rate, and assume no repurchases or issuance of shares for each of the second through ninth quarters of the planning horizon. The proposal would maintain the assumptions of no repurchases, redemptions, or issuance of regulatory capital instruments in the stress tests.

This proposed change is responsive to concerns raised by banking organizations that dividends made at the holding company level are often funded directly through a subsidiary bank's distributions to its holding company, but that subsidiary banks may be subject to dividend restrictions that would not permit the bank to upstream capital to its holding company. The proposed change would also better align the stress test rules with the rules applicable to state member banks and the rules of the other banking agencies.

*B. Company Run Stress Test Transition Provisions for Certain Savings and Loan Holding Companies*

The proposal would delay for one stress test cycle the application of the company-run stress test rules to saving and loan holding companies with total consolidated assets of more than $10 billion, such that these savings and loan holding companies would become subject to the stress test rules for the first time beginning on January 1, 2017.

Savings and loan holding companies with total consolidated assets of more than $10 billion must conduct annual company-run stress tests.[7] The original stress test rules provided a two-year transition period for these savings and loan holding companies to comply with the stress test requirements once they became subject to regulatory capital requirements on January 1, 2015. However, the October 2014 revisions to the stress test rules resulted in a shortening of this initial transition period to one year. The proposal would reinstate the previous transition period, such that these savings and loan holding companies would become subject to the company-run stress tests on January 1, 2017. Accordingly, savings and loan holding companies with total consolidated assets of more than $50 billion would report results by April 5, 2017, and those with total consolidated assets of less than $50 billion would report results by July 31, 2017.

## VI. Proposed Technical Amendments to the Capital Plan and Stress Test Rules

The proposal would also make certain technical amendments to the capital plan and stress test rules to incorporate changes related to other rulemakings. On January 1, 2015, the risk-based capital rules under 12 CFR part 217 became effective, and the proposal would remove references to the risk-based capital rules in 12 CFR part 225 that are no longer operative as of that date.

In addition, the Board is proposing to amend the definition of minimum regulatory capital ratio in 12 CFR 225.8(d)(8), and the definition of regulatory capital ratio in 12 CFR 252.12(n), 12 CFR 252.42(m), and 12 CFR 252.52(n) to incorporate the deductions required under 12 CFR 248.12(d) (the Volcker Rule). The Volcker Rule requires a banking organization to deduct from tier 1 capital its aggregate investments in covered funds (as defined in 12 CFR. 248.10(b)). These required deductions are not, however, reflected in the regulatory text of 12 CFR part 217. Accordingly, the proposal would revise the regulatory text of the above-referenced definitions to include the required deductions under the Volcker Rule in the definition of regulatory capital ratio and minimum regulatory

[7] Currently, savings and loan holding companies are not subject to the Board's capital plan rule or supervisory stress tests, regardless of size.

capital ratio. The amended language will ensure that the definitions referenced above will incorporate not only the deductions required under 12 CFR part 217 but also the deductions required under the Volcker Rule.

*Administrative Law Matters*

a. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (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 this proposed rule under the authority delegated to the Board by the OMB and determined that it contains no collections of information. As the Board considers the public comments received and finalizes the rulemaking, the Board will reevaluate this PRA determination.

b. Regulatory Flexibility Act Analysis

The Board is providing an initial regulatory flexibility analysis with respect to this proposed rule. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that an agency prepare and make available an initial regulatory flexibility analysis in connection with a notice of proposed rulemaking.

Under regulations issued by the Small Business Administration (''SBA''), 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).[8] As of March 31, 2015, there were approximately 631 small state member banks. As of December 31, 2014, there were approximately 3,833 small bank holding companies and 271 small savings and loan holding companies. The proposed rule would apply to bank holding companies, savings and loan holding companies, and state member banks with total consolidated asset of $10 billion or more and nonbank financial companies supervised by the Board. Companies that would be subject to the proposed rule therefore substantially exceed the $550 million total asset threshold at which a company is considered a small company under SBA regulations. Therefore, there are no significant alternatives to the proposed rule that would have less economic impact on small banking organizations. As discussed above, the projected reporting, recordkeeping, and other compliance requirements of the rule are expected to be small. The Board does not believe that the 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 welcomes comment on all aspects of its analysis. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

c. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the proposed rule in a simple and straightforward manner, and invites comment on the use of plain language.

For example:

- Have we organized the material to suit your needs? If not, how could the rule be more clearly stated?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

**List of Subjects**

*12 CFR Part 225*

Administrative practice and procedure, Banks, Banking, Capital planning, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

*12 CFR Part 252*

Administrative practice and procedure, Banks, Banking, Capital planning, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities, Stress testing.

**Authority and Issuance**

For the reasons stated in the Supplementary Information, the Board of Governors of the Federal Reserve System proposes to amend 12 CFR chapter II as follows:

## PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

**Authority:** 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

### Subpart A—General Provisions

■ 2. Section 225.8 is amended by:
■ a. Revising paragraphs (c)(3), (d)(8), and (d)(11);
■ b. Removing paragraphs (d)(12) and (d)(13);
■ c. Redesignating paragraph (d)(14) as paragraph (d)(12);
■ d. Removing and reserving paragraph (e)(2)(i)(B); and
■ e. Revising paragraphs (e)(2)(ii)(A), (f)(1)(i)(C), (f)(2)(ii)(C), and (g)(1)(i).

The revisions to read as follows:

**§ 225.8 Capital planning.**

* * * * *

(c) * * *

(3) *Transition periods for bank holding companies subject to the supplementary leverage ratio.* Notwithstanding paragraph (d)(8) of this section, only for purposes of the capital plan cycle beginning on January 1, 2016, a bank holding company shall not include an estimate of its supplementary leverage ratio.

(d) * * *

(8) *Minimum regulatory capital ratio* means any minimum regulatory capital ratio that the Federal Reserve may require of a bank holding company, by regulation or order, including, the bank holding company's tier 1 and supplementary leverage ratios as calculated under 12 CFR 217, including the deductions required under 12 CFR 248.12, as applicable, and the bank holding company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 12 CFR 217.300, or any successor regulation; except that, the bank holding company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

[8] *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) *Tier 1 capital* has the same meaning as under 12 CFR part 217 or any successor regulation.

* * * * *

(e) * * *

(2)(i) * * *

(B) [Reserved]

* * * * *

(ii) * * *

(A) A discussion of how the bank holding company will, under expected and stressful conditions, maintain capital commensurate with its risks, maintain capital above the minimum regulatory capital ratios, and serve as a source of strength to its subsidiary depository institutions;

* * * * *

(f) * * *

(1)(i) * * *

(C) The bank holding company's ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon, including but not limited to any scenarios required under paragraphs (e)(2)(i)(A) and (e)(2)(ii) of this section.

* * * * *

(2)(ii) * * *

(C) The bank holding company has not demonstrated an ability to maintain capital above each minimum regulatory capital ratio on a pro forma basis under expected and stressful conditions throughout the planning horizon; or

* * * * *

(g) * * *

(1) * * *

(i) After giving effect to the capital distribution, the bank holding company would not meet a minimum regulatory capital ratio;

* * * * *

## PART 252—ENHANCED PRUDENTIAL STANDARDS (Regulation YY).

■ 3. The authority citation for part 252 continues to read as follows:

**Authority:** 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

■ 4. Section 252.12 is amended by revising paragraph (n) to read as follows:

### § 252.12 Definitions.

* * * * *

(n) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements for the company by regulation or order, including a company's tier 1 and supplementary leverage ratio as calculated under 12 CFR 217, including the deductions required under 12 CFR 248.12, as applicable, and the company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 12 CFR 217.300, or any successor regulation; except that, the company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

■ 5. Section 252.13 is amended by revising paragraphs (b)(2) and (b)(3) to read as follows:

### § 252.13 Applicability.

* * * * *

(b) * * *

(2) *Transition period for savings and loan holding companies.* (i) A savings and loan holding company that is subject to minimum regulatory capital requirements and exceeds the asset threshold for the first time on or before March 31 of a given year, must comply with the requirements of this subpart beginning on January 1 of the following year, unless that time is extended by the Board in writing;

(ii) A savings and loan holding company that is subject to minimum regulatory capital requirements and exceeds the asset threshold for the first time after March 31 of a given year must comply with the requirements of this subpart beginning on January 1 of the second year following that given year, unless that time is extended by the Board in writing; and

(iii) Notwithstanding paragraph (b)(2)(i) of this section, a savings and loan holding company that is subject to minimum regulatory capital requirements and exceeded the asset threshold for the first time on or before March 31, 2015, must comply with the requirements of this subpart beginning on January 1, 2017, unless that time is extended by the Board in writing.

(3) *Transition periods for companies subject to the supplementary leverage ratio.*

Notwithstanding § 252.12(n) of this subpart, for purposes of the stress test cycle beginning on January 1, 2016, a company shall not include an estimate of its supplementary leverage ratio.

* * * * *

■ 6. Section 252.15 is amended by revising paragraph (b)(2) to read as follows:

### § 252.15 Methodologies and practices.

* * * * *

(b) * * *

(2) For each of the second through ninth quarters of the planning horizon, the bank holding company or savings and loan holding company must:

(i) Assume no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio;

(ii) Assume no issuances of common stock or preferred stock, except for issuances related to expensed employee compensation or in connection with a planned merger or acquisition to the extent that the merger or acquisition is reflected in the company's pro forma balance sheet estimates; and

(iii) Make reasonable assumptions regarding payments of dividends consistent with internal capital needs and projections.

* * * * *

■ 7. Section 252.42 is amended by:

■ a. Revising paragraph (m); and

■ b. Removing paragraph (r).

The revision to read as follows:

### § 252.42 Definitions.

* * * * *

(m) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements for the company by regulation or order, including the company's tier 1 and supplementary leverage ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12, as applicable, and the company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 12 CFR 217.300, or any successor regulation; except that, the company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

■ 8. Section 252.43 is amended by revising paragraph (c) to read as follows:

### § 252.43 Applicability.

* * * * *

(c) *Transition periods for covered companies subject to the supplementary leverage ratio.* Notwithstanding § 252.42(m) of this subpart, only for purposes of the stress test cycle beginning on January 1, 2016, the Board will not include an estimate a covered company's supplementary leverage ratio.

* * * * *

■ 9. Section 252.44 is amended by revising paragraph (a)(2) to read as follows:

### § 252.44 Annual analysis conducted by the Board.

(a) * * *

(2) The analysis will include an assessment of the projected losses, net income, and pro forma capital levels and regulatory capital ratios and other capital ratios for the covered company and use such analytical techniques that the Board determines are appropriate to identify, measure, and monitor risks of the covered company that may affect the financial stability of the United States.

* * * * *

■ 10. Section 252.45 is amended by revising paragraph (b)(2) to read as follows:

**§ 252.45 Data and information required to be submitted in support of the Board's analyses.**

* * * * *

(b) * * *

(2) Project a company's pre-provision net revenue, losses, provision for loan and lease losses, and net income; and, pro forma capital levels, regulatory capital ratios, and any other capital ratio specified by the Board under the scenarios described in § 252.44(b).

* * * * *

■ 11. Section 252.52 is amended by:
■ a. Revising paragraph (n); and
■ b. removing paragraph (t).

The revision to read as follows:

**§ 252.52 Definitions.**

* * * * *

(n) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements for the company by regulation or order, including the company's tier 1 and supplementary leverage ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12, as applicable, and the company's common equity tier 1, tier 1, and total risk-based capital ratios as calculated under 12 CFR part 217, including the deductions required under 12 CFR 248.12 and the transition provisions at 12 CFR 217.1(f)(4) and 12 CFR 217.300, or any successor regulation; except that, the company shall not use the advanced approaches to calculate its regulatory capital ratios.

* * * * *

■ 12. Section 252.53 is amended by revising paragraph (b)(3) to read as follows:

**§ 252.53 Applicability.**

* * * * *

(b) * * *

(3) *Transition periods for covered companies subject to the supplementary leverage ratio.* Notwithstanding § 252.52(n) of this subpart, only for purposes of the stress test cycle beginning on January 1, 2016, a bank holding company shall not include an estimate of its supplementary leverage ratio.

* * * * *

■ 13. Section 252.56 is amended by revising paragraphs (a)(2), (b)(2)(i), and (b)(2)(iv) to read as follows:

**§ 252.56 Methodologies and practices.**

(a) * * *

(2) The potential impact on pro forma regulatory capital levels and pro forma capital ratios (including regulatory capital ratios and any other capital ratios specified by the Board), incorporating the effects of any capital actions over the planning horizon and maintenance of an allowance for loan losses appropriate for credit exposures throughout the planning horizon.

(b) * * *

(2) * * *

(i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters) plus common stock dividends attributable to issuances related to expensed employee compensation;

* * * * *

(iv) An assumption of no issuances of common stock or preferred stock, except for issuances related to expensed employee compensation or in connection with a planned merger or acquisition to the extent that the merger or acquisition is reflected in the covered company's pro forma balance sheet estimates.

* * * * *

■ 14. Section 252.58 is amended by revising paragraphs (b)(3)(v), (b)(4), and (c)(2) to read as follows:

**§ 252.58 Disclosure of stress test results.**

* * * * *

(b) * * *

(3) * * *

(v) Pro forma regulatory capital ratios and any other capital ratios specified by the Board;

(4) An explanation of the most significant causes for the changes in regulatory capital ratios; and

* * * * *

(c) * * *

(2) The disclosure of pro forma regulatory capital ratios and any other capital ratios specified by the Board that is required under paragraph (b) of this section must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

* * * * *

By order of the Board of Governors of the Federal Reserve System, July 17, 2015.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2015–18038 Filed 7–22–15; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2015–2958; Directorate Identifier 2014–NM–248–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 all The Boeing Company Model 787 airplanes. This proposed AD was prompted by the disclosure that the inner diameters of some batches of landing gear pins were not shot peened in accordance with design specifications and need to be replaced. This proposed AD would require inspection for improperly manufactured landing gear pins, and replacement if necessary. We are proposing this AD to detect and correct insufficient shot peening that could lead to stress corrosion cracking and failure of the landing gear pin, and cause landing gear collapse and inability to control the airplane at high speeds on the ground.

**DATES:** We must receive comments on this proposed AD by September 8, 2015.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207;

telephone 206–544–5000, extension 1; fax 206–766–5680; 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–2015–2958.

**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–2015–2958; 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:** Melanie Violette, Senior Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6422; fax: 425–917–6590; email: *melanie.violette@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–2015–2958; Directorate Identifier 2014–NM–248–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 the inner diameters of some batches of landing gear pins were not shot peened and need to be replaced. On high strength steel parts, shot peening increases fatigue life and reduces the likelihood of stress corrosion cracking. Stress corrosion cracking, if not corrected, could result in failure of the landing gear pin, and consequent landing gear collapse and the inability to control the airplane at high speeds on the ground.

**Related Service Information Under 1 CFR Part 51**

We reviewed Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014. The service information describes procedures for the inspection for improperly manufactured landing gear pins (parts that were not shot peened), and replacement if necessary. 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 of this NPRM.

**FAA's Determination**

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' Refer to this service information for details on the procedures and compliance times.

**Differences Between This Proposed AD and the Service Information**

Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014, limits the effectivity in Group 2 to airplanes delivered prior to the publication of Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014. However, this NPRM does not propose to include that limitation. The applicability of this proposed AD includes all The Boeing Company Model 787 airplanes. Because the affected landing gear pins are rotable parts, we have determined that these parts could later be installed on production airplanes, thereby subjecting those airplanes to the unsafe condition. This difference has been coordinated with Boeing.

**Costs of Compliance**

We estimate that this proposed AD affects 13 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 | 3 work-hours × $85 per hour = $255 | $0 | $255 | $3,315 |

We estimate the following costs to do any necessary replacements 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 replacements:

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Replacement | Up to 19 work-hours × $85 per hour = $1,615. | $35,569 | Up to $37,184 |

**Explanation of ''RC'' Steps in Service Information**

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (ARC), to enhance the AD system. One enhancement was a new process for annotating which steps in the service information are required for compliance with an AD. Differentiating these steps from other tasks in the service information is expected to improve an owner's/operator's understanding of crucial AD requirements and help provide consistent judgment in AD compliance. The steps identified as RC (required for compliance) in any service information identified previously have a direct effect on detecting, preventing, resolving, or eliminating an identified unsafe condition.

For service information that contains steps that are labeled as Required for Compliance (RC), the following provisions apply: (1) 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, and an AMOC is required for any deviations to RC steps, including substeps and identified figures; and (2) 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.

**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–2015–2958; Directorate Identifier 2014–NM–248–AD.

**(a) Comments Due Date**

We must receive comments by September 8, 2015.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all The Boeing Company Model 787 airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 32, Landing Gear.

**(e) Unsafe Condition**

This AD was prompted by the disclosure that the inner diameters of some batches of landing gear pins were not shot peened in accordance with design specifications and need to be replaced. We are issuing this AD to detect and correct insufficient shot peening that could lead to stress corrosion cracking and failure of the landing gear pin, and cause landing gear collapse and inability to control the airplane at high speeds on the ground.

**(f) Compliance**

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

**(g) Inspection and Replacement**

At the applicable time specified in paragraph 5, ''Compliance,'' of Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014, do a landing gear pin part number and serial number inspection, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB320022–00, dated November 14, 2014. A review of airplane maintenance or delivery records is acceptable in lieu of this inspection if the part number and serial number of the installed landing gear pins can be conclusively determined from that review.

(1) If no part number or serial number is found that matches the list of affected pin numbers: No further action is required by this paragraph at that pin location.

(2) If any part number or serial number is found that matches the list of affected pin numbers: At the applicable time specified in paragraph 5, ''Compliance,'' of Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014, replace the affected pin with a pin that does not have an affected part number and serial number, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 2014.

**(h) Parts Installation Prohibition**

As of the effective date of this AD, no person may install on any airplane a landing gear pin having an affected part or serial number identified in Boeing Alert Service Bulletin B787–81205–SB320022–00, Issue 001, dated November 14, 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

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.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (i)(4)(i) and (i)(4)(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. 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.

**(j) Related Information**

(1) For more information about this AD, contact Melanie Violette, Senior Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6422; fax: 425–917–6590; email: *melanie.violette@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; 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 July 14, 2015.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2015–17955 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2015–2568; Directorate Identifier 2014–SW–026–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Helicopters (Previously Eurocopter France) Helicopters

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede airworthiness directive (AD) 2014–07–52 for certain Airbus Helicopters (previously Eurocopter France) Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters. AD 2014–07–52 currently requires repetitively inspecting certain reinforcement angles of the rear structure to tailboom junction frame (reinforcement angles) for a crack at 10 hour time-in-service (TIS) intervals, repairing any cracked reinforcement angle, and allows an optional repetitive inspection with a 165 hour TIS inspection interval as a terminating action for the 10 hour TIS inspections. This proposed AD would retain the inspection requirements of AD 2014–07–52 and require the inspection of the area around each reinforcement angle screw hole as terminating action to the 10 hour TIS inspections. These proposed actions are intended to detect a crack in the reinforcement angle, which if not corrected, could result in loss of the tailboom and subsequent loss of control of the helicopter.

**DATES:** We must receive comments on this proposed AD by September 21, 2015.

**ADDRESSES:** You may send comments by any of the following methods:

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

*Examining the AD Docket*

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the European Aviation Safety Agency (EASA) AD, the economic 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 service information identified in this proposed AD, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub.* You may review service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

**FOR FURTHER INFORMATION CONTACT:** Robert Grant, Aviation Safety Engineer, Safety Management Group, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *robert.grant@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you 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 adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

**Discussion**

On May 21, 2014, we issued AD 2014–07–52, Amendment 39–17858, 79 FR 33054, June 10, 2014) for Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters with Modification (MOD) 07 3215 installed or with a reinforcement angle, part-number (P/N) 350A08.2493.21 or 350A08.2493.23, installed. AD 2014–07–52 requires, for helicopters with 640 or more hours TIS, within 10 hours TIS and thereafter at

intervals not exceeding 10 hours TIS, repetitively inspecting each reinforcement angle for a crack. If there is a crack, AD 2014–07–52 requires, before further flight, repairing the reinforcement angle. As an optional terminating action for the repetitive 10 hour TIS inspections, AD 2014–07–52 allows a repetitive 165 hour TIS inspection of the reinforcement angle under each attaching screw for a crack.

AD 2014–07–52 was prompted by Emergency AD No. 2014–0076–E, dated March 25, 2014, issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters Model AS350B, AS350BA, AS350BB, AS350B1, AS350B2, AS350B3, AS350D, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters with MOD 07 3215 or with at least one reinforcement angle, P/N 350A08.2493.21 or P/N 350A08.2493.23, installed. EASA advises that during the inspection of several AS355 helicopters, cracks found in the reinforcement angles had initiated on the non-visible surface of the angle, and that this condition, if not corrected, could lead to further crack propagation and subsequent loss of the tailboom, resulting in loss of control of the helicopter. The EASA AD requires repetitive inspections of the reinforcement angles, and states that a terminating action is under investigation.

**Actions Since AD 2014–07–52 Was Issued**

Since we issued AD 2014–07–52 (79 FR 33054, June 10, 2014), we have determined that the optional terminating action in AD 2014–07–52 should be a required terminating action. This NPRM would retain the actions in AD 2014–07–52 but would require the 165-hour TIS visual inspection as terminating action for the 10-hour TIS inspections. In addition, because MOD 07 3215 installed reinforcement angle P/Ns 350A08.2493.21 and 350A08.2493.23, AD 2014–07–52 was written to apply to helicopters with either the reinforcement angle P/Ns or with MOD 07 3215, so that operators could more easily determine whether AD 2014–07–52 applied to their aircraft. Airbus Helicopters then developed MOD 07 3232, which removes reinforcement angle P/N 350A08.2493.21 and P/N 350A08.2493.23. Because a helicopter with both MOD 07 3215 and MOD 07 3232 in its aircraft records would not have reinforcement angle P/N 350A08.2493.21 or P/N 350A08.2493.23 installed, this NPRM would revise the applicability to no longer include helicopters with MOD 07 3215 and to include a note clarifying that the AD would not apply if MOD 07 3232 is installed.

**Comments**

After AD 2014–07–52 (79 FR 33054, June 10, 2014), was published, we received comments from three commenters.

**Request**

Two commenters requested that the AD not be applicable to aircraft with MOD 07 3232 installed, as this modification improved the attachment at the junction frame to prevent cracking.

We partially agree. Although AD 2014–07–52 does not apply to helicopters with MOD 07 3232 installed, we have revised the language in the proposed AD so that this exclusion is more clear.

Two commenters requested that we increase the time between inspections or allow the repetitive inspections to end if no cracks are found after a few inspections. The commenters stated that the inspection frequency of the repetitive 165-hour TIS inspection is excessive and that if correctly installed, the doublers do not crack. One commenter stated that in practice the 165-hour inspection is being completed at every 100-hour inspection to avoid repeated grounding of the aircraft. Another commenter stated that frequent removal of the bolts and nuts could affect the airworthiness of the aircraft.

We do not agree. Analysis has demonstrated that cracking has been found in more than one location, which indicates there may be more than one cause of the cracking. The uncertainty regarding the root cause of the cracking supports requiring the 165-hour TIS inspections without any changes.

**FAA's Determination**

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition is likely to exist or develop on other products of the same type design.

**Related Service Information Under 1 CFR Part 51**

Airbus Helicopters issued Emergency Alert Service Bulletin (EASB) No. 05.00.70 for Model AS350B, BA, BB, Bl, B2, B3, and D helicopters and EASB No. 05.00.62 for Model AS355E, F, F1, F2, N, and NP helicopters, both Revision 0 and dated March 24, 2014. EASB No. 05.00.70 and EASB No. 05.00.62 describe procedures for inspecting the angle reinforcements for a crack. 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 of this NPRM.

**Proposed AD Requirements**

This proposed AD would retain the 10 hour TIS repetitive inspection of the junction frame required by AD 2014–07–52 (79 FR 33054, June 10, 2014), and would also require the repetitive 165 hour TIS inspection of the junction frame bores as a terminating action for the 10 hour TIS inspection. This proposed AD would also revise the applicability paragraph by no longer including helicopters with MOD 07 3215.

**Differences Between This Proposed AD and the EASA AD**

This proposed AD is not applicable to the AS350BB as that model is not type certificated in the U.S. This proposed AD applies to Airbus Helicopters Model AS350C and AS350D1 helicopters because these helicopters have a similar design. Finally, the EASA AD requires operators to contact Airbus Helicopters if there is a crack, and this proposed AD does not, however it does require repairing the crack before further flight.

**Interim Action**

We consider this proposed AD to be an interim action. If final action is later identified, we might consider further rulemaking then.

**Costs of Compliance**

We estimate that this proposed AD would affect 822 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this proposed AD. At an average labor rate of $85 per hour, inspecting the reinforcement angles for a crack without removing the screws would require 1.0 work-hour, for a cost per helicopter of $85 and a total cost of $69,870 for the U.S. fleet per inspection cycle. Removing the screws and inspecting the reinforcement angle would require 2 work-hours, for a cost per helicopter of $170 and a total cost of $139,740 for the U.S. fleet, per inspection cycle. If required, repairing a cracked reinforcement angle would require about 10 work-hours, and

required parts would cost about $300, for a total cost per helicopter of $1,150.

**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, 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 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.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

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

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2014–07052, Amendment 39–17858 (79 FR 33054, June 10, 2014), and adding the following new AD:

**Airbus Helicopters (previously Eurocopter France):** Docket No. FAA–2015–2568; Directorate Identifier 2014–SW–026–AD.

**(a) Applicability**

This AD applies to Airbus Helicopters Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, AS350D1, AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters, with a reinforcement angle part number (P/N) 350A08.2493.21 or P/N 350A08.2493.23 installed, certificated in any category.

**Note 1 to paragraph (a) of this AD:** Helicopters with Modification (MOD) 073232 do not have P/N 350A08.2493.21 or P/N 350A08.2493.23 installed.

**(b) Unsafe Condition**

This AD defines the unsafe condition as a crack in a rear structure to tailboom junction frame reinforcement angle (reinforcement angle), which if not detected could result in loss of the tail boom and subsequent loss of control of the helicopter.

**(c) Affected ADs**

This AD supersedes AD 2014–07–52, Amendment 39–17858 (79 FR 33054, June 10, 2014).

**(d) Comments Due Date**

We must receive comments by September 21, 2015.

**(e) Compliance**

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

**(f) Required Actions**

(1) For helicopters with 640 or more hours time-in-service (TIS) since installation of MOD 07 3215 or since installation of an applicable reinforcement angle, within 10 hours TIS, and thereafter at intervals not exceeding 10 hours TIS, inspect each reinforcement angle for a crack as depicted in Figure 1 of Airbus Helicopters Emergency Alert Service Bulletin No. 05.00.70 for Model AS350B, AS350BA, AS350B1, AS350B2, AS350B3, AS350C, AS350D, and AS350D1 helicopters and Airbus Helicopters Emergency Alert Service Bulletin No. 05.00.62 for AS355E, AS355F, AS355F1, AS355F2, AS355N, and AS355NP helicopters, both Revision 0 and dated March 24, 2014.

(2) If there is a crack, before further flight, repair the reinforcement angle in a manner approved by the manager listed in paragraph (h)(1) of this AD.

(3) Within 165 hours TIS after the first inspection required by paragraph (f)(1) of this AD, and thereafter at intervals not exceeding 165 hours TIS, remove screw No. 5 from the reinforcement angle, thoroughly clean the area around the hole and inspect the reinforcement angle for a crack. If there is not a crack, reinstall the screw. Sequentially repeat the steps required by this paragraph for screws No. 6 through No. 12. If there is a crack, comply with paragraph (f)(2) of this AD. Accomplishment of the inspection required by this paragraph terminates the repetitive inspections required by paragraph (f)(1) of this AD.

**(g) Special Flight Permit**

Special flight permits are prohibited.

**(h) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Robert Grant, Aviation Safety Engineer, Safety Management Group, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email *robert.grant@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(3) AMOCs approved previously in accordance with AD 2014–07–52, Amendment 39–17858 (79 FR 33054, June 10, 2014) are approved as AMOCs for the corresponding requirements of paragraph (f)(2) of this AD.

**(i) Additional Information**

The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD 2014–0076–E, dated March 25, 2014. You may view the EASA AD on the Internet at *http://www.regulations.gov* in Docket No. FAA–2015–2568.

**(j) Subject**

Joint Aircraft Service Component (JASC) Code: 5302: Rotorcraft Tailboom.

Issued in Fort Worth, Texas, on July 15, 2015.

**Bruce E. Cain,**

*Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2015–17952 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2015–2464; Directorate Identifier 2014–NM–195–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; The Boeing Company Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to supersede Airworthiness Directive (AD) 2013–22–11, which applies to certain The Boeing Company Model 747–400 and –400D series airplanes. AD 2013–22–11 currently requires repetitive inspections to detect cracks in the floor panel attachment fastener holes of certain upper deck floor beam upper chords, repetitive inspections, corrective actions if necessary, and replacement of the upper deck floor beam upper chords. Since we issued AD 2013–22–11, we received a report that certain fastener holes in the upper deck floor beam upper chords may not have been inspected in accordance with AD 2013–22–11. This proposed AD would add additional repetitive inspections for cracks for certain airplanes, and corrective actions if necessary. We are proposing this AD to detect and correct fatigue cracking in certain upper chords of the upper deck floor beam, which could become large and cause the floor beams to become severed and result in rapid decompression or reduced controllability of the airplane.

**DATES:** We must receive comments on this proposed AD by September 8, 2015.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; 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–2015–2464.

**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–2015–2464; 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:** Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2015–2464; Directorate Identifier 2014–NM–195–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**

Structural fatigue damage is progressive. It begins as minute cracks, and those cracks grow under the action of repeated stresses. This can happen because of normal operational conditions and design attributes, or because of isolated situations or incidents such as material defects, poor fabrication quality, or corrosion pits, dings, or scratches. Fatigue damage can occur locally, in small areas or structural design details, or globally. Global fatigue damage is general degradation of large areas of structure with similar structural details and stress levels. Multiple-site damage is global damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Global damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site-damage and multiple-element-damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane, in a condition known as widespread fatigue damage (WFD). As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010), became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that design approval holders (DAH) establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010), does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur.

This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

On October 17, 2013, we issued AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), for certain The Boeing Company Model 747–400 and –400D series airplanes. AD 2013–22–11 requires repetitive inspections to detect cracks in the floor panel attachment fastener holes of the Section 41 upper deck floor beam upper chords, and corrective actions if necessary; repetitive post-repair and post-modification inspections, and corrective actions if necessary; repetitive inspections of Section 44 upper deck floor beam upper chords, and corrective actions if necessary; repetitive post-repair and post-modification inspections, and corrective actions if necessary; and replacement of the upper deck floor beam upper chords. AD 2013–22–11 superseded AD 2009–10–06, Amendment 39–15901 (74 FR 22424, May 13, 2009). AD 2013–22–11 resulted from an evaluation by the design approval holder (DAH) indicating that certain upper chords of the upper deck floor beam are subject to widespread fatigue damage (WFD). We issued AD 2013–22–11 to detect and correct fatigue cracking in certain upper chords of the upper deck floor beam, which could become large and cause the floor beams to become severed and result in rapid decompression or reduced controllability of the airplane.

**Actions Since AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), Was Issued**

Since we issued AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), an evaluation by the DAH indicated that certain fastener holes in the upper deck floor beam upper chords in Section 41, that were plugged or re-used during the conversion to a Boeing Converted Freighter, may not have been inspected in accordance with the requirements of AD 2013–22–11, because the locations may be hidden and not recognized as inspection locations. We have determined that, for certain airplanes, it is necessary to add additional repetitive inspections for cracks in the Section 41 upper deck floor beam upper chords and repair if necessary.

**Related Service Information Under 1 CFR Part 51**

We reviewed Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. The service information describes procedures for upper deck floor beam upper chord inspection and repair at floor panel attachment fastener holes in section 41 and section 42. 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 of this NPRM. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–2464.

**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**

Although this proposed AD does not explicitly restate the requirements of AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), this proposed AD would retain all of the requirements of AD 2013–22–11. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraphs (g) through (k) of this proposed AD. This proposed AD would add new actions. This proposed AD would require accomplishing the actions specified in the service information identified previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' Refer to this service information for information on the procedures and compliance times.

In addition, the phrase ''corrective actions'' might be used in this proposed AD. ''Corrective actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

**Differences Between This Proposed AD and the Service Information**

Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

**Costs of Compliance**

We estimate that this proposed AD affects 84 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 (retained actions from AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013)). | Up to 309 work-hours × $85 per hour = $26,265 per inspection cycle. | $0 | Up to $26,265 per inspection cycle. | Up to $2,206,260 per inspection cycle. |
| New Inspections | Up to 241 work-hours × $85 per hour = $20,485. | $0 | Up to $20,485 per inspection cycle. | Up to $1,720,740 per inspection cycle. |

We have received no definitive data that would enable us to provide a cost estimate for the repair or modification 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 have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

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

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

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), and adding the following new AD:

**The Boeing Company:** Docket No. FAA–2015–2464; Directorate Identifier 2014–NM–195–AD.

**(a) Comments Due Date**

The FAA must receive comments on this AD action by September 8, 2015.

**(b) Affected ADs**

This AD replaces AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013).

**(c) Applicability**

(1) This AD applies to The Boeing Company Model 747–400 and –400D series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014.

**(d) Subject**

Air Transport Association (ATA) of America Code 53, Fuselage.

**(e) Unsafe Condition**

This AD was prompted by an evaluation by the design approval holder (DAH) indicating that certain upper chords of the upper deck floor beam are subject to widespread fatigue damage (WFD). This AD was also prompted by reports that certain fastener holes in the upper deck floor beam upper chords in Section 41, may not have been inspected in accordance with AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013). We are issuing this AD to detect and correct fatigue cracking in certain upper chords of the upper deck floor beam, which could become large and cause the floor beams to become severed and result in rapid decompression or reduced controllability of the airplane.

**(f) Compliance**

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

**(g) Section 41—Repetitive Inspections, and Corrective Actions**

At the applicable time specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, do open hole or surface high frequency eddy current inspections for cracking of the floor panel attachment holes in the upper deck floor beam upper chords, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. If any crack is found during any inspection, before further flight, repair in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, or repair using a method approved in accordance with procedures specified in paragraph (o) of this AD. Repeat the inspections thereafter at the applicable time specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, until an action specified in paragraph (g)(1) or (g)(2) of this AD is done.

(1) Doing a repair as a hole modification in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(2) of this AD, terminates the inspections required by paragraph (g) of this AD for the modified hole only.

(2) Doing a modification in accordance with Figure 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(2) of this AD, terminates the inspections required by paragraph (g) of this AD for the modification only.

**(h) Section 41—Repetitive Inspection of Repaired or Modified Holes, and Corrective Actions**

For airplanes on which a repair specified in Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688 is done or a modification specified in Figure 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688 is done: At the applicable time specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(3) of this AD, do open hole or surface high frequency eddy current inspections for cracking of repaired or modified floor panel attachment holes in the upper deck floor beam upper chords, in accordance with Part 1 or Part 3, as applicable, of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. If any crack is found during any inspection required by this paragraph, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (o) of this AD. Repeat the inspections thereafter at the applicable time specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014.

**(i) Section 44—Repetitive Inspection, and Corrective Actions**

For airplanes identified in Group 1 in Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014: At the applicable time specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(4) of this AD, do open hole or surface high frequency eddy current inspections of the floor panel attachment holes in the upper deck floor beam upper chords, in accordance with Part 4 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. If any crack is found during any inspection required by this paragraph, before further flight, repair in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(2) of this AD. Repeat the inspections thereafter at the applicable time specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, until an action specified in paragraph (i)(1) or (i)(2) of this AD is done.

(1) Doing a repair as a hole modification in accordance with Part 5 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(2) of this AD, terminates the inspections required by paragraph (i) of this AD for that modified hole only.

(2) Doing a modification in accordance with Figure 21 of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(2) of this AD, terminates the inspections required by paragraph (i) of this AD for that modified hole only.

**(j) Section 44—Repetitive Inspection of Repaired or Modified Holes, and Corrective Actions**

For airplanes identified in Group 1 in Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, on which a repair specified in Part 5 of Boeing Alert Service Bulletin 747–53A2688 is done or a modification specified in Figure 21 of Boeing Alert Service Bulletin 747–53A2688 is done: At the applicable time specified in table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(3) of this AD, do open hole or surface high frequency eddy current inspections of repaired or modified floor panel attachment holes in the upper deck floor beam upper chords, in accordance with Part 4 or Part 6, as applicable, of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. If any crack is found during any inspection by this paragraph, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (o) of this AD. Repeat the inspections thereafter at the applicable time specified in table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014.

**(k) Section 41 and 44—Replacement and Post-Replacement Repetitive Inspections**

At the applicable time specified in table 5 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014: Replace all upper deck floor beam upper chords, in accordance with Part 7 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. Within 20,000 flight cycles after doing the replacement, do the inspections specified in paragraphs (g) and (i) of this AD, as applicable. Thereafter, repeat the inspections required by paragraphs (g) and (i) of this AD, as applicable, at the times specified in paragraphs (g) and (i) of this AD.

**(l) Section 41—Repetitive Inspection of Plugged or Re-Used Holes, and Corrective Actions**

For airplanes identified in Group 2 in Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014: At the applicable time specified in table 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, except as required by paragraph (m)(1) of this AD, at all plugged or re-used floor panel attachment holes in the affected floor beam upper chords, do a surface high frequency eddy current inspection of the upper deck floor beam upper chords and detailed inspection for cracks on the vertical flange, in accordance with Part 8 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014. If any crack is found during any inspection required by this paragraph, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (o) of this AD. Repeat the inspections thereafter at the applicable time specified in table 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014.

**(m) Exceptions to Service Information Specifications**

(1) Where Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, specifies a compliance time ''after the Revision 2 date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014; specifies to contact Boeing for certain procedures: Do the specified actions before further flight using a method approved in accordance with the procedures specified in paragraph (o) of this AD.

(3) Where table 2 or table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 747–53A2688, Revision 2, dated August 21, 2014, specifies to contact Boeing for inspections and compliance times: Before further flight, contact the Manager, FAA, Seattle Aircraft Certification Office (ACO), for inspections and compliance times and accomplish the inspections at the given times.

(4) Where Boeing Alert Service Bulletin 747–53A2688, Revision 1, dated September 19, 2012, specifies a compliance time ''after the Revision 1 date of this service bulletin,'' this AD requires compliance within the specified compliance time after December 10, 2013 (the effective date of AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013)).

**(n) Credit for Previous Actions**

(1) This paragraph restates the requirements of paragraph (o) of AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), with new paragraph (h). This paragraph provides credit for the actions required by paragraphs (g) and (h) of this AD, if those actions were performed before December 10, 2013 (the effective date of AD 2013–22–11) using Boeing Alert Service Bulletin 747–53A2688, dated August 21, 2008.

(2) This paragraph provides credit for the actions required by paragraphs (g) through (k) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 747–53A2688, Revision 1, dated September 19, 2012, which is not incorporated by reference in this AD.

**(o) 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 (p)(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 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.

(4) AMOCs approved for AD 2013–22–11, Amendment 39–17643 (78 FR 66254, November 5, 2013), are approved as AMOCs for the corresponding provisions of paragraphs (g) through (k) of this AD.

**(p) Related Information**

(1) For more information about this AD, contact Nathan Weigand, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6428; fax: 425–917–6590; email: *Nathan.P.Weigand@faa.gov*.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; phone: 206–544–5000, extension 1; fax: 206–766–5680; 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 July 15, 2015.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

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**BILLING CODE 4910–13–P**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

**[REG–115452–14]**

**RIN 1545–BM12**

## Disguised Payments for Services

**AGENCY:** Internal Revenue Service (IRS), Treasury

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to disguised payments for services under section 707(a)(2)(A) of the Internal Revenue Code. The proposed regulations provide guidance to partnerships and their partners regarding when an arrangement will be treated as a disguised payment for services. This document also proposes conforming modifications to the regulations governing guaranteed payments under section 707(c). Additionally, this document provides notice of proposed modifications to Rev. Procs. 93–27 and 2001–43 relating to the issuance of interests in partnership profits to service providers.

**DATES:** Written and electronic comments and requests for a public hearing must be received by October 21, 2015.

**ADDRESSES:** Send submissions to CC:PA:LPD:PR (REG–115452–14), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–115452–14), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (indicate IRS and REG–115452–14).

**FOR FURTHER INFORMATION CONTACT:** Concerning submissions of comments, Oluwafunmilayo (Funmi) Taylor (202) 517–6901; concerning the proposed regulations, Jaclyn M. Goldberg (202) 317–6850 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Background

Generally, under the statutory framework of Subchapter K of the Code, an allocation or distribution between a partnership and a partner for the provision of services can be treated in one of three ways: (1) A distributive share under section 704(b); (2) a guaranteed payment under section 707(c); or (3) as a transaction in which a partner has rendered services to the partnership in its capacity as other than a partner under section 707(a).

*Distributive Share Treatment*

Partnership allocations that are determined with regard to partnership income and that are made to a partner for services rendered by the partner in its capacity as a partner are generally treated as distributive shares of partnership income, taxable under the general rules of sections 702, 703, and 704. In some cases, the right to a distributive share may qualify as a profits interest defined in Rev. Proc. 93–27, 1993–2 C.B. 343. Rev. Proc. 93–27, clarified by Rev. Proc. 2001–43, 2001–2 C.B. 191, provides guidance on the treatment of the receipt of a profits interest for services provided to or for the benefit of the partnership.

*Arrangements Subject to Sections 707(c) or 707(a)(1).*

In 1954, Congress added section 707 to the Code to clarify transactions between a partner and a partnership. Section 707(a) addresses arrangements in which a partner engages with the partnership other than in its capacity as a partner. The legislative history to section 707(a) provides the general rule that a partner who engages in a transaction with the partnership, other than in its capacity as a partner is treated as though it were not a partner. The provision was intended to apply to the sale of property by the partner to the partnership, the purchase of property by the partner from the partnership, and the rendering of services by the partner to the partnership or by the partnership to the partner. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 227 (1954) (House Report); S. Rep. No. 1622, 83d Cong., 2d Sess. 387 (1954) (Senate Report).

Congress simultaneously added section 707(c) to address payments to partners of the partnership acting in their partner capacity. Section 707(c) provides that to the extent determined without regard to the income of the partnership, payment to a partner for services shall be considered as made to a person who is not a partner, but only for purposes of sections 61(a) and 162(a). The Senate Report and the House Report provide that a fixed salary, payable without regard to partnership income, to a partner who renders services to the partnership is a guaranteed payment. The amount of the payment shall be included in the partner's gross income, and shall not be considered a distributive share of income or gain. A partner who is guaranteed a minimum annual amount for its services shall be treated as receiving a fixed payment in that amount. House Report at 227; Senate Report at 387.

In 1956, the Treasury Department and the IRS issued additional guidance under § 1.707–1 relating to a partner not acting in its capacity as a partner under section 707(a) and to guaranteed payments under section 707(c). See TD 6175. However, it remained unclear when a partner's services to the partnership were rendered in a non-partner capacity under section 707(a) rather than in a partner capacity under section 707(c).

In 1975, the Tax Court distinguished sections 707(a) and 707(c) payments in *Pratt* v. *Commissioner,* 64 T.C. 204 (1975), *aff'd* in part, *rev'd* in part, 550 F.2d 1023 (5th Cir. 1977). In *Pratt,* the general partners in two limited partnerships formed to purchase, develop, and operate two shopping centers received a fixed percentage of gross rentals in exchange for the performance of managerial services. The Tax Court held that these payments were not guaranteed payments under section 707(c) because they were computed based on a percentage of gross rental income and therefore were not paid without regard to partnership income. The Tax Court further held that section 707(a) did not apply because the general partners performed managerial duties in their partner capacities in accordance with their basic duties under the partnership agreement. On appeal, the Fifth Circuit affirmed the Tax Court's decision. The Fifth Circuit reasoned that Congress enacted section 707(a) to apply to partners who perform services for the partnership that are outside the scope of the partnership's activities. The Court indicated that if the partner performs services that the partnership itself provides, then the compensation to the service provider is merely a rearrangement among the partners of their distributive shares in the partnership income.

In response to the decision in *Pratt,* the Treasury Department and the IRS issued Rev. Rul. 81–300, 1981–2 C.B. 143 and Rev. Rul. 81–301, 1981–2 C.B. 144 to clarify the treatment of transactions under sections 707(a) and 707(c). As in the *Pratt* case, Rev. Rul. 81–300 considers a partnership formed to purchase, develop, and operate a shopping center. The partnership agreement required the general partners to contribute their time, managerial abilities, and best efforts to the partnership. In return for these services, the general partners received a fee equal to five percent of the partnership's gross rental income. The ruling concluded that the taxpayers performed managerial services in their capacities as general

partners, and characterized the management fees as guaranteed payments under section 707(c). The ruling provides that, although guaranteed payments under section 707(c) frequently involve a fixed amount, they are not limited to fixed amounts. Thus, the ruling concluded that a payment for services determined by reference to an item of gross income will be a guaranteed payment if, on the basis of all facts and circumstances, the payment is compensation rather than a share of profits.

Rev. Rul. 81–301 describes a limited partnership which has two classes of general partners. The first class of general partner (director general partners) had complete control over the management, conduct, and operation of partnership activities. The second class of general partner (adviser general partner) rendered to the partnership services that were substantially the same as those that the adviser general partner rendered to other persons as an independent contractor. The adviser general partner received 10 percent of daily gross income in exchange for the management services it provided to the partnership. Rev. Rul. 81–301 held that the adviser general partner received its gross income allocation in a nonpartner capacity under section 707(a) because the adviser general partner provided similar services to other parties, was subject to removal by the director general partners, was not personally liable to the other partners for any losses, and its management was supervised by the director general partners.

*Enactment of Section 707(a)(2)(A)*

Congress revisited the scope of section 707(a) in 1984, in part to prevent partners from circumventing the capitalization requirements of sections 263 and 709 by structuring payments for services as allocations of partnership income under section 704. H.R. Rep. No. 432 (Pt. 2), 98th Cong., 2d Sess. 1216–21 (1984) (H.R. Rep.); S. Prt. No. 169 (Vol. 1), 98th Cong., 2d Sess. 223–32 (1984) (S. Prt.). Congress specifically addressed the holdings in Rev. Rul. 81–300 and Rev. Rul. 81–301, affirming Rev. Rul. 81–301 and concluding that the payment in Rev. Rul. 81–300 should be recharacterized as a section 707(a) payment. S. Prt. at 230. Accordingly, the Treasury Department and the IRS are obsoleting Rev. Rul. 81–300 and request comments on whether it should be reissued with modified facts.

Congress also added an anti-abuse rule to section 707(a) relating to payments to partner service providers. Section 707(a)(2)(A) provides that if a partner performs services for a partnership and receives a related direct or indirect allocation and distribution, and the performance of services and allocation and distribution, when viewed together, are properly characterized as a transaction occurring between the partnership and a partner acting other than in its capacity as a partner, the transaction will be treated as occurring between the partnership and one who is not a partner under section 707(a)(1). See section 73 of the Tax Reform Act of 1984 (the 1984 Act). The Treasury Department and the IRS have concluded that section 707(a)(2) applies to arrangements in which distributions to the service provider depend on an allocation of an item of income, and section 707(c) applies to amounts whose payments are unrelated to partnership income.

Section 707(a)(2) grants the Secretary broad regulatory authority to identify transactions involving disguised payments for services under section 707(a)(2)(A). This grant of regulatory authority stems from Congress's concern that partnerships and service providers were inappropriately treating payments as allocations and distributions to a partner even when the service provider acted in a capacity other than as a partner. S. Prt. at 225. Congress determined that allocations and distributions that were, in substance, direct payments for services should be treated as a payment of fees rather than as an arrangement for the allocation and distribution of partnership income. H.R. Rep. at 1218; S. Prt. at 225. Congress differentiated these arrangements from situations in which a partner receives an allocation (or increased allocation) for an extended period to reflect its contribution of property or services to the partnership, such that the partner receives the allocation in its capacity as a partner. In balancing these potentially conflicting concerns, Congress anticipated that the regulations would take five factors into account in determining whether a service provider would receive its putative allocation and distribution in its capacity as a partner. H.R. Rep. at 1219–20; S. Prt. at 227.

Congress identified as its first and most important factor whether the payment is subject to significant entrepreneurial risk as to both the amount and fact of payment. In explaining why entrepreneurial risk is the most important factor, Congress provides that ''[p]artners extract the profits of the partnership with reference to the business success of the venture, while third parties generally receive payments which are not subject to this risk.'' S. Prt. at 227. An arrangement for an allocation and distribution to a service provider which involves limited risk as to amount and payment is treated as a fee under section 707(a)(2)(A). Congress specified examples of allocations that presumptively limit a partner's risk, including (i) capped allocations of income, (ii) allocations for a fixed number of years under which the income that will go to the partner is reasonably certain, (iii) continuing arrangements in which purported allocations and distributions are fixed in amount or reasonably determinable under all facts and circumstances, and (iv) allocations of gross income items.

An arrangement in which an allocation and distribution to a service provider are subject to significant entrepreneurial risk as to amount will generally be recognized as a distributive share, although other factors are also relevant. The legislative history to section 707(a)(2)(A) includes the following examples of factors that could bear on this determination: (i) Whether the partner status of the recipient is transitory; (ii) whether the allocation and distribution that are made to the partner are close in time to the partner's performance of services; (iii) whether the facts and circumstances indicate that the recipient became a partner primarily to obtain tax benefits for itself or the partnership that would not otherwise have been available; and (iv) whether the value of the recipient's interest in general and in continuing partnership profits is small in relation to the allocation in question.

**Explanation of Provisions**

Section 1.707–1 sets forth general rules on the operation of section 707. Section 1.707–2 is titled ''Disguised payments for services'' and is currently reserved. Sections 1.707–3 through 1.707–7 provide guidance regarding transactions involving disguised sales under section 707(a)(2)(B). These proposed regulations are issued under § 1.707–2 and provide guidance regarding transactions involving disguised payments for services under section 707(a)(2)(A). The effective date of the proposed regulations is provided under § 1.707–9.

*I. General Rules Regarding Disguised Payments for Services*

A. Scope

Consistent with the language of section 707(a)(2)(A), § 1.707–2(b) of the proposed regulations provides that an arrangement will be treated as a disguised payment for services if (i) a person (service provider), either in a

partner capacity or in anticipation of being a partner, performs services (directly or through its delegate) to or for the benefit of the partnership; (ii) there is a related direct or indirect allocation and distribution to the service provider; and (iii) the performance of the services and the allocation and distribution when viewed together, are properly characterized as a transaction occurring between the partnership and a person acting other than in that person's capacity as a partner.

The proposed regulations provide a mechanism for determining whether or not an arrangement is treated as a disguised payment for services under section 707(a)(2)(A). An arrangement that is treated as a disguised payment for services under these proposed regulations will be treated as a payment for services for all purposes of the Code. Thus, the partnership must treat the payments as payments to a non-partner in determining the remaining partners' shares of taxable income or loss. Where appropriate, the partnership must capitalize the payments or otherwise treat them in a manner consistent with the recharacterization.

The consequence of characterizing an arrangement as a payment for services is otherwise beyond the scope of these regulations. For example, the proposed regulations do not address the timing of inclusion by the service provider or the timing of a deduction by the partnership other than to provide that each is taken into account as provided for under applicable law by applying all relevant sections of the Code and all relevant judicial doctrines. Further, if an arrangement is subject to section 707(a), taxpayers should look to relevant authorities to determine the status of the service provider as an independent contractor or employee. See, generally, Rev. Rul. 69–184, 1969–1 C.B. 256. The Treasury Department and the IRS believe that section 707(a)(2)(A) generally should not apply to arrangements that the partnership has reasonably characterized as a guaranteed payment under section 707(c).

Allocations pursuant to an arrangement between a partnership and a service provider to which sections 707(a) and 707(c) do not apply will be treated as a distributive share under section 704(b). Rev. Proc. 93–27 and Rev. Proc. 2001–43 may apply to such an arrangement if the specific requirements of those Revenue Procedures are also satisfied. The Treasury Department and the IRS intend to modify the exceptions set forth in those revenue procedures to include an additional exception for profits interests issued in conjunction with a partner forgoing payment of a substantially fixed amount. This exception is discussed in part IV of the Explanation of Provisions section of this preamble.

B. Application and Timing

These proposed regulations apply to a service provider who purports to be a partner even if applying the regulations causes the service provider to be treated as a person who is not a partner. S. Prt. at 227. Further, the proposed regulations may apply even if their application results in a determination that no partnership exists. The regulations also apply to a special allocation and distribution received in exchange for services by a service provider who receives other allocations and distributions in a partner capacity under section 704(b).

The proposed regulations characterize the nature of an arrangement at the time at which the parties enter into or modify the arrangement. Although section 707(a)(2)(A)(ii) requires both an allocation and a distribution to the service provider, the Treasury Department and the IRS believe that a premise of section 704(b) is that an income allocation correlates with an increased distribution right, justifying the assumption that an arrangement that provides for an income allocation should be treated as also providing for an associated distribution for purposes of applying section 707(a)(2)(A). The Treasury Department and the IRS considered that some arrangements provide for distributions in a later year, and that those later distributions may be subject to independent risk. However, the Treasury Department and the IRS believe that recharacterizing an arrangement retroactively is administratively difficult. Thus, the proposed regulations characterize the nature of an arrangement when the arrangement is entered into (or modified) regardless of when income is allocated and when money or property is distributed. The proposed regulations apply to both one-time transactions and continuing arrangements. S. Prt. at 226.

*II. Factors Considered*

Whether an arrangement constitutes a payment for services (in whole or in part) depends on all of the facts and circumstances. The proposed regulations include six non-exclusive factors that may indicate that an arrangement constitutes a disguised payment for services. Of these factors, the first five factors generally track the facts and circumstances identified as relevant in the legislative history for purposes of applying section 707(a)(2)(A). The proposed regulations also add a sixth factor not specifically identified by Congress. The first of these six factors, the existence of significant entrepreneurial risk, is accorded more weight than the other factors, and arrangements that lack significant entrepreneurial risk are treated as disguised payments for services. The weight given to each of the other five factors depends on the particular case, and the absence of a particular factor (other than significant entrepreneurial risk) is not necessarily determinative of whether an arrangement is treated as a payment for services.

A. Significant Entrepreneurial Risk

As described in the Background section of this preamble, Congress indicated that the most important factor in determining whether or not an arrangement constitutes a payment for services is that the allocation and distribution is subject to significant entrepreneurial risk. S. Prt. at 227. Congress noted that partners extract the profits of the partnership based on the business success of the venture, while third parties generally receive payments that are not subject to this risk. Id.

The proposed regulations reflect Congress's view that this factor is most important. Under the proposed regulations, an arrangement that lacks significant entrepreneurial risk constitutes a disguised payment for services. An arrangement in which allocations and distributions to the service provider are subject to significant entrepreneurial risk will generally be recognized as a distributive share but the ultimate determination depends on the totality of the facts and circumstances. The Treasury Department and the IRS request comments on whether allocations to service providers that lack significant entrepreneurial risk could be characterized as distributive shares under section 704(b) in any circumstances.

Whether an arrangement lacks significant entrepreneurial risk is based on the service provider's entrepreneurial risk relative to the overall entrepreneurial risk of the partnership. For example, a service provider who receives a percentage of net profits in each of a partnership that invests in high-quality debt instruments and a partnership that invests in volatile or unproven businesses may have significant entrepreneurial risk with respect to both interests.

Section 1.707–2(c)(1)(i) through (v) of the proposed regulations set forth arrangements that presumptively lack significant entrepreneurial risk. These

arrangements are presumed to result in an absence of significant entrepreneurial risk (and therefore, a disguised payment for services) unless other facts and circumstances can establish the presence of significant entrepreneurial risk by clear and convincing evidence. These examples generally describe facts and circumstances in which there is a high likelihood that the service provider will receive an allocation regardless of the overall success of the business operation, including (i) capped allocations of partnership income if the cap would reasonably be expected to apply in most years, (ii) allocations for a fixed number of years under which the service provider's distributive share of income is reasonably certain, (iii) allocations of gross income items, (iv) an allocation (under a formula or otherwise) that is predominantly fixed in amount, is reasonably determinable under all the facts and circumstances, or is designed to assure that sufficient net profits are highly likely to be available to make the allocation to the service provider (for example, if the partnership agreement provides for an allocation of net profits from specific transactions or accounting periods and this allocation does not depend on the overall success of the enterprise), and (v) arrangements in which a service provider either waives its right to receive payment for the future performance of services in a manner that is non-binding or fails to timely notify the partnership and its partners of the waiver and its terms.

With respect to the fourth example, the presence of certain facts, when coupled with a priority allocation to the service provider that is measured over any accounting period of the partnership of 12 months or less, may create opportunities that will lead to a higher likelihood that sufficient net profits will be available to make the allocation. One fact is that the value of partnership assets is not easily ascertainable and the partnership agreement allows the service provider or a related party in connection with a revaluation to control the determination of asset values, including by controlling events that may affect those values (such as timing of announcements that affect the value of the assets). (See Example 3(iv).) Another fact is that the service provider or a related party controls the entities in which the partnership invests, including controlling the timing and amount of distributions by those controlled entities. (These two facts by themselves do not, however, necessarily establish the absence of significant entrepreneurial risk.) By contrast, certain priority allocations that are intended to equalize a service provider's return with priority allocations already allocated to investing partners over the life of the partnership (commonly known as ''catch-up allocations'') typically will not fall within the types of allocations covered by the fourth example and will not lack significant entrepreneurial risk, although all of the facts and circumstances are considered in making that determination.

With respect to the fifth example, the Treasury Department and the IRS request suggestions regarding fee waiver requirements that sufficiently bind the waiving service provider and that are administrable by the partnership and its partners.

Congress's emphasis on entrepreneurial risk requires changes to existing regulations under section 707(c). Specifically, Example 2 of § 1.707–1(c) provides that if a partner is entitled to an allocation of the greater of 30 percent of partnership income or a minimum guaranteed amount, and the income allocation exceeds the minimum guaranteed amount, then the entire income allocation is treated as a distributive share under section 704(b). Example 2 also provides that if the income allocation is less than the guaranteed amount, then the partner is treated as receiving a distributive share to the extent of the income allocation and a guaranteed payment to the extent that the minimum guaranteed payment exceeds the income allocation. The treatment of the arrangements in Example 2 is inconsistent with the concept that an allocation must be subject to significant entrepreneurial risk to be treated as a distributive share under section 704(b). Accordingly, the proposed regulations modify Example 2 to provide that the entire minimum amount is treated as a guaranteed payment under section 707(c) regardless of the amount of the income allocation. Rev. Rul. 66–95, 1966–1 C.B. 169, and Rev. Rul. 69–180, 1969–1 C.B. 183, are also inconsistent with these proposed regulations. The Treasury Department and the IRS intend to obsolete Rev. Rul. 66–95 and revise Rev. Rul. 69–180, when these regulations are published in final form.

B. Secondary Factors

Section 1.707–2(c)(2) through (6) describes additional factors of secondary importance in determining whether or not an arrangement that gives the appearance of significant entrepreneurial risk constitutes a payment for services. The weight given to each of the other factors depends on the particular case, and the absence of a particular factor is not necessarily determinative of whether an arrangement is treated as a payment for services. Four of these factors, described by Congress in the legislative history to section 707(a)(2)(A), are (i) that the service provider holds, or is expected to hold, a transitory partnership interest or a partnership interest for only a short duration, (ii) that the service provider receives an allocation and distribution in a time frame comparable to the time frame that a non-partner service provider would typically receive payment, (iii) that the service provider became a partner primarily to obtain tax benefits which would not have been available if the services were rendered to the partnership in a third party capacity, and (iv) that the value of the service provider's interest in general and continuing partnership profits is small in relation to the allocation and distribution.

To these four factors, the proposed regulations add a fifth factor. The fifth factor is present if the arrangement provides for different allocations or distributions with respect to different services received, where the services are provided either by a single person or by persons that are related under sections 707(b) or 267(b), and the terms of the differing allocations or distributions are subject to levels of entrepreneurial risk that vary significantly. For example, assume that a partnership receives services from both its general partner and from a management company that is related to the general partner under section 707(b). Both the general partner and the management company receive a share in future partnership net profits in exchange for their services. The general partner is entitled to an allocation of 20 percent of net profits and undertakes an enforceable obligation to repay any amounts distributed pursuant to its interest (reduced by reasonable allowance for tax payments made on the general partner's allocable shares of partnership income and gain) that exceed 20 percent of the overall net amount of partnership profits computed over the partnership's life and it is reasonable to anticipate that the general partner can and will comply fully with this obligation. The proposed regulations refer to this type of obligation and similar obligations, as a ''clawback obligation.'' In contrast, the management company is entitled to a preferred amount of net income that, once paid, is not subject to a clawback obligation. Because the general partner and the management company are service providers that are related parties under section 707(b), and because the

terms of the allocations and distributions to the management company create a significantly lower level of economic risk than the terms for the general partner, the management company's arrangement might properly be treated as a disguised payment for services (depending on all other facts and circumstances, including amount of entrepreneurial risk).

*III. Examples*

Section 1.707–2(d) of the proposed regulations contains a number of examples illustrating the application of the factors described in § 1.707–2(c). The examples illustrate the application of these regulations to arrangements that contain certain facts and circumstances that the Treasury Department and the IRS believe demonstrate the existence or absence of significant entrepreneurial risk.

Several of the examples consider arrangements in which a partner agrees to forgo fees for services and also receives a share of future partnership income and gains. The examples consider the application of section 707(a)(2)(A) based on the manner in which the service provider (i) forgoes its right to receive fees, and (ii) is entitled to share in future partnership income and gains. In Examples 5 and 6, the service provider forgoes the right to receive fees in a manner that supports the existence of significant entrepreneurial risk by forgoing its right to receive fees before the period begins and by executing a waiver that is binding, irrevocable, and clearly communicated to the other partners. Similarly, the service provider's arrangement in these examples include the following facts and circumstances that taken together support the existence of significant entrepreneurial risk: The allocation to the service provider is determined out of net profits and is neither highly likely to be available nor reasonably determinable based on all facts and circumstances available at the time of the arrangement, and the service provider undertakes a clawback obligation and is reasonably expected to be able to comply with that obligation. The presence of each fact described in these examples is not necessarily required to determine that section 707(a)(2)(A) does not apply to an arrangement. However, the absence of certain facts, such as a failure to measure future profits over at least a 12-month period, may suggest that an arrangement constitutes a fee for services.

The proposed regulations also contain examples that consider arrangements to which section 707(a)(2)(A) applies. Example 1 concludes that an arrangement in which a service provider receives a capped amount of partnership allocations and distributions and the cap is likely to apply provides for a disguised payment for services under section 707(a)(2)(A). In Example 3(iii), a service provider is entitled to a share of future partnership net profits, the partnership can allocate net profits from specific transactions or accounting periods, those allocations do not depend on the long-term future success of the enterprise, and a party that is related to the service provider controls the timing of purchases, sales, and distributions. The example concludes that under these facts, the arrangement lacks significant entrepreneurial risk and provides for a disguised payment for services. Example 4 considers similar facts, but assumes that the partnership's assets are publicly traded and are marked-to-market under section 475(f)(1). Under these facts, the example concludes that the arrangement has significant entrepreneurial risk, and thus that section 707(a)(2)(A) does not apply.

*IV. Safe Harbor Revenue Procedures*

Rev. Proc. 93–27 provides that in certain circumstances if a person receives a profits interest for the provision of services to or for the benefit of a partnership in a partner capacity or in anticipation of becoming a partner, the IRS will not treat the receipt of such interest as a taxable event for the partner or the partnership. The revenue procedure does not apply if (1) the profits interest relates to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease; (2) within two years of receipt, the partner disposes of the profits interest; or (3) the profits interest is a limited partnership interest in a ''publicly traded partnership'' within the meaning of section 7704(b).

Rev. Proc. 2001–43 provides that, for purposes of Rev. Proc. 93–27, if a partnership grants a substantially nonvested profits interest in the partnership to a service provider, the service provider will be treated as receiving the interest on the date of its grant, provided that: (i) The partnership and the service provider treat the service provider as the owner of the partnership interest from the date of its grant, and the service provider takes into account the distributive share of partnership income, gain, loss, deduction and credit associated with that interest in computing the service provider's income tax liability for the entire period during which the service provider has the interest; (ii) upon the grant of the interest or at the time that the interest becomes substantially vested, neither the partnership nor any of the partners deducts any amount (as wages, compensation, or otherwise) for the fair market value of the interest; and (iii) all other conditions of Rev. Proc. 93–27 are satisfied.

The Treasury Department and the IRS are aware of transactions in which one party provides services and another party receives a seemingly associated allocation and distribution of partnership income or gain. For example, a management company that provides services to a fund in exchange for a fee may waive that fee, while a party related to the management company receives an interest in future partnership profits the value of which approximates the amount of the waived fee. The Treasury Department and the IRS have determined that Rev. Proc. 93–27 does not apply to such transactions because they would not satisfy the requirement that receipt of an interest in partnership profits be for the provision of services to or for the benefit of the partnership in a partner capacity or in anticipation of being a partner, and because the service provider would effectively have disposed of the partnership interest (through a constructive transfer to the related party) within two years of receipt.

Further, the Treasury Department and the IRS plan to issue a revenue procedure providing an additional exception to the safe harbor in Rev. Proc. 93–27 in conjunction with the publication of these regulations in final form. The additional exception will apply to a profits interest issued in conjunction with a partner forgoing payment of an amount that is substantially fixed (including a substantially fixed amount determined by formula, such as a fee based on a percentage of partner capital commitments) for the performance of services, including a guaranteed payment under section 707(c) or a payment in a non-partner capacity under section 707(a).

In conjunction with the issuance of proposed regulations (REG–105346–03; 70 FR 29675–01; 2005–1 C.B. 1244) relating to the tax treatment of certain transfers of partnership equity in connection with the performance of services, the Treasury Department and the IRS issued Notice 2005–43, 2005–24 I.R.B. 1221. Notice 2005–43 includes a proposed revenue procedure regarding partnership interests transferred in connection with the performance of services. In the event that the proposed revenue procedure provided for in

Notice 2005–43 is finalized, it will include the additional exception referenced.

**Effective Dates**

The proposed regulations would be effective on the date the final regulations are published in the **Federal Register** and would apply to any arrangement entered into or modified on or after the date of publication of the final regulations. In the case of any arrangement entered into or modified before the final regulations are published in the **Federal Register**, the determination of whether an arrangement is a disguised payment for services under section 707(a)(2)(A) is made on the basis of the statute and the guidance provided regarding that provision in the legislative history of section 707(a)(2)(A). Pending the publication of final regulations, the position of the Treasury Department and the IRS is that the proposed regulations generally reflect Congressional intent as to which arrangements are appropriately treated as disguised payments for services.

**Effect on Other Documents**

The following publication is obsolete as of July 23, 2015:

Rev. Rul. 81–300 (1981–2 C.B. 143).

The following publications will be obsolete as of the date of a Treasury decision adopting these rules as final regulations in the **Federal Register**:

Rev. Rul. 66–95 (1966–1 C.B. 169); and

Rev. Rul. 69–180 (1969–1 C.B. 183).

**Special Analyses**

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

**Comments and Requests for Public Hearing**

The Treasury Department and the IRS invite public comment on these proposed regulations. The legislative history supporting section 707(a)(2)(A) indicates that an arrangement that lacks significant entrepreneurial risk is generally treated as a disguised payment for services. The Treasury Department and the IRS have concluded that the presence of significant entrepreneurial risk in an arrangement is necessary for the arrangement to be treated as occurring between a partnership and a partner acting in a partner capacity. Nonetheless, the Treasury Department and the IRS request comments on, and examples of, whether arrangements could exist that should be treated as a distributive share under section 704(b) despite the absence of significant entrepreneurial risk. In addition, the Treasury Department and the IRS request comments on sufficient notification requirements to effectively render a fee waiver binding upon the service provider and the partnership.

The Treasury Department and the IRS have become aware that some partnerships that assert reliance on § 1.704–1(b)(2)(ii)(i) (the economic effect equivalence rule) have expressed uncertainty on the proper treatment of partners who receive an increased right to share in partnership property upon a partnership liquidation without respect to the partnership's net income. These partnerships typically set forth each partner's distribution rights upon a liquidation of the partnership and require the partnership to allocate net income annually in a manner that causes partners' capital accounts to match partnership distribution rights to the extent possible. Such agreements are commonly referred to as ''targeted capital account agreements.'' Some taxpayers have expressed uncertainty whether a partnership with a targeted capital account agreement must allocate income or a guaranteed payment to a partner who has an increased right to partnership assets determined as if the partnership liquidated at the end of the year even in the event that the partnership recognizes no, or insufficient, net income. The Treasury Department and the IRS generally believe that existing rules under §§ 1.704–1(b)(2)(ii) and 1.707–1(c) address this circumstance by requiring partner capital accounts to reflect the partner's distribution rights as if the partnership liquidated at the end of the taxable year, but request comments on specific issues and examples with respect to which further guidance would be helpful. No inference is intended as to whether and when targeted capital account agreements could satisfy the economic effect equivalence rule.

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available for public inspection and copying upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

**Drafting Information**

The principal author of these proposed regulations is Jaclyn M. Goldberg of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Internal Revenue Service and the Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendment to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.707–0 also issued under 26 U.S.C. 707(a).

Section 1.707–2 also issued under 26 U.S.C. 707(a).

Section 1.707–9 also issued under 26 U.S.C. 707(a). * * *

Section 1.736–1 also issued under 26 U.S.C. 736(a). * * *

■ **Par. 2.** Section 1.707–0 is amended by revising § 1.707–2 to read as follows:

**§ 1.707–0. Table of contents.**

* * * * *

**§ 1.707–2. Disguised payments for services.**

(a) In general.

(b) Elements necessary to characterize arrangements as disguised payments for services.

(1) In general.

(2) Application and timing.

(i) Timing and effect of the determination.

(ii) Timing of inclusion.

(3) Application of disguised payment rules.

(c) Factors considered.

(d) Examples.

* * * * *

■ **Par. 3.** Section 1.707–1 is amended by adding a sentence at the end of paragraph (a) and revising paragraph (c) Example 2 to read as follows.

**§ 1.707–1. Transactions between partner and partnership.**

(a) * * * For arrangements pursuant to which a purported partner performs services for a partnership and the partner receives a related direct or indirect allocation and distribution from the partnership, see § 1.707–2 to determine whether the arrangement should be treated as a disguised payment for services.

(c) * * *

*Example 2.* Partner C in the CD partnership is to receive 30 percent of partnership income, but not less than $10,000. The income of the partnership is $60,000, and C is entitled to $18,000 (30 percent of $60,000). Of this amount, $10,000 is a guaranteed payment to C. The $10,000 guaranteed payment reduces the partnership's net income to $50,000 of which C receives $8,000 as C's distributive share.

* * * * *

■ **Par. 4.** Section 1.707–2 is added to read as follows:

**§ 1.707–2 Disguised payments for services.**

(a) *In general.* This section prescribes rules for characterizing arrangements as disguised payments for services. Paragraph (b) of this section outlines the elements necessary to characterize an arrangement as a payment for services, and it provides operational rules regarding application and timing of this section. Paragraph (c) of this section identifies the factors that weigh in the determination of whether an arrangement includes the elements described in paragraph (b) of this section that make it appropriate to characterize the arrangement as a payment for services. Paragraph (d) of this section provides examples applying these rules to determine whether an arrangement is a payment for services.

(b) *Elements necessary to characterize arrangements as disguised payments for services*—(1) *In general.* An arrangement will be treated as a disguised payment for services if—

(i) A person (service provider), either in a partner capacity or in anticipation of becoming a partner, performs services (directly or through its delegate) to or for the benefit of a partnership;

(ii) There is a related direct or indirect allocation and distribution to such service provider; and

(iii) The performance of such services and the allocation and distribution, when viewed together, are properly characterized as a transaction occurring between the partnership and a person acting other than in that person's capacity as a partner.

(2) *Application and timing.*—(i) *Timing and effect of the determination.* Whether an arrangement is properly characterized as a payment for services is determined at the time the arrangement is entered into or modified and without regard to whether the terms of the arrangement require the allocation and distribution to occur in the same taxable year. An arrangement that is treated as a payment for services under this paragraph (b) is treated as a payment for services for all purposes of the Internal Revenue Code, including for example, sections 61, 409A, and 457A (as applicable). The amount paid to a person in consideration for services under this section is treated as a payment for services provided to the partnership, and, when appropriate, the partnership must capitalize these amounts (or otherwise treat such amounts in a manner consistent with their recharacterization). The partnership must also treat the arrangement as a payment to a non-partner in determining the remaining partners' shares of taxable income or loss.

(ii) *Timing of inclusion.* The inclusion of income by the service provider and deduction (if applicable) by the partnership of amounts paid pursuant to an arrangement that is characterized as a payment for services under paragraph (b)(1) of this section is taken into account in the taxable year as required under applicable law by applying all relevant sections of the Internal Revenue Code, including for example, sections 409A and 457A (as applicable), to the allocation and distribution when they occur (or are deemed to occur under all other provisions of the Internal Revenue Code).

(3) *Application of disguised payment rules.* If a person purports to provide services to a partnership in a capacity as a partner or in anticipation of becoming a partner, the rules of this section apply for purposes of determining whether the services were provided in exchange for a disguised payment, even if it is determined after applying the rules of this section that the service provider is not a partner. If after applying the rules of this section, no partnership exists as a result of the service provider failing to become a partner under the arrangement, then the service provider is treated as having provided services directly to the other purported partner.

(c) *Factors considered.* Whether an arrangement constitutes a payment for services (in whole or in part) depends on all of the facts and circumstances. Paragraphs (c)(1) through (6) of this section provide a non-exclusive list of factors that may indicate that an arrangement constitutes in whole or in part a payment for services. The presence or absence of a factor is based on all of the facts and circumstances at the time the parties enter into the arrangement (or if the parties modify the arrangement, at the time of the modification). The most important factor is significant entrepreneurial risk as set forth in paragraph (c)(1) of this section. An arrangement that lacks significant entrepreneurial risk constitutes a payment for services. An arrangement that has significant entrepreneurial risk will generally not constitute a payment for services unless other factors establish otherwise. For purposes of making determinations under this paragraph (c), the weight to be given to any particular factor, other than entrepreneurial risk, depends on the particular case and the absence of a factor is not necessarily indicative of whether or not an arrangement is treated as a payment for services.

(1) The arrangement lacks significant entrepreneurial risk. Whether an arrangement lacks significant entrepreneurial risk is based on the service provider's entrepreneurial risk relative to the overall entrepreneurial risk of the partnership. Paragraphs (c)(1)(i) through (v) of this section provide facts and circumstances that create a presumption that an arrangement lacks significant entrepreneurial risk and will be treated as a disguised payment for services unless other facts and circumstances establish the presence of significant entrepreneurial risk by clear and convincing evidence:

(i) Capped allocations of partnership income if the cap is reasonably expected to apply in most years;

(ii) An allocation for one or more years under which the service provider's share of income is reasonably certain;

(iii) An allocation of gross income;

(iv) An allocation (under a formula or otherwise) that is predominantly fixed in amount, is reasonably determinable under all the facts and circumstances, or is designed to assure that sufficient net profits are highly likely to be available to make the allocation to the service provider (*e.g.* if the partnership agreement provides for an allocation of

net profits from specific transactions or accounting periods and this allocation does not depend on the long-term future success of the enterprise); or

(v) An arrangement in which a service provider waives its right to receive payment for the future performance of services in a manner that is non-binding or fails to timely notify the partnership and its partners of the waiver and its terms.

(2) The service provider holds, or is expected to hold, a transitory partnership interest or a partnership interest for only a short duration.

(3) The service provider receives an allocation and distribution in a time frame comparable to the time frame that a non-partner service provider would typically receive payment.

(4) The service provider became a partner primarily to obtain tax benefits that would not have been available if the services were rendered to the partnership in a third party capacity.

(5) The value of the service provider's interest in general and continuing partnership profits is small in relation to the allocation and distribution.

(6) The arrangement provides for different allocations or distributions with respect to different services received, the services are provided either by one person or by persons that are related under sections 707(b) or 267(b), and the terms of the differing allocations or distributions are subject to levels of entrepreneurial risk that vary significantly.

(d) *Examples.* The following examples illustrate the application of this section:

*Example 1.* Partnership ABC constructed a building that is projected to generate $100,000 of gross income annually. A, an architect, performs services for partnership ABC for which A's normal fee would be $40,000 and contributes cash in an amount equal to the value of a 25 percent interest in the partnership. In exchange, A will receive a 25 percent distributive share for the life of the partnership and a special allocation of $20,000 of partnership gross income for the first two years of partnership's operations. The ABC partnership agreement satisfies the requirements for economic effect contained in § 1.704–1(b)(2)(ii), including requiring that liquidating distributions are made in accordance with the partners' positive capital account balances. Under paragraph (c) of this section, whether the arrangement is treated as a payment for services depends on the facts and circumstances. The special allocation to A is a capped amount and the cap is reasonably expected to apply. The special allocation is also made out of gross income. Under paragraphs (c)(1)(i) and (iii) of this section, the capped allocations of income and gross income allocations described are presumed to lack significant entrepreneurial risk. No additional facts and circumstances establish otherwise by clear and convincing evidence. Thus, the allocation lacks significant entrepreneurial risk. Accordingly, the arrangement provides for a disguised payment for services as of the date that A and ABC enter into the arrangement and, pursuant to paragraph (b)(2)(ii) of this section, should be included in income by A in the time and manner required under applicable law as determined by applying all relevant sections of the Internal Revenue Code to the arrangement.

*Example 2.* A, a stock broker, agrees to effect trades for Partnership ABC without the normal brokerage commission. A contributes 51 percent of partnership capital and in exchange, receives a 51 percent interest in residual partnership profits and losses. In addition, A receives a special allocation of gross income that is computed in a manner which approximates its foregone commissions. The special allocation to A is computed by means of a formula similar to a normal brokerage fee and varies with the value and amount of services rendered rather than with the income of the partnership. It is reasonably expected that Partnership ABC will have sufficient gross income to make this allocation. The ABC partnership agreement satisfies the requirements for economic effect contained in § 1.704–1(b)(2)(ii), including requiring that liquidating distributions are made in accordance with the partners' positive capital account balances. Under paragraph (c) of this section, whether the arrangement is treated as a payment for services depends on the facts and circumstances. Under paragraphs (c)(1)(iii) and (iv) of this section, because the allocation is an allocation of gross income and is reasonably determinable under the facts and circumstances, it is presumed to lack significant entrepreneurial risk. No additional facts and circumstances establish otherwise by clear and convincing evidence. Thus, the allocation lacks significant entrepreneurial risk. Accordingly, the arrangement provides for a disguised payment for services as of the date that A and ABC enter into the arrangement and, pursuant to paragraph (b)(2)(ii) of this section, should be included in income by A in the time and manner required under applicable law as determined by applying all relevant sections of the Internal Revenue Code to the arrangement.

*Example 3.* (i) M performs services for which a fee would normally be charged to new partnership ABC, an investment partnership that will acquire a portfolio of investment assets that are not readily tradable on an established securities market. M will also contribute $500,000 in exchange for a one percent interest in ABC's capital and profits. In addition to M's one percent interest, M is entitled to receive a priority allocation and distribution of net gain from the sale of any one or more assets during any 12-month accounting period in which the partnership has overall net gain in an amount intended to approximate the fee that would normally be charged for the services M performs. A, a company that controls M, is the general partner of ABC and directs all operations of the partnership consistent with the partnership agreement, including causing ABC to purchase or sell an asset during any accounting period. A also controls the timing of distributions to M including distributions arising from M's priority allocation. Given the nature of the assets in which ABC will invest and A's ability to control the timing of asset dispositions, the amount of partnership net income or gains that will be allocable to M under the ABC partnership agreement is highly likely to be available and reasonably determinable based on all facts and circumstances available upon formation of the partnership. A will be allocated 10 percent of any net profits or net losses of ABC earned over the life of the partnership. A undertakes an enforceable obligation to repay any amounts allocated and distributed pursuant to this interest (reduced by reasonable allowances for tax payments made on A's allocable shares of partnership income and gain) that exceed 10 percent of the overall net amount of partnership profits computed over the life of the partnership (a ''clawback obligation''). It is reasonable to anticipate that A could and would comply fully with any repayment responsibilities that arise pursuant to this obligation. The ABC partnership agreement satisfies the requirements for economic effect contained in § 1.704–1(b)(2)(ii), including requiring that liquidating distributions are made in accordance with the partners' positive capital account balances.

(ii) Under paragraph (c) of this section, whether A's arrangement is treated as a payment for services in directing ABC's operations depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of significant entrepreneurial risk. The arrangement with respect to A creates significant entrepreneurial risk under paragraph (c)(1) of this section because the allocation to A is of net profits earned over the life of the partnership, the allocation is subject to a clawback obligation and it is reasonable to anticipate that A could and would comply with this obligation, and the allocation is neither reasonably determinable nor highly likely to be available. Additionally, other relevant factors do not establish that the arrangement should be treated as a payment for services. Thus, the arrangement with respect to A does not constitute a payment for services for purposes of paragraph (b)(1) of this section.

(iii) Under paragraph (c) of this section, whether M's arrangement is treated as a payment for services depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of entrepreneurial risk. The priority allocation to M is an allocation of net profit from any 12-month accounting period in which the partnership has net gain, and thus it does not depend on the overall success of the enterprise. Moreover, the sale of the assets by ABC, and hence the timing of recognition of gains and losses, is controlled by A, a company related to M. Taken in combination, the facts indicate that the allocation is reasonably determinable under all the facts and circumstances and that sufficient net profits are highly likely to be available to make the priority allocation to the service

provider. As a result, the allocation presumptively lacks significant entrepreneurial risk. No additional facts and circumstances establish otherwise by clear and convincing evidence. Accordingly, the arrangement provides for a disguised payment for services as of the date M and ABC enter into the arrangement and, pursuant to paragraph (b)(2)(ii) of this section, should be included in income by M in the time and manner required under applicable law as determined by applying all relevant sections of the Internal Revenue Code to the arrangement.

(iv) Assume the facts are the same as paragraph (i) of this example, except that the partnership can also fund M's priority allocation and distribution of net gain from the revaluation of any partnership assets pursuant to § 1.704–1(b)(2)(iv)(f). As the general partner of ABC, A controls the timing of events that permit revaluation of partnership assets and assigns values to those assets for purposes of the revaluation. Under paragraph (c) of this section, whether M's arrangement is treated as a payment for services depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of entrepreneurial risk. Under this arrangement, the valuation of the assets is controlled by A, a company related to M, and the assets of the company are difficult to value. This fact, taken in combination with the partnership's determination of M's profits by reference to a specified accounting period, causes the allocation to be reasonably determinable under all the facts and circumstances or to ensure that net profits are highly likely to be available to make the priority allocation to the service provider. No additional facts and circumstances establish otherwise by clear and convincing evidence. Accordingly, the arrangement provides for a disguised payment for services as of the date M and ABC enter into the arrangement and, pursuant to paragraph (b)(2)(ii) of this section, should be included in income by M in time and manner required under applicable law as determined by applying all relevant sections of the Internal Revenue Code to the arrangement.

*Example 4.* (i) The facts are the same as in *Example 3,* except that ABC's investment assets are securities that are readily tradable on an established securities market, and ABC is in the trade or business of trading in securities and has validly elected to mark-to-market under section 475(f)(1). In addition, M is entitled to receive a special allocation and distribution of partnership net gain attributable to a specified future 12-month taxable year. Although it is expected that one or more of the partnership's assets will be sold for a gain, it cannot reasonably be predicted whether the partnership will have net profits with respect to its entire portfolio in that 12-month taxable year.

(ii) Under paragraph (c) of this section, whether the arrangement is treated as a payment for services depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of entrepreneurial risk. The special allocation to M is allocable out of net profits, the partnership assets have a readily ascertainable market value that is determined at the close of each taxable year, and it cannot reasonably be predicted whether the partnership will have net profits with respect to its entire portfolio for the year to which the special allocation would relate. Accordingly, the special allocation is neither reasonably determinable nor highly likely to be available because the partnership assets have a readily ascertainable fair market value that is determined at the beginning of the year and at the end of the year. Thus, the arrangement does not lack significant entrepreneurial risk under paragraph (c)(1) of this section. Additionally, the facts and circumstances do not establish the presence of other factors that would suggest that the arrangement is properly characterized as a payment for services. Accordingly, the arrangement does not constitute a payment for services under paragraph (b)(1) of this section.

*Example 5.* (i) A is a general partner in newly-formed partnership ABC, an investment fund. A is responsible for providing management services to ABC, but has delegated that management function to M, a company controlled by A. Funds that are comparable to ABC commonly require the general partner to contribute capital in an amount equal to one percent of the capital contributed by the limited partners, provide the general partner with an interest in 20 percent of future partnership net income and gains as measured over the life of the fund, and pay the fund manager annually an amount equal to two percent of capital committed by the partners.

(ii) Upon formation of ABC, the partners of ABC execute a partnership agreement with terms that differ from those commonly agreed upon by other comparable funds. The ABC partnership agreement provides that A will contribute nominal capital to ABC, that ABC will annually pay M an amount equal to one percent of capital committed by the partners, and that A will receive an interest in 20 percent of future partnership net income and gains as measured over the life of the fund. A will also receive an additional interest in future partnership net income and gains determined by a formula (the ''Additional Interest''). The parties intend that the estimated present value of the Additional Interest approximately equals the present value of one percent of capital committed by the partners determined annually over the life of the fund. However, the amount of net profits that will be allocable to A under the Additional Interest is neither highly likely to be available nor reasonably determinable based on all facts and circumstances available upon formation of the partnership. A undertakes a clawback obligation, and it is reasonable to anticipate that A could and would comply fully with any repayment responsibilities that arise pursuant to this obligation. The ABC partnership agreement satisfies the requirements for economic effect contained in § 1.704–1(b)(2)(ii), including requiring that liquidating distributions are made in accordance with the partners' positive capital account balances.

(iii) Under paragraph (c) of this section, whether the arrangement relating to the Additional Interest is treated as a payment for services depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of significant entrepreneurial risk. The arrangement with respect to A creates significant entrepreneurial risk under paragraph (c)(1) of this section because the allocation to A is of net profits, the allocation is subject to a clawback obligation over the life of the fund and it is reasonable to anticipate that A could and would comply with this obligation, and the allocation is neither reasonably determinable nor highly likely to be available. Additionally, the facts and circumstances do not establish the presence of other factors that would suggest that the arrangement is properly characterized as a payment for services. Accordingly, the arrangement does not constitute a payment for services under paragraph (b)(1) of this section.

*Example 6.* (i) A is a general partner in limited partnership ABC, an investment fund. A is responsible for providing management services to ABC, but has delegated that management function to M, a company controlled by A. The ABC partnership agreement provides that A must contribute capital in an amount equal to one percent of the capital contributed by the limited partners, that A is entitled to an interest in 20 percent of future partnership net income and gains as measured over the life of the fund, and that M is entitled to receive an annual fee in an amount equal to two percent of capital committed by the partners. The amount of partnership net income or gains that will be allocable to A under the ABC partnership agreement is neither highly likely to be available nor reasonably determinable based on all facts and circumstances available upon formation of the partnership. A also undertakes a clawback obligation, and it is reasonable to anticipate that A could and would comply fully with any repayment responsibilities that arise pursuant to this obligation.

(ii) ABC's partnership agreement also permits M (as A's appointed delegate) to waive all or a portion of its fee for any year if it provides written notice to the limited partners of ABC at least 60 days prior to the commencement of the partnership taxable year for which the fee is payable. If M elects to waive irrevocably its fee pursuant to this provision, the partnership will, immediately following the commencement of the partnership taxable year for which the fee would have been payable, issue to M an interest determined by a formula in subsequent partnership net income and gains (the ''Additional Interest''). The parties intend that the estimated present value of the Additional Interest approximately equals the estimated present value of the fee that was waived. However, the amount of net income or gains that will be allocable to M is neither highly likely to be available nor reasonably determinable based on all facts and circumstances available at the time of the waiver of the partnership. The ABC partnership agreement satisfies the requirements for economic effect contained in § 1.704–1(b)(2)(ii), including requiring that

liquidating distributions are made in accordance with the partners' positive capital account balances. The partnership agreement also requires ABC to maintain capital accounts pursuant to § 1.704–1(b)(2)(iv) and to revalue partner capital accounts under § 1.704–1(b)(2)(iv)(f) immediately prior to the issuance of the partnership interest to M. M undertakes a clawback obligation, and it is reasonable to anticipate that M could and would comply fully with any repayment responsibilities that arise pursuant to this obligation.

(iii) Under paragraph (c) of this section, whether the arrangements relating to A's 20 percent interest in future partnership net income and gains and M's Additional Interest are treated as payment for services depends on the facts and circumstances. The most important factor in this facts and circumstances determination is the presence or absence of significant entrepreneurial risk. The allocations to A and M do not presumptively lack significant entrepreneurial risk under paragraph (c)(1) of this section because the allocations are based on net profits, the allocations are subject to a clawback obligation over the life of the fund and it is reasonable to anticipate that A and M could and would comply with this obligation, and the allocations are neither reasonably determinable nor highly likely to be available. Additionally, the facts and circumstances do not establish the presence of other factors that would suggest that the arrangement is properly characterized as a payment for services. Accordingly, the arrangements do not constitute payment for services under paragraph (b)(1) of this section.

■ **Par. 5.** Section 1.707–9 is amended by:

a. Redesignating paragraph (b) as paragraph (c);

b. Redesignating paragraph (a) as paragraph (b); and

c. Adding new paragraph (a).

The addition reads as follows:

**§ 1.707–9. Effective dates and transitional rules.**

(a) *Section 1.707–2*—(1) *In general.* Section 1.707–2 applies to all arrangements entered into or modified after the date of publication of the Treasury decision adopting that section as final regulations in the **Federal Register**. To the extent that an arrangement permits a service provider to waive all or a portion of its fee for any period subsequent to the date the arrangement is created, then the arrangement is modified for purposes of this paragraph on the date or dates that the fee is waived.

(2) *Arrangements entered into or modified before final regulations are published in the* ***Federal Register****.* In the case of any arrangement entered into or modified that occurs on or before final regulations are published in the **Federal Register**, the determination of whether the arrangement is a disguised fee for services under section 707(a)(2)(A) is to be made on the basis of the statute and the guidance provided regarding that provision in the legislative history of section 73 of the Tax Reform Act of 1984 (Pub. L. 98–369, 98 Stat. 494). See H.R. Rep. No. 861, 98th Cong., 2d Sess. 859–2 (1984); S. Prt. No. 169 (Vol. I), 98th Cong., 2d Sess. 223–32 (1984); H.R. Rep. No. 432 (Pt. 2), 98th Cong., 2d Sess. 1216–21 (1984).

* * * * *

■ **Par. 6.** Section 1.736–1 is amended by adding a sentence at the end of paragraph (a)(1)(i) to read as follows:

**§ 1.736–1. Payments to a retiring partner or a deceased partner's successor in interest.**

(a) * * *

(1)(i) * * * Section 736 does not apply to arrangements treated as disguised payments for services under § 1.707–2.

* * * * *

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2015–17828 Filed 7–22–15; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R06–OAR–2015–0189; FRL–9931–02–Region 6]**

## Approval and Promulgation of Implementation Plans; Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Reopening of Comment Period

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

**ACTION:** Proposed rule, reopening of comment period.

**SUMMARY:** The Environmental Protection Agency (EPA) is reopening the comment period for a proposed rule to establish a Clean Air Act (CAA) Federal Implementation Plan (FIP) to address regional haze and visibility transport requirements for the State of Arkansas. The EPA is reopening the public comment period for the proposed rule for an additional 15 days from the date of today's publication. The reopening of the comment period is in response to a request submitted by the Domtar Ashdown Mill to extend the comment period.

**DATES:** The comment period for the proposed rule published on April 8, 2015 (80 FR 18944), extended on May 1, 2015 (80 FR 24872), is reopened. Written comments must be received on or before August 7, 2015.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA–R06–OAR–2015–0189, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: R6AIR_ARHaze@epa.gov.*
- *Mail:* Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Guy Donaldson at the address above. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.
- *Fax:* Guy Donaldson at (214) 665–7263.

*Instructions:* Direct your comments to Docket No. EPA–R06–OAR–2015–0189. Our policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to us without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, 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 due to technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy

at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available at either location (*e.g.,* CBI).

**FOR FURTHER INFORMATION CONTACT:** Dayana Medina, (214) 665–7241; *medina.dayana@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Ms. Medina.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

On April 8, 2015, we published in the **Federal Register** a proposal to establish a FIP for the State of Arkansas addressing regional haze and visibility transport (80 FR 18944). Comments on the proposed rule were required to be received by May 16, 2015. On May 1, 2015 (80 FR 24872), we published in the **Federal Register** a document that announced the availability in the docket of supplemental modeling performed by us and extended the comment period until July 15, 2015, to allow interested persons additional time to prepare and submit comments.

On July 6, 2015, we received a request from the Domtar Ashdown Mill to extend the comment period for an additional 45 days for the purpose of allowing it to complete modeling work and submit to us information it believes to be essential and related to a significant aspect of the proposed FIP requirements for the Domtar Ashdown Mill. On July 13, 2015, we received a renewed and revised request from the Domtar Ashdown Mill to extend the comment period until August 4, 2015. Given that the comment period closed on July 15, 2015, we are unable to extend the comment period, but will reopen the comment period for 15 days from the date of today's publication. We will also consider any comments submitted to us in the interim period following the close of the public comment period on July 15, 2015, and prior to today's publication. This reopening will allow the Domtar Ashdown Mill and other interested persons additional time to submit comments to us.

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

Environmental protection, Air pollution control, Best available control technology, Incorporation by reference, Intergovernmental relations, Interstate transport of pollution, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxides, Regional haze, Visibility.

Dated: July 15, 2015.

**Wren Stenger,**

*Multimedia Planning and Permitting Division Director, Region 6.*

[FR Doc. 2015–17990 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R01–OAR–2010–0460; A–1–FRL–9930–93-Region 1]**

## Approval and Promulgation of Air Quality Implementation Plans; Rhode Island; Control of Volatile Organic Compounds from Adhesives and Sealants

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Rhode Island. This revision includes a regulation adopted by Rhode Island that establishes and requires Reasonably Available Control Technology (RACT) for volatile organic compound (VOC) sources of emissions from miscellaneous adhesives and sealants. The intended effect of this action is to propose to approve Rhode Island's Air Pollution Control Regulation No. 44, ''Control of Volatile Organic Compounds from Adhesives and Sealants,'' into the Rhode Island SIP. This action is being taken in accordance with the Clean Air Act.

**DATES:** Written comments must be received on or before August 24, 2015.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R01–OAR–2010–0460 by one of the following methods:

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

2. Email: *arnold.anne@epa.gov*. Fax: (617) 918–0047.

3. Mail: EPA–R01–OAR–2010–0460, Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912. Hand Delivery or Courier. Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** David Mackintosh, Air Quality Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912, telephone number (617) 918–1584, fax number (617) 918–0584, email *mackintosh.david@epa.gov.*

**SUPPLEMENTARY INFORMATION:** In the Rules and Regulations section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to the rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of the rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules and Regulations section of this **Federal Register**.

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

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

Dated: June 18, 2015.

**H. Curtis Spalding,**

*Regional Administrator, EPA New England.*

[FR Doc. 2015–17851 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R03–OAR–2014–0759; FRL–9930–95–Region–3]**

### Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; 2011 Base Year Emissions Inventories for the Washington, DC–MD–VA Nonattainment Area for the 2008 Ozone National Ambient Air Quality Standard

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) proposes to approve State Implementation Plan (SIP) revisions submitted by the District of Columbia, the State of Maryland, and the Commonwealth of Virginia (collectively, the States). The submittals are comprised of the 2011 base year carbon monoxide (CO) emissions inventories for the Washington, DC–MD–VA nonattainment area for the 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS). In the Rules and Regulations section of this **Federal Register**, EPA is approving the States' SIP submittals as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule and EPA's Technical Support Document (TSD) prepared in support of this rulemaking action. The TSD is available in the Docket for this rulemaking action. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by August 24, 2015.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R03–OAR–2014–0759 by one of the following methods:

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

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2014–0759, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

*Instructions:* Direct your comments to Docket ID No. EPA–R03–OAR–2014–0759. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of the Environment, Air Quality Division, 1200 1st Street NE., 5th Floor, Washington, DC 20002; the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Powers, (215) 814–2308, or by email at *powers.marilyn@epa.gov.*

**SUPPLEMENTARY INFORMATION:** For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: July 10, 2015.

**William C. Early,**

*Acting Regional Administrator, Region III.*

[FR Doc. 2015–17976 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 571

**[Docket No. NHTSA–2015–0070]**

**RIN 2127–AL57**

### Rear Impact Protection, Lamps, Reflective Devices, and Associated Equipment, Single Unit Trucks

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** NHTSA is issuing this ANPRM following a July 10, 2014 grant of a petition for rulemaking from Ms. Marianne Karth and the Truck Safety Coalition (petitioners) regarding possible amendments to the Federal motor vehicle safety standards (FMVSSs) relating to rear impact (underride) guards. The petitioners request that NHTSA require underride guards on vehicles not currently required by the FMVSSs to have guards, notably, single unit trucks, and improve the standards' requirements for all guards, including guards now required for heavy trailers and semitrailers. Today's ANPRM requests comment on NHTSA's estimated cost and benefits of requirements for underride guards on

single unit trucks, and for retroreflective material on the rear and sides of the vehicles to improve the conspicuity of the vehicles to other motorists. Separately, NHTSA plans to issue a notice of proposed rulemaking proposing to upgrade the requirements for all guards.

**DATES:** You should submit your comments early enough to ensure that the docket receives them not later than September 21, 2015.

**ADDRESSES:** You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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

Regardless of how you submit your comments, please mention the docket number of this document.

You may also call the Docket at 202–366–9324.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Privacy Act:* Please see the Privacy Act heading under Rulemaking Analyses and Notices.

**FOR FURTHER INFORMATION CONTACT:** For technical issues, you may contact Robert Mazurowski, Office of Crashworthiness Standards (telephone: 202–366–1012) (fax: 202–493–2990). For legal issues, you may contact Deirdre Fujita, Office of Chief Counsel (telephone: 202–366–2992) (fax: 202–366–3820). The address for these officials is: National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

NHTSA is issuing this ANPRM following a July 10, 2014 grant [1] of a petition for rulemaking from petitioners Ms. Marianne Karth and the Truck Safety Coalition regarding possible amendments to the FMVSSs regulating underride guards. The petitioners request that NHTSA require underride guards on vehicles not currently required by the FMVSSs to have guards, notably, single unit trucks (SUTs),[2] and improve the standards' requirements for all guards, including guards now required for heavy trailers and semitrailers.

The July 10, 2014 grant document announced that NHTSA would be pursuing possible rulemaking through two separate actions. The first action would be an ANPRM pertaining to rear impact guards for SUTs and other safety strategies not currently required for those vehicles. Today's ANPRM completes that step, requesting comment on NHTSA's estimated cost and benefits of requiring underride guards and estimated cost and benefits of requiring retroreflective material on the rear and sides of the vehicles to improve the conspicuity of the vehicles to other motorists. In the near future, NHTSA will be issuing the second action, a notice of proposed rulemaking (NPRM) to upgrade the FMVSSs for underride guards for vehicles subject to the current standards.[3]

## II. Overview

NHTSA is undertaking rulemaking to upgrade FMVSS No. 223, ''Rear impact guards,'' and FMVSS No. 224, ''Rear impact protection,'' which together establish rear underride protection for vehicles subject to the standards. This ANPRM comprises the first step of a larger agency initiative to upgrade the standards.

Rear underride crashes are those in which the front end of a vehicle impacts the rear of a generally larger vehicle, and slides under the chassis of the rear-impacted vehicle. Underride may occur to some extent in collisions in which a small passenger vehicle crashes into the rear end of a large SUT or trailer because the SUT or trailer bed is higher than the hood of the passenger vehicle. In passenger compartment intrusion (PCI) crashes, the passenger vehicle underrides so far that the rear end of the struck vehicle strikes and enters the passenger compartment. PCI crashes can result in passenger vehicle occupant injuries and fatalities caused by occupant contact with the rear end of the struck vehicle.

FMVSS Nos. 223 and 224 were issued in 1996 to prevent PCI by upgrading then-existing underride guards to make them stronger but energy-absorbing as well. The agency was concerned that overly rigid guards may prevent PCI but could stop the passenger vehicle too suddenly, resulting in excessive occupant compartment deceleration forces which could harm passenger vehicle occupants.

NHTSA established the two-standard approach to underride protection to reduce test burdens on small trailer manufacturers. FMVSS No. 223, an ''equipment standard,'' specifies performance requirements that rear impact guards must meet to be sold for installation on new trailers and semitrailers. The guard may be tested for compliance while mounted to a test fixture or to a complete trailer. FMVSS No. 224, a ''vehicle standard,'' requires most new trailers and semitrailers with a gross vehicle weight rating of 4,536 kilograms (kg) (10,000 pounds (lb)) or more to be equipped with a rear impact guard meeting FMVSS No. 223. The vehicle standard requires that the guard be mounted on the trailer or semitrailer in accordance with the instructions provided with the guard by the guard

[1] 79 FR 39362.

[2] SUTs are trucks with a gross vehicle weight rating (GVWR) greater than 4,536 kilograms (kg) (10,000 pounds (lb)) with no trailer. They are primarily straight trucks, in which the engine, cab, drive train, and cargo area are mounted on one chassis. SUTs are the most commonly used truck, and are used extensively in all urban areas for short-haul operation, generally 321.87 kilometers (km) (200 miles) or less. SUTs are often designed to perform a specific task. Common examples of SUTs are dump trucks, garbage haulers, concrete mixers, tank trucks, trash trucks, and local delivery trucks.

[3] NHTSA is in the process of evaluating petitioners' request to require side guards and front override guards by way of research and will issue a separate decision on those aspects of the petitions at a later date.

manufacturer. Under this approach, a small manufacturer that produces relatively few trailers can certify its trailers to FMVSS No. 224 without feeling compelled to undertake destructive testing of what could be a substantial portion of its production. The two-standard approach provides a practicable and reasonable means of meeting the safety need served by an underride guard requirement.

FMVSS No. 224 only applies to trailers and semitrailers with GVWR greater than 4,536 kg (10,000 lb).[4] The agency excluded SUTs from FMVSS No. 224 requirements because it was concerned that the variety, complexity, and relatively lower weight and chassis strength of many SUTs would require guards that are substantially more costly than the guards for trailers. Additionally, field data indicated that the rear end fatality problem was more prominent in trailers than in SUTs. While SUTs represented 72 percent of the registered heavy vehicle fleet, they only represented 27 percent of the rear end fatalities.

However, there are Federal requirements now in place ensuring that SUTs provide some degree of rear impact protection. Federal Motor Carrier Safety Regulation (FMCSR) No. 393.86(b), ''Rear impact guards and rear end protection,'' (49 CFR 393.86(b), ''FMCSR 393.86(b)'') has rear impact protection requirements for certain SUTs utilized in interstate commerce.[5] The regulation requires that the horizontal member of the rear impact guard be located such that its bottom surface is not more than 760 millimeters (mm) (30 inches) vertically above ground level (ground clearance), its rear surface is not more than 610 mm (24 inches) forward of the rear extremity of the vehicle, and that it laterally extends to within 460 mm (18 inches) of each side of the vehicle. The regulation requires the guard to be ''substantially constructed and attached by means of bolts, welding, or other comparable means.'' FMCSA's regulation also ensures that carriers maintain the mandated device throughout the life of the vehicle.

*Current Work*

NHTSA's interest in this rulemaking originated from the findings of a 2009 NHTSA study[6] to evaluate why fatalities were still occurring in frontal crashes despite high rates of seat belt use and the presence of air bags and other advanced safety features. NHTSA reviewed all cases of frontal crash fatalities to belted drivers or right-front passengers in model year (MY) 2000 or newer vehicles in the Crashworthiness Data System of the National Automotive Sampling System (NASS–CDS) through calendar year 2007. Among the 122 fatalities examined in this review, 49 (40 percent) were in exceedingly severe crashes that were not survivable, 29 (24 percent) were in oblique or corner impact crashes where there was low engagement of the striking vehicle's structural members (a factor which would have resulted in the striking vehicle absorbing more of the crash energy), and 17 (14 percent) were underrides into SUTs and trailers (14 were rear underride and 3 were side underride).[7] In survivable frontal crashes of newer vehicle models resulting in fatalities to belted vehicle occupants, rear underrides into large SUTs and trailers were the second highest cause of fatality.

In 2010, NHTSA analyzed several data sources to determine the effectiveness of trailer rear impact guards compliant with FMVSS Nos. 223 and 224 in preventing fatalities and serious injuries.[8] While the agency's analysis of the Fatality Analysis Reporting System (FARS) could not establish a nationwide downward trend in fatalities to passenger vehicle occupants in impacts with the rear of trailers subsequent to the implementation of FMVSS Nos. 223 and 224, supplemental data collected in Florida and North Carolina showed decreases in fatalities and serious injuries. However, the observed decrease in fatalities in these two States was not statistically significant, possibly due to small sample sizes of the data.

Following these studies, NHTSA undertook research to examine the agency's underride protection requirements, highlighting this program as a significant one in the ''NHTSA Vehicle Safety and Fuel Economy Rulemaking and Research Priority Plan 2011–2013 (March 2011).''

One of the resulting research projects began in 2009, as NHTSA initiated research with the University of Michigan Transportation Research Institute (UMTRI) to gather data on the rear geometry of SUTs and trailers, the configuration of rear impact guards on SUTs and trailers, and the incidence and extent of underride and fatalities in rear impacts with SUTs and trailers. UMTRI collected the supplemental information as part of its Trucks Involved in Fatal Accidents (TIFA) survey for the years 2008 and 2009.[9] [10] These data enabled NHTSA to obtain national estimates of rear impact crashes into heavy vehicles that resulted in PCI. Details of the UMTRI study, completed in 2013, are discussed in detail below in the next section of this preamble. The findings with regard to SUTs particularly pertain to this ANPRM.

More data were obtained in 2011 from the Insurance Institute for Highway Safety (IIHS), which had petitioned NHTSA to upgrade FMVSS No. 223 and FMVSS No. 224 to improve the strength and energy-absorbing capabilities of rear impact guards. IIHS provided analyses of data from DOT's Large Truck Crash Causation Study (LTCCS) and from a series of 56 kilometers per hour (km/h) (35 miles per hour (mph)) impact speed passenger car-to-trailer rear impact crash tests IIHS conducted. (We provide a discussion of the IIHS tests in Appendix B to this preamble.)[11] IIHS believes that trailers with rear impact guards compliant with the Canada Motor Vehicle Safety Standard (CMVSS) for underride guards (CMVSS No. 223) were significantly superior to FMVSS No. 224 in mitigating PCI of the striking passenger car. The information submitted by IIHS is particularly pertinent to the upcoming NPRM which

[4] Excluded from FMVSS No. 224 are pole trailers, logging trailers, low chassis trailers (trailers where the ground clearance of the chassis is no more than 560 mm (22 inches)), wheels back trailers (trailers with rearmost point of rear wheels within 305 mm (12 inches) of the rear extremity of the trailer), and special purpose trailers (trailers with equipment in the rear and those intended for certain special operations). The exclusions are based on practical problems with meeting the standard or an absence of a need to meet the standard due to vehicle configuration.

[5] FMCSR 393.86(b) excludes SUTs in driveaway-towaway operations, low chassis vehicles (vertical distance between the rear bottom edge of the body and the ground is 762 mm or lower), wheels back vehicles (the rear of tires is less than 610 mm forward of the rear extremity of the vehicle), special purpose vehicles, and vehicles with equipment that reside in the area of the guard and provide the rear impact protection comparable to rear impact guards.

[6] Kahane, et al. ''Fatalities in Frontal Crashes Despite Seat Belts and Air Bags—Review of All CDS Cases—Model and Calendar Years 2000–2007–122 Fatalities,'' September 2009, DOT–HS–811102.

[7] In addition, 15 (12 percent) were fatalities to vulnerable occupants (occupants 75 years and older), 4 (3.3 percent) were narrow object impacts, and 8 (6.6 percent) were other types of impact conditions.

[8] Allen, Kirk ''The Effectiveness of Underride Guards for Heavy Trailers,'' October, 2010, DOT HS 811 375.

[9] Analysis of Rear Underride in Fatal Truck Crashes, 2008, DOT HS 811 652, August 2012.

[10] Heavy-Vehicle Crash Data Collection and Analysis to Characterize Rear and Side Underride and Front Override in Fatal Truck Crashes, DOT HS 811 725, March 2013.

[11] Details of the tests are in Brumbelow, M.L., ''Crash Test Performance of Large Truck Rear Impact Guards,'' 22nd International Conference on the Enhanced Safety of Vehicles (ESV), 2011. *http://www-nrd.nhtsa.dot.gov/pdf/esv/esv22/22ESV-000074.pdf.*

will propose upgrades to FMVSS No. 223 and 224.

*Purpose of This ANPRM*

In this ANPRM, the agency requests comments that would help NHTSA assess and make judgments on the benefits, costs and other impacts of strategies that increase the crash protection to occupants of vehicles crashing into the rear of SUTs and/or that increase the likelihood of avoiding a crash into SUTs. Strategies discussed in this ANPRM are possible amendments to the FMVSSs to: (a) Expand FMVSS Nos. 223 and 224, to require upgraded guards on SUTs; and (b) amend FMVSS No. 108, ''Lamps, reflective devices, and associated equipment,'' to require the type of retroreflective material on the rear and sides of SUTs that is now required to be placed on the rear and sides of trailers to improve the conspicuity of the vehicles to other motorists.

## III. Extending FMVSS No. 224, Rear Impact Protection, to SUTs

*a. 2013 NHTSA/UMTRI Study*

In 2009, the agency initiated an in-depth field analysis to obtain a greater understanding of the characteristics of underride events and factors contributing to such crashes. NHTSA sought this information to assess the need for and impacts of possible amendments to the FMVSSs to reduce severe passenger vehicle underride in truck/trailer rear end impacts.

NHTSA published the first phase of the field analysis in 2012,[12] and published the final report in March 2013. The reports analyze 2008–2009 data collected as a supplement to UMTRI's TIFA survey.[13] The TIFA survey contains data for all the trucks with a GVWR greater than 4,536 kg (10,000 lb) (''medium and heavy trucks'') that were involved in fatal traffic crashes in the 50 U.S. States and the District of Columbia. TIFA data contains additional detail beyond the information contained in NHTSA's Fatality Analysis Reporting System (FARS).

NHTSA contracted UMTRI to collect supplemental data for 2008 and 2009 as part of the TIFA survey. The supplemental data included the rear geometry of the SUTs and trailers; type of equipment at the rear of the trailer, if any; whether a rear impact guard was present; the type of rear impact guard; and, the standards the guard was manufactured to meet. For SUTs and trailers involved in fatal rear impact crashes, additional information was collected on: the extent of underride; damage to the rear impact guard; estimated impact speeds; and whether the collision was offset or had fully engaged the guard.

NHTSA derived average annual estimates from the 2008 and 2009 TIFA data files and the supplemental information collected in the 2013 UMTRI study. The agency's review of these files found that there are 3,762 SUTs and trailers involved in fatal accidents annually, among which trailers accounted for 2521 (67 percent), SUTs for 1080 (29 percent), tractor alone for 66 (1.5 percent), and unknown for the remaining 95 (2.5 percent).[14] About 489 SUTs and trailers are struck in the rear in fatal crashes annually, constituting about 13 percent of all SUTs and trailers in fatal crashes. Among rear impacted SUTs and trailers in fatal crashes, 331 (68 percent) are trailers, 151 (31 percent) are SUTs, and 7 (1 percent) are tractors alone.

Presence of Rear Impact Guard on Heavy Vehicles

UMTRI evaluated 2008 and 2009 TIFA data regarding the rear geometry of the trailers and SUTs involved in all fatal crashes (not just those rear-impacted) to assess whether the vehicle had to have a guard under FMVSS No. 224 (regarding trailers) or the Federal Motor Carrier Safety Administration's (FMCSA's) Federal Motor Carrier Safety Regulation (FMCSR) No. 393.86(b) (49 CFR 393.86(b), ''FMCSR 393.86(b)'') (regarding SUTs).[15] Based on this evaluation, UMTRI estimated that 38 percent of the SUTs involved in fatal crashes were required to have rear impact guards (based on the truck rear geometry according to FMCSR 393.86(b)) (Table 1). However, only 18 percent of SUTs were equipped with rear impact guards (Table 1). It is likely that the remaining 20 percent of the SUTs that were configured such that they would be subject to FMCSR 393.86(b) based on vehicle design, but that did not have a guard, were not used in interstate commerce. Among the 62 percent of SUTs that were excluded from installing rear impact guards by the FMCSR, 27 percent were wheels back SUTs,[16] 9 percent were low chassis SUTs,[17] 2 percent were wheels back and low chassis SUTs, and 16 percent had equipment in the rear that interfered with rear impact guard installation (see Table 1). UMTRI also estimated that 65 percent of trailers had to have a rear impact guard per FMVSS No. 224 and the remaining were excluded because of their rear geometry, equipment in the rear, or type of cargo or operation.

TABLE 1—PERCENTAGE OF SUTS BY THEIR REAR GEOMETRY AND WHETHER A REAR IMPACT GUARD WAS REQUIRED ACCORDING TO UMTRI'S EVALUATION OF SUTS INVOLVED IN FATAL CRASHES IN THE 2008–2009 TIFA DATA FILES

| Type of rear geometry | Percentage of SUTs |
|---|---|
| Rear Impact Guard Required: | |
| Guard present | 18 |
| Guard not present | 20 |
| Rear Impact Guard Not Required: | |
| Excluded vehicle | 8 |
| Wheels back vehicle | 27 |
| Low chassis vehicle | 9 |
| Wheels back and low chassis vehicle | 2 |
| Equipment | 16 |

Since the data presented in Table 1 takes into consideration all SUTs involved in all types of fatal crashes in 2008 and 2009 (total of 2,159 SUTs), we assume that the percentage of SUTs with and without rear impact guards in Table 1 is representative of that in the SUT fleet.

Light Vehicle Fatal Crashes Into the Rear of Trailers and SUTs

Among the types of vehicles that impacted the rear of trailers and SUTs, 73 percent were light vehicles,[18] 18 percent were large trucks, 7.4 percent

[12] Analysis of Rear Underride in Fatal Truck Crashes, DOT HS 811 725, August 2012. Also available at *http://www.nhtsa.gov/Research/Crashworthiness/Truck%20Underride,* last accessed on November 24, 2014.

[13] Heavy-Vehicle Crash Data Collection and Analysis to Characterize Rear and Side Underride and Front Override in Fatal Truck Crashes, DOT HS 811 725, March 2013. Also available at *http://www.nhtsa.gov/Research/Crashworthiness/Truck%20Underride,* last accessed on July 24, 2014.

[14] ''Bobtail'' and ''tractor/other'' configurations were combined into ''others'' category and ''tractor/trailer'' and ''straight trucks with trailer'' were combined into ''trailers'' category.

[15] UMTRI only evaluated the rear geometry to determine whether a SUT's configuration qualified the vehicle as subject to FMCSR 393.86(b). It did not determine how the truck was operated and whether it was used in interstate commerce.

[16] Wheels back SUTs according to FMCSR 393.86(b) is where the rearmost axle is permanently fixed and is located such that the rearmost surface of tires is not more than 610 mm forward of the rear extremity of the vehicle.

[17] Low chassis SUTs according FMCSR 393.86(b) is where the rearmost part of the vehicle includes the chassis and the vertical distance between the rear bottom edge of the chassis assembly and the ground is less than or equal to 762 mm (30 inches).

[18] UMTRI categorized passenger cars, compact and large sport utility vehicles, minivans, large vans (*e.g.* Econoline and E150–E350), compact pickups (*e.g.,* S–10, Ranger), and large pickups (e.g Ford F100–350, Ram, Silverado) as light vehicles.

were motorcycles, and 1.7 percent were other/unknown vehicle types. Since we do not expect trucks and buses to underride other trucks in rear impacts, the data presented henceforth only apply to light vehicles impacting the rear of trailers and SUTs.

Underride Extent in Fatal Crashes of Light Vehicles Into the Rear of SUTs

In the UMTRI study of 2008 and 2009 TIFA data, survey respondents estimated the amount of underride in terms of the amount of the striking vehicle that went under the rear of the struck vehicle and/or the extent of deformation or intrusion of the vehicle. The categories were ''no underride,'' ''less than halfway up the hood,'' ''more than halfway but short of the base of the windshield,'' and ''at or beyond the base of the windshield.'' When the extent of underride is ''at or beyond the base of the windshield,'' there is PCI that could result in serious injury to occupants in the vehicle. Rear impacts into heavy vehicles could result in some level of underride without PCI when the rear impact guard prevents the impacting vehicle from traveling too far under the heavy vehicle during impact. Such impacts into the rear of heavy vehicles without PCI may not pose additional crash risk to light vehicle occupants than that in crashes with another light vehicle at similar crash speeds.

The data show that about 319 light vehicle fatal crashes into the rear of trailers and trucks occur annually. UMTRI determined that about 36 percent (121) of light vehicle impacts into the rear of trailers and trucks resulted in PCI. Among fatal light vehicle impacts, the frequency of PCI was greatest for passenger cars and sport utility vehicles (SUVs) (40 and 41.5 percent, respectively) and lowest for large vans and large pickups (25 and 26 percent respectively), as shown in Figure 1 below. Since the extent of underride was also determined by the extent of deformation and intrusion of the vehicle, it was observed in a number of TIFA cases that large vans and large pickups did not actually underride the truck or trailer but sustained PCI because of the high speed of the crash and/or because of the very short front end of the vehicle.

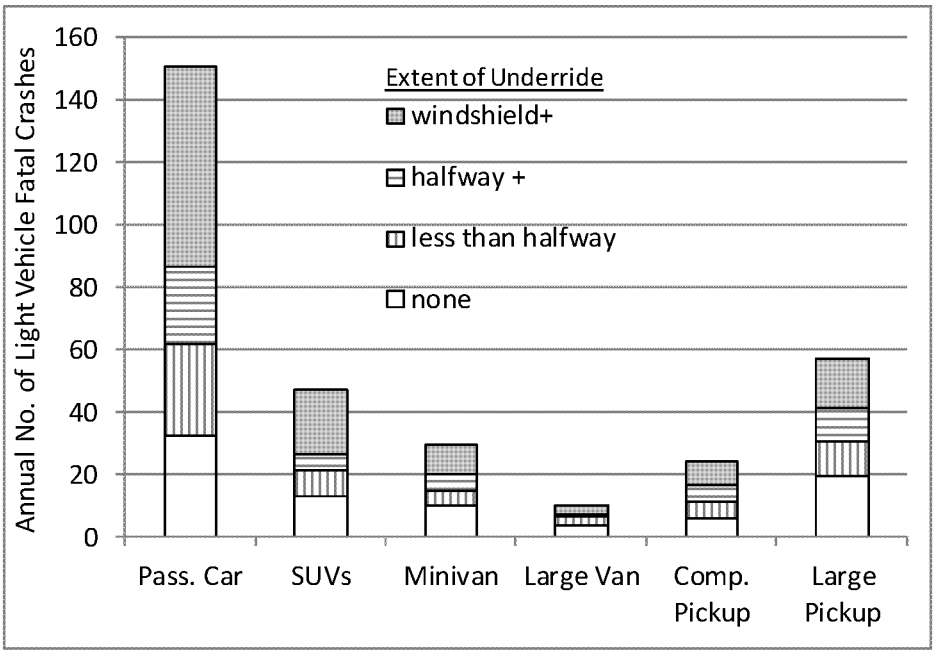



**Figure 1: Annual light vehicle fatal crashes into the rear of trailers and SUTs by type of light vehicle and extent of underride[19] (2008-2009 TIFA UMTRI study).**

Fatallight vehicle crashes into the rear of trucks and trailers were further examined by the type of truck and trailer struck and whether a guard was required (according to FMCSR 393.86(b) for SUTs and FMVSS No. 224 for trailers) (Figure 2 and Figure 3).

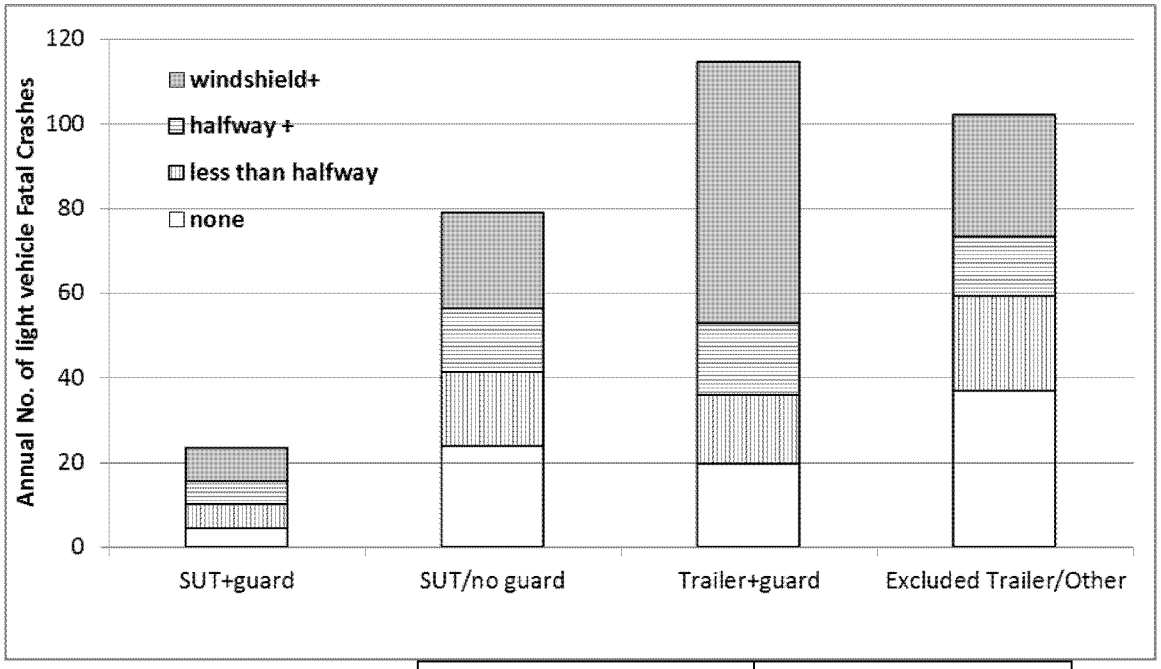
Among the 319 fatal light vehicle crashes into the rear of SUTs and trailers, 79 (25 percent) are into SUTs without any guards, 23 (7 percent) are into SUTs with guards, 115 (36 percent) are into trailers with guards, and 102 (32 percent) are into excluded trailers without guards and other truck/trailer type. (Figure 2).

[19] The extent of underride in this and subsequent figures and tables means the following: None means ''no underride''; less than halfway means ''underride extent of less than halfway up the hood''; halfway+ means ''underride extent at or more than halfway up the hood but short of the base of the windshield''; windshield+ means ''extent of underride at or beyond the base of the windshield'' or PCI.


**Figure 2. Percentage of light vehicle fatal crashes into the rear of SUTs and trailers (2008-2009 TIFA UMTRI Study)**

Among these annual light vehicle fatal crashes, 121 result in PCI, among which 23 (19 percent) occur in impacts with SUTs without guards, 8 (7 percent) in impacts with SUTs with guards, 62 (51 percent) in impacts with trailers with guards, and 28 (23 percent) with excluded trailers and other truck/trailer type (Figure 3).[20]

[20] Underride extent was determined for 303 light vehicles, about 95 percent of the 319 light vehicle impacts into the rear of trailers and trucks. Unknown underride extent was distributed among known underride levels.




| | Light vehicle fatal crashes into the rear of SUTs and trailers | | Light vehicle fatal PCI crashes into the rear of SUTs and trailers | |
|---|---|---|---|---|
| | Annual # | Percentage | Annual # | Percentage |
| SUT+Guard | 23 | 7% | 8 | 7% |
| SUT/No Guard | 79 | 25% | 23 | 19% |
| Trailer+Guard | 115 | 36% | 62 | 51% |
| Excluded Trailer/Other | 102 | 32% | 28 | 23% |
| Total | 319 | | 121 | |

**Figure 3: Annual light vehicle fatal crashes into the rear of SUTs and trailers by type of truck/trailer and extent of underride.**

It is noteworthy that trailers with guards represent 36 percent of annual light vehicle fatal rear impacts but represent 51 percent of annual light vehicle fatal rear impacts with PCI. On the other hand, SUTs (with and without guards) represent 32 percent of annual light vehicle fatal rear impacts but represent 26 percent of annual light vehicle fatal rear impacts with PCI. The field data suggest that there are more light vehicle fatal impacts into the rear of trailers than SUTs and a higher percentage of fatal light vehicle impacts into the rear of trailers involve PCI than those into the rear of SUTs.

Relative Speed of Light Vehicle Fatal Crashes Into the Rear of SUTs

Using information derived by reviewing police crash reports,[21] UMTRI estimated the relative velocity of fatal light vehicle crashes into the rear of SUTs and trailers. Relative velocity was computed as the resultant of the difference in the truck velocity and the striking vehicle velocity and could only be estimated for about 30 percent of light vehicle fatal crashes into the rear of trailers and SUTs. Most of the crashes (with known relative velocity) were at a very high relative velocity and many were not survivable. The mean relative velocity at impact into the rear of trailers and SUTs was estimated at 44 mph. Among fatal light vehicle impacts into the rear of SUTs that resulted in PCI, 70 percent were with relative velocity greater than 56 km/h (35 mph). Among the remaining 30 percent fatal light vehicle impacts into the rear of SUTs, 3 percent of the SUTs had rear impact guards, 10 percent of the SUTs could be required to have a guard based on rear geometry but did not have a guard, 3 percent were excluded from requiring a guard (wheels back, low chassis vehicles), and 14 percent had equipment in the rear precluding rear impact guards.

[21] Information included police estimates of travel speed, crash narrative, crash diagram, and witness statements. The impact speed was estimated from the travel speed, skid distance, and an estimate of the coefficient of friction.

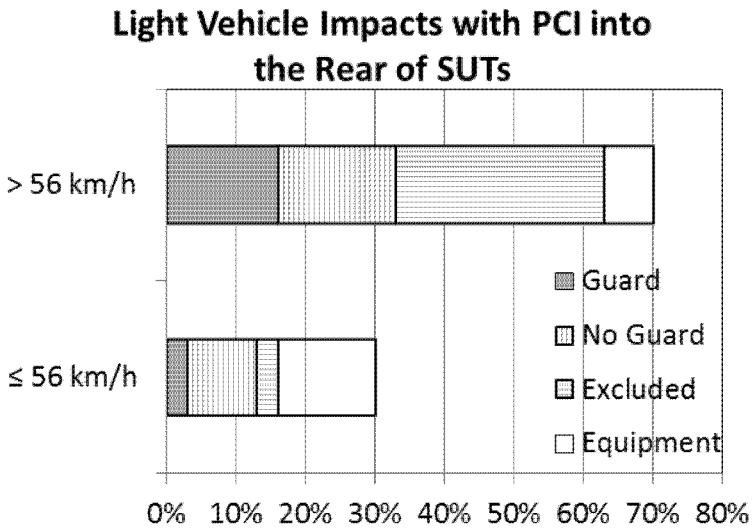


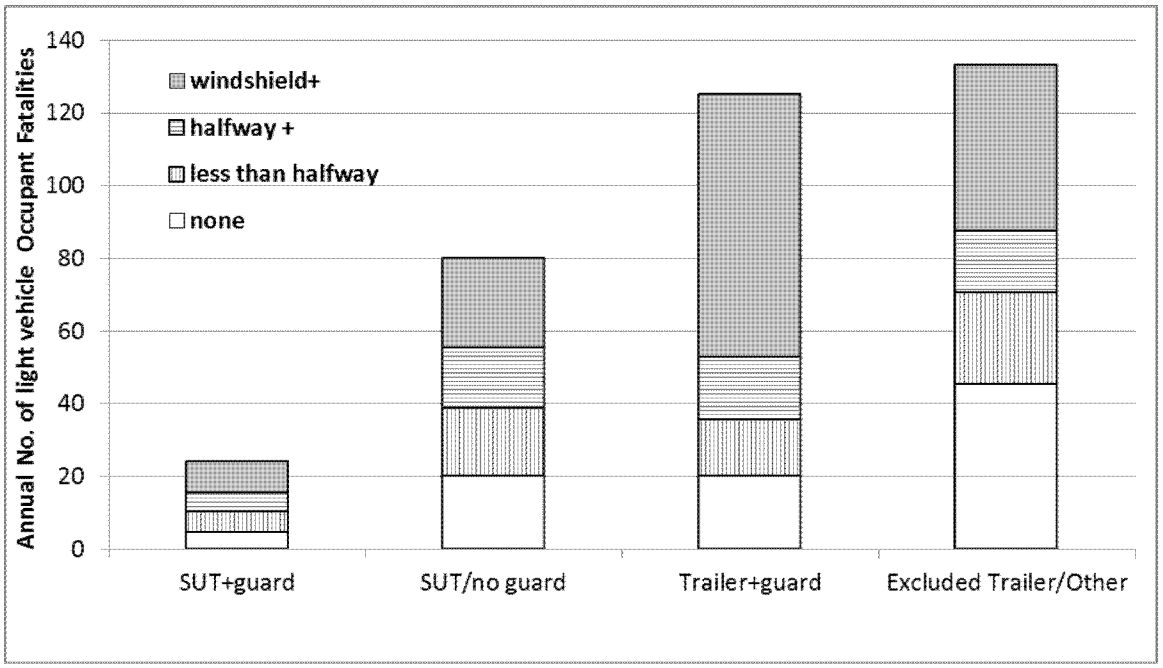

**Figure 4: Percentage of fatal light vehicle crashes into the rear of SUTs that resulted in passenger compartment intrusion - categorized by the relative speed of the crash, presence of rear impact guard, exclusion, and equipment in rear of vehicle.**

Fatalities Associated With Light Vehicle Crashes Into the Rear of SUTs and Trailers

There are about 362 light vehicle occupant fatalities annually due to impacts into the rear of SUTs and trailers.[22] Of these fatalities, 104 (29 percent) are in impacts with SUTs, 125 (35 percent) are in impacts with trailers with guards, and 133 (37 percent) are in impacts with excluded trailers and other truck/trailer type (Figure 5).

Among the 104 light vehicle occupant fatalities resulting from impacts with the rear of SUTs, 80 occurred in impacts with SUTs without rear impact guards while the remaining 24 were in impacts to SUTs with guards. PCI was associated with 33 annual light vehicle occupant fatalities resulting from impacts into the rear of SUTs; 25 of these fatalities were in impacts with SUTs without rear impact guards and 8 with SUTs with guards (see Figure 5).

[22] Thus, the 319 fatal crashes result in 362 fatalities, or 1.13 fatalities per fatal crash.




| | Light vehicle fatalities in crashes into the rear of SUTs & trailers | | Light vehicle fatalities in PCI crashes into the rear of SUTs & trailers | |
|---|---|---|---|---|
| | Annual # | Percentage | Annual # | Percentage |
| SUT+Guard | 24 | 7% | 8 | 5% |
| SUT/No Guard | 80 | 22% | 25 | 17% |
| Trailer+Guard | 125 | 35% | 72 | 48% |
| Excluded Trailer/Other | 133 | 37% | 45 | 30% |
| Total | 362 | | 150 | |

**Figure 5: Annual light vehicle occupant fatalities in impacts into the rear of SUTs and trailers categorized by the geometry of the rear of the impacted vehicle and the extent of underride.[23]**

Amonglight vehicle occupant fatalities in impacts into the rear of SUTs, approximately 70 percent were in vehicles with no underride, underride less than halfway or underride up to the hood without PCI. The agency found that in a number of TIFA cases reviewed, fatalities occurred due to occupants being unrestrained, other occupant characteristics (*e.g.* age), and other crash circumstances. Additionally, as shown in Figure 4, only 30 percent of light vehicle impacts with PCI into the rear of SUTs had a relative velocity less than or equal to 56 km/h (35 mph). Since currently manufactured light vehicles are subject to FMVSS No. 208 requirements that ensure adequate occupant crash protection to restrained occupants in a 56 km/h (35 mph) rigid barrier frontal crash test, some light vehicle occupant fatalities in impacts into the rear of SUTs and trailers at speeds less than or equal to 56 km/h (35 mph) that resulted in PCI may be preventable if intrusion into the passenger compartment were mitigated.[24]

*b. NHTSA's Cost-Benefit Analysis (Overview)*

As part of its evaluation of whether an underride guard requirement should apply to SUTs, NHTSA conducted a cost-benefit analysis of equipping SUTs with rear impacts guards. The analysis is set forth in Appendix A of this preamble, and an overview is provided below. We are requesting comments on the analysis.

Preliminary Estimate of Cost of Requiring CMVSS No. 223 Guards

FMVSS Nos. 223 and 224 requirements were developed to prevent

[23] This figure presents the target population for SUTs and trailers for use in determining benefits. The data in this figure cannot be used to determine effectiveness of the current rear impact guards on SUTs since many SUTs that do not have guards have equipment in the rear, or are low chassis or wheels back vehicles. Such rear configurations would limit underride without the need for a guard. In other words, this table in itself does not provide sufficient information to conclude that current rear impact guards on SUTs are not effective in preventing PCI. There are no data that would enable us to compare fatality rates in crashes into the rear of SUTs with guards and crashes into the rear of SUTs that would have needed guards per rear geometry but didn't have them. For this reason we did not make any inferences on the effectiveness of the current guards based on the data in Figure 5.

[24] Some of the fatalities associated with PCI shown in Figure 2 may also be due to unrestrained status of the occupant.

PCI in 48 km/h (30 mph) impacts of compact and subcompact passenger cars into the rear of trailers. CMVSS No. 223 performance requirements were developed to prevent PCI in 56 km/h (35 mph) impacts. The crash tests conducted by IIHS (see Appendix B) indicated the improved performance of rear impact guards designed to CMVSS No. 223 compared to guards designed to FMVSS No. 223. The rear impact guard geometric specifications in CMVSS No. 223 cover a larger portion of the truck rear extremity than those specified in FMCSR 393.86(b). Additionally, there are no strength specifications for rear impact guards in FMCSR 393.86(b). Since a high percentage of crashes into the rear of SUTs are at high speeds, it is unlikely that equipping all SUTs with FMCSR 393.86(b) would sufficiently mitigate light vehicle occupant fatalities in PCI crashes into the rear of SUTs. For these reasons, NHTSA estimated the cost and benefits of requiring SUTs to comply with the requirements of CMVSS No. 223.

We estimate [25] that currently 18 percent of SUTs in the fleet are equipped with rear impact guards meeting the FMCSR regulation, 49 CFR 393.86(b). A requirement for SUTs to comply with CMVSS No. 223, though, would require 59 percent of newly manufactured SUTs to be equipped with CMVSS No. 223 rear impact guards due to that regulation's greater coverage.[26] The estimated incremental minimum to average cost of equipping new covered SUTs with CMVSS No. 223 guards ranges from $307 to $453 per vehicle (See Table A–7 in Appendix A for details). The total annual fleet cost of equipping new SUTs with CMVSS No. 223 guards ranges from $105 million to $155 million. The estimate of minimum to average additional weight of equipping SUTs with CMVSS No. 223 guards is 76.8 kg (169 lb) to 95.5 kg (210 lb) per vehicle. The estimate of minimum to average additional fuel cost during the lifetime of the vehicle due to the additional weight of the guard ranges from $924.7 to $1,505.3. Therefore, the total minimum to average annual cost (including fuel costs) of requiring SUTs to have CMVSS No. 223 rear impact guards is estimated to be $421 million to $669 million.

Preliminary Estimate of Benefits of Requiring CMVSS No. 223 Guards

For estimating the benefits of requiring SUTs to have CMVSS No. 223 guards, NHTSA estimated the annual number of fatalities and injuries in light vehicle rear impact crashes with PCI into the rear of SUTs. Non-PCI crashes were not considered as part of the target population for estimating benefits. This is because the IIHS test data (see Appendix B to this preamble) show that when PCI was prevented, the dummy injury measures were significantly below the injury assessment reference values specified in FMVSS No. 208. In non-PCI crashes into the rear of SUTs and trailers, the IIHS test data indicated that the passenger vehicle's restraint system would mitigate injury.

Although CMVSS No. 223's requirements are intended to mitigate PCI in light vehicle rear impacts at speeds less than or equal to 56 km/h (35 mph),[27] we note that CMVSS No. 223 guards may not be able to mitigate all fatalities in such crashes because some of the crashes may be low overlap (30 percent or less),[28] and because some fatalities are not as a result of PCI but are due to other circumstances (*e.g.* unrestrained status of occupants, elderly and other vulnerable occupants). In those circumstances, we believe that a rear impact guard would not prevent the fatality.[29]

Preventing Fatalities

For the purpose of this analysis, NHTSA assumed that CMVSS No. 223 compliant guards on SUTs would be able to prevent about 85 percent of light vehicle occupant fatalities with PCI in impacts into the rear of SUTs with crash speeds less or equal to 56 km/h.[30] However, since only 30 percent of the target population of light vehicle crashes with PCI into the rear of SUTs are at speeds less than or equal to 56 km/h, CMVSS No. 223 compliant guards would only be effective for a portion of the target population. Therefore, NHTSA estimated an overall effectiveness of 25 percent (approximately 30% x 85%) for CMVSS No. 223 rear impact guards in preventing fatalities in light vehicle crashes into the rear of SUTs with PCI.[31] We believe this is an upper estimate of CMVSS No. 223 guard effectiveness in preventing fatalities, because (1) there will be real-world crashes of light passenger vehicles into the rear of SUTs at low overlap (30 percent or less) for which IIHS test data indicates that the CMVSS No. 223 compliant guards would not be able to prevent PCI, (2) some restrained occupants of light passenger vehicles would be killed even if PCI were prevented due to other circumstances (*e.g.* elderly and other vulnerable occupants), and (3) our review of 2009 TIFA data files of light vehicle impacts with PCI into the rear of SUTs indicated that only 55 percent of the fatally injured occupants were restrained.[32]

The real world data indicated that there are annually 31 light vehicle crashes with PCI into the rear of SUTs

[25] Using the 2008–2009 TIFA data files from the 2013 UMTRI study, it is estimated that 38 percent of the SUTs were configured so as not to be considered among the vehicles excluded from FMCSA 393.86(b) based on vehicle design. However, UMTRI estimated that only 18 percent of these SUTs were equipped with rear impact guards. The remaining 20 percent of SUTs that appeared, based on vehicle design, not to be excluded from the requirement to have a guard but did not have one, was likely comprised of vehicles that were not used in interstate commerce.

[26] Since the definition of wheels back and low chassis vehicles in 393.86(b) allows more vehicles to be excluded from requiring rear impact guards than CMVSS No. 223, when SUTs are required to comply with CMVSS No. 223, a larger percentage would need to have rear impact guards. This is further explained in Appendix A.

[27] Transport Canada testing of minimally compliant CMVSS No. 223 rear impact guards indicated that such guards could prevent PCI in light vehicle impacts with full overlap with the guard at crash speeds up to 56 km/h. See Boucher D., Davis D., ''Trailer Underride Protection—A Canadian Perspective,'' SAE Paper No. 2000–01–3522, Truck and Bus Meeting and Exposition, December 2000, Society of Automotive Engineers.

[28] Overlap refers to the percentage of impacting vehicle front end width that engages the rear impact guard. IIHS's test data showed that 8 of the 9 rear impact guards tested by IIHS could not prevent PCI in a 56 km/h crash with 30 percent overlap of the Chevrolet Malibu.

[29] CMVSS No. 223 compliant rear impact guards may mitigate the severity of impact into the rear of SUTs at speeds greater than 56 km/h, but NHTSA is unable to quantify this possible benefit at this time. We seek comment on this issue.

[30] This effectiveness estimate is based on current estimates of seat belt use in light passenger vehicles (about 87% per 2014 National Occupant Protection Use Survey (NOPUS)) and on the IIHS test data which indicated that belted occupants of light passenger vehicles in 35 mph impacts into the rear of trailers with CMVSS No. 223 guards with 100 percent and 50 percent overlap would experience similar injury risk as that in 35 mph frontal crashes of two light passenger vehicles of similar size.

[31] In the final regulatory evaluation for the January 24, 1996 final rule establishing FMVSS Nos. 223 and 224 (61 FR 2004), NHTSA assumed an effectiveness range of 10 to 25 percent for rear impact guards in preventing fatalities in crashes with PCI (all speeds) into the rear of trailers. The 25 percent effectiveness estimated for the current analysis (based on 2008–2009 TIFA data and the IIHS crash test data) is the same as the higher value of the assumed effectiveness range of rear impact guards in the 1996 final rule. CMVSS No. 223 requires a higher level of performance than that required by the 1996 final rule, so NHTSA assumes the CMVSS will have an effectiveness level at least as high as our highest assumed rate for the FMVSSs.

[32] The agency's 2010 study—''The Effectiveness of Underride Guards for Heavy Trailers,'' October 2010, DOT HS 811 375—estimated an effectiveness of 27 percent from data collected in Florida and 83 percent from data collected in North Carolina for FMVSS No. 223 compliant rear impact guards in preventing fatalities. These two estimates are considerably different and not statistically significant, possibly due to small sample size, and so associated with some uncertainty. Therefore, these effectiveness estimates were not utilized in the current analysis. Instead, the agency relied on real world crash data and the test data to estimate rear impact guard effectiveness.

resulting in 33 light vehicle occupant fatalities. Since only 59 percent of SUTs would require rear impact guards, the target population is reduced to approximately 20 (=33 x 59%). Applying 25 percent effectiveness of CMVSS compliant guards, the upper bound on lives saved by CMVSS No. 223 compliant rear impact guards on SUTs is about 5.

Preventing Nonfatal Injuries

In our current analysis, we also assumed 20 percent effectiveness of CMVSS No. 223 compliant guards in preventing nonfatal injuries in light vehicle crashes with PCI into the rear of SUTs. CMVSS No. 223 guards are effective in mitigating PCI in light vehicle impacts into the rear of SUTs at speeds less or equal to 56 km/h (35 mph), which is about 30 percent of all such impacts with PCI.[33] Additionally, we expect the effectiveness of rear impact guards for preventing injuries to be lower than that for fatalities since occupant injuries could occur from interior vehicle contacts even if PCI were prevented. The 20 percent effectiveness estimate takes into consideration that some injuries are due to factors such as the unrestrained status of the occupants. An improved rear impact guard would not prevent such injuries.

The agency analyzed the National Accident Sampling System—Crashworthiness Data System (NASS–CDS) data files for the year 1999–2012 and estimated a total of 151—291 MAIS [34] 1 to 5 severity nonfatal injuries to light vehicle occupants in PCI crashes into the rear of SUTs. Applying a 20 percent effectiveness of rear impact guards in preventing nonfatal injuries, we estimate that 30—58 nonfatal injuries would be prevented annually.

Cost Per Equivalent Lives Saved

The benefits analysis in Appendix A estimates the equivalent lives saved (ELS) from a requirement for SUTs to have CMVSS No. 223 guards. The ELS are approximately 5.7 to 6.3 lives. The cost per ELS (3 and 7 percent discounted) is $106.7 million to $164.7 million, for each equivalent life saved. A summary of the analysis estimating incremental costs using low and average estimates, benefits using average and high estimates, and cost per equivalent lives saved is shown below in Table 2.

TABLE 2—ESTIMATES OF MATERIAL, INSTALLATION, AND FUEL COSTS OF EQUIPPING APPLICABLE SUTS (CLASS 3–8) WITH CMVSS REAR IMPACT GUARDS, RESULTING INCREMENTAL BENEFITS OF LIVES SAVED AND INJURIES PREVENTED, AND COST PER EQUIVALENT LIVES SAVED

| | |
|---|---|
| **Material + Installation + Fuel Costs** | |
| Minimum to average incremental cost of CMVSS guard per SUT | $307–$453 |
| Number of SUTs needing guards annually | 341,392 |
| Total minimum to average incremental cost of CMVSS guards in SUT fleet | $104.9M–$154.6M |
| Minimum to average incremental weight of CMVSS guard per SUT | 169 lb–210 lb |
| Minimum to average incremental lifetime fuel cost per SUT | $924.7–$1,505.3 |
| Minimum to average incremental fuel cost for SUT fleet | $316M–$514M |
| Total minimum to average incremental cost of CMVSS guards +fuel for SUT fleet | $421M–$669M |
| **Benefits Estimates** | |
| Target Population (light vehicle occupant fatalities in crashes with PCI into the rear of applicable SUTs) average to high injury estimates. | 20 lives; 99–182 MAIS 1 injuries; 33–82 MAIS 2 and 17–27 MAIS 3–5 injuries |
| Estimated effectiveness of CMVSS guards | 0.25 for fatalities, 0.2 for injuries |
| Equivalent lives saved (undiscounted) average to high estimates | 5.7–6.3 |
| Equivalent lives saved (3% discounted) average to high estimates | 4.4–4.9 |
| Equivalent lives saved (7% discounted) average to high estimates | 3.3–3.7 |
| **Cost/Benefit Analysis** | |
| Cost per equivalent lives saved (3% discount) | $106.7M–$152.9M |
| Cost per equivalent lives saved (7% discount) | $113.9M–$164.7M |

Guidance from the U.S. Department of Transportation [35] identifies $9.1 million as the value of a statistical life (VSL) to be used for Department of Transportation analyses assessing the benefits of preventing fatalities for the base year of 2012. Per this guidance, VSL in 2014 is $9.2 million. While not directly comparable, the preliminary estimates for rear impact guards on SUTs (minimum of $106.7 million per equivalent lives saved) is a strong indicator that these systems will not be cost effective (current VSL $9.2 million).

Alternatives

NHTSA further considered whether excluding Class 3 SUTs (GVWR 10,000 lb to 14,000 lb) from a requirement to have CMVSS No. 223 guards would make the requirement more cost effective (see Table 3, below). (An exclusion of Class 3 SUTs may also be based on a practical matter, as the vehicles may be too small to withstand the loads imparted from impacts to CMVSS No. 223 guards.) NHTSA analyzed the cost and benefits of a requirement that would require only Class 4–8 SUTs to have CMVSS No. 223 guards. Class 4–8 SUTs comprise approximately 60 percent of annual sales of SUTs. The total annual cost of CMVSS No. 223 compliant rear impact guards on Class 4 -8 SUTs is estimated to be $218 million to $348.5 million. The analysis was conducted with a conservative assumption of no

[33] As noted earlier, CMVSS No. 223 compliant rear impact guards may mitigate the severity of impact into the rear of SUTs at speeds greater than 56 km/h, but NHTSA is unable to quantify this possible benefit at this time. We seek comment on this issue.

[34] MAIS is the maximum severity injury for an occupant according to the Abbreviated Injury Scale (AIS). MAIS 1 are minor injuries, MAIS 2 are moderate injuries, MAIS 3–5 are serious to critical injuries.

[35] See *http://www.dot.gov/sites/dot.dev/files/docs/VSL%20Guidance_2013.pdf.* The guidance starts with a $9.1 million VSL in the base year of 2012 and then estimates a 1.07 percent increase in VSL each year after the base year to reflect the estimated growth rate in median real wages for the next 30 years.

reduction in benefits by not requiring Class 3 SUTs to have the rear impact guards. Even with such a conservative assumption, the cost per ELS (3 and 7 percent discounted) was $55.2 million to $85.9 million, respectively.

TABLE 3—ESTIMATES OF MATERIAL, INSTALLATION, AND FUEL COSTS OF EQUIPPING APPLICABLE SUTS (CLASS 4–8) WITH CMVSS REAR IMPACT GUARDS, RESULTING INCREMENTAL BENEFITS OF LIVES SAVED AND INJURIES PREVENTED, AND COST PER EQUIVALENT LIVES SAVED

| | |
|---|---|
| **Material + Installation + Fuel Costs** | |
| Minimum to average incremental cost of CMVSS guard per SUT | $307–$453 |
| Number of SUTs needing guards annually | 204,246 |
| Total incremental cost of CMVSS guards in SUT fleet | $62.7M–$92.4M |
| Minimum to average incremental weight of CMVSS guard per SUT | 169 lb–210 lb |
| Minimum to average incremental lifetime fuel cost per SUT | $759.9–$1,253.8 |
| Minimum to average incremental fuel cost for SUT fleet | $155M–$256M |
| Total minimum to average incremental cost of CMVSS guards +fuel for SUT fleet | $218M–$348.5M |
| **Benefits Estimates** | |
| Target Population (light vehicle occupant fatalities in crashes with PCI into the rear of applicable SUTs) average to high injury estimates. | 20 lives; 99–182 MAIS 1 injuries; 33–82 MAIS 2 and 17–27 MAIS 3–5 injuries |
| Estimated effectiveness of CMVSS guards | 0.25 for fatalities, 0.2 for injuries |
| Equivalent lives saved (undiscounted) average to high estimates | 5.7–6.3 |
| Equivalent lives saved (3% discounted) average to high estimates | 4.4–4.9 |
| Equivalent lives saved (7% discounted) average to high estimates | 3.3–3.7 |
| **Cost/Benefit Analysis** | |
| Cost per equivalent lives saved (3% discount) | $55.2M–$79.7M |
| Cost per equivalent lives saved (7% discount) | $59.0M–$85.9M |

As in the analysis for Class 3–8 SUTs shown in Table 2, the preliminary estimates for rear impact guards on Class 4–8 SUTs (minimum of $55.2 million per equivalent lives saved) is a strong indicator that these systems will not be cost effective (current VSL $9.2 million).

## IV. Request for Comment on Extension of FMVSS No. 224

NHTSA requests comments that would help the agency assess and make judgments on the benefits, costs and other impacts of requiring SUTs to have underride guards. In providing a comment on a particular matter or in responding to a particular question, interested persons are asked to provide any relevant factual information to support their opinions, including, but not limited to, statistical and cost data and the source of such information. For easy reference, the questions below are numbered consecutively.

1. The injury target population was obtained from weighted NASS–CDS data files (1999–2012). Analysis was conducted with not only the weighted average estimates but also with the upper bound of the injury estimates. We seek comment on the estimated injury target population resulting from underride crashes with PCI into the rear of SUTs.

2. The agency assumed 25 percent effectiveness of CMVSS No. 223 rear impact guards in preventing fatalities in light vehicle crash with PCI into the rear of SUTs. We seek comment on this effectiveness estimate.

3. The agency assumed 20 percent effectiveness of CMVSS No. 223 guards in preventing injuries in light vehicle crashes with PCI into the rear of SUTs. We seek comment on this effectiveness estimate.

4. In estimating benefits, the agency assumed that rear impact guards would mitigate fatalities and injuries in light vehicle impacts with PCI into the rear of SUTs at impact speeds up to 56 km/h (35 mph), since the requirements of CMVSS No. 223 are intended to prevent PCI in impacts with speeds up to 56 km/h (35 mph). We recognize, however, that benefits may accrue from underride crashes at speeds higher than 56 km/h (35 mph), if, *e.g.,* a vehicle's guard exceeded the minimum performance requirements of the FMVSS. NHTSA requests information that would assist the agency in quantifying the possible benefits of CMVSS No. 223 rear impact guards in crashes with speeds higher than 56 km/h (35 mph).

5. The percentage of SUTs requiring rear impact guards was determined by obtaining details of the rear extremity of SUTs involved in fatal crashes in the 2008–2009 TIFA data files. We seek any other information to corroborate these estimates.

6. The cost-benefit analysis showed that requiring CMVSS No. 223 guards on SUTs would cost more than $100 million per equivalent life saved. The following information was not included in the analysis. NHTSA seeks the information so that the analysis is more complete.

a. The additional cost to install CMVSS No. 223 compliant rear impact guards did not include the cost of strengthening the rear beams, frame rails, and floor of the vehicle. We seek information on the changes to SUTs to accommodate the CMVSS No. 223 rear impact guard and the additional costs resulting from these changes.

b. The additional weight to install CMVSS No. 223 compliant rear impact guards did not include the weight of additional material needed to strengthen the rear beams, frame rails, and floor of the vehicle. We seek information on the changes to SUTs to accommodate the CMVSS No. 223 rear impact guard and the additional weight resulting from these changes.

c. The cost-benefit analysis did not take into consideration the reduction in payload resulting from increased weight of the SUT due to installation of a CMVSS No. 223 guard. We seek comment on what type of SUT operations are affected by the increased weight and the associated cost impacts.

d. The cost-benefit analysis did not take into consideration the aerodynamic effects of rear impact guards on fuel consumption due to paucity of information on this matter. We seek comment on whether aerodynamic effects due to the presence of a rear impact guard would increase or

decrease fuel consumption and by how much.

7. The fuel economy for SUTs was obtained from a 2012 market report by Oakridge National Laboratories. However, this report did not distinguish the miles per gallon for different classes of SUTs. We seek more refined information on the fuel economy for different class SUTs so as to refine the cost-benefit analysis.

8. SUTs with equipment in the rear (in the zone where the guard would be located) were excluded from the cost-benefit analysis of a requirement for the guard. We seek comment on whether rear impact guards can be accommodated in such SUTs.

9. We seek information that would help us determine the feasibility, benefits, and costs associated with improving the performance of CMVSS No. 223 guards in low overlap crashes. ''Overlap'' refers to the portion of the striking passenger vehicle's width overlapping the underride guard.

## V. Amending FMVSS No. 108, ''Lamps, Reflective Devices, and Associated Equipment,'' to Improve the Conspicuity of SUTs

NHTSA seeks to improve safety not just when there is a crash but by reducing the likelihood of a crash occurring in the first place. This is especially important in preventing the types of fatal crashes that NHTSA is addressing in this ANPRM, where most of the fatalities occur in crashes that are either at high speeds that render the crash unsurvivable, or, conversely, involve comparatively minor to no underride but are nevertheless fatal because of other factors, most prominently the presence of unbelted occupants. One strategy relevant to the crashes addressed in today's ANPRM, NHTSA has for years mandated that heavy trailers and truck tractors be equipped with red-and-white tape (''retroreflective tape,'' ''conspicuity tape,'' or ''tape'') under FMVSS No. 108. In this ANPRM, the agency requests comments that would help NHTSA assess and make judgments on the benefits, costs and other impacts of amending FMVSS No. 108 to require retroreflective material on the rear and sides of SUTs to improve the conspicuity of the vehicles to other motorists. The retroreflective material would be the same as tape now placed on the rear and sides of heavy trailers [36] and the rear of truck tractors pursuant to FMVSS No. 108 (S8.2.3). This ANPRM is consistent with the National Transportation Safety Board recommendation (H–13–017) [37] that the agency amend FMVSS No. 108 to include a conspicuity tape requirement for SUTs with a GVWR greater than 10,000 lb.

The purpose of retroreflective tape is to increase the visibility of heavy trailers and truck tractors to other motorists, especially in the dark. At those times, the tape brightly reflects other motorists' headlights and warns them that they are closing on a large vehicle. In the dark, without the tape, many trailers and truck tractors do not become visible to other road users until motorists are dangerously close. The alternating red-and-white pattern identifies the vehicle as a large vehicle and at the same time helps other road users gauge their distance and rate of approach.

FMVSS No. 108's conspicuity requirement for heavy trailers applies to vehicles manufactured on or after December 1, 1993. Two types of material are permitted by the standard: (a) retroreflective sheeting, or tape; and (b) reflex reflectors. A combination of the two types is also permissible. Retroreflective tape has been used almost exclusively for meeting the standard.[38] Essentially, the retroreflective tape must outline the bottom of the sides of the trailers and the top corners, bottom and underride guard of the rear of the trailers. When the agency issued the final rule adopting the requirement, NHTSA estimated the requirement would be 15 percent effective in preventing nighttime fatalities and injuries resulting from crashes to the sides and rear of trailers.

In 1996, NHTSA amended FMVSS No. 108 to extend the conspicuity requirements to truck tractors manufactured on or after July 1, 1997.[39] Because truck tractors riding bobtail (without pulling a trailer) have poorer rear-end conspicuity compared to trailers, NHTSA used a 15 to 25 percent range to estimate fatality and injury-prevention effectiveness for truck tractors to reflect a potentially greater effectiveness of a conspicuity countermeasure on the vehicles compared to trailers.

In the first part of this section, the agency discusses a 2001 NHTSA evaluation that found conspicuity tape to be ''quite effective'' in reducing side and rear impacts by other vehicles into heavy trailers in dark conditions. In the second part, based on the findings of effectiveness of the 2001 evaluation and certain assumptions, NHTSA provides preliminary estimates of the cost and benefits of requiring new SUTs to have conspicuity tape. In the third part, the agency requests comments on the data collection techniques used in the 2001 evaluation, NHTSA's assumptions in applying the findings of that evaluation to SUTs, and other issues.

### *a. 2001 NHTSA Evaluation*

In 2001, NHTSA issued an evaluation of the effectiveness of retroreflective tape in reducing side and rear impacts by other vehicles into heavy trailers during dark conditions. (''The Effectiveness of Retroreflective Tape on Heavy Trailers,'' March 2001, NHTSA Technical Report, DOT HS 809 222.[40]) Because the crash data at the time (FARS, NASS, or State files) did not identify whether crash-involved heavy trailers had retroreflective tape, NHTSA entered into arrangements with the Florida Highway Patrol and the Pennsylvania State Police to collect data for an analysis. For a two-year period, each time these State agencies investigated a crash involving a tractor-trailer combination [41] and filed a crash report, they also filled out an ''Investigator's Supplementary Truck-Tractor Trailer Accident Report'' on every trailer in the crash.

The Florida Highway Patrol collected 6,095 crash cases from June 1, 1997, through May 31, 1999. The Pennsylvania State Police collected 4,864 crash cases from December 1, 1997, through November 30, 1999. NHTSA's analysis estimated the reduction of side and rear impacts by other vehicles into conspicuity tape-equipped trailers in dark conditions, relative to the number that would have been expected if the trailers had not been equipped. The analysis tabulated and statistically analyzed crash involvements of tractor-trailers by three critical parameters: (1) whether the trailer was tape-equipped; (2) the light condition, *i.e.,* dark (comprising ''dark-not-lighted,'' ''dark-lighted,'' ''dawn'' and ''dusk'') versus daylight; and (3) relevant versus control-group crash involvements.

Given that the tape can help the other driver see and possibly avoid hitting the trailer, NHTSA determined that relevant

[36] ''Heavy trailers'' are at least 2032 mm (80 inches (in)) wide and have a GVWR greater than 4,536 kg (10,000 lb).

[37] *http://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-13-017.* Last accessed on March 24, 2015.

[38] This ANPRM assumes that tape would be used as the countermeasure on SUTs.

[39] The requirement was not applied retroactively to vehicles manufactured before July 1, 1997.

[40] The document is available to the public through the National Technical Information Service, Springfield, Virginia, 22161.

[41] A tractor-trailer combination was defined as a truck tractor pulling one or more trailers, *i.e.,* tractor with semi-trailer, full trailer, or two trailers.

crash involvements were those in which another vehicle crashed into the side or rear of a tractor-trailer combination. The control group consisted of single-vehicle crashes of tractor-trailers (where visibility of the tractor-trailer to other road users is not an issue at all) and impacts of the front of the tractor into other vehicles (where conspicuity of the side and rear of the trailer is also not an issue).

The principal conclusion of the study was that retroreflective tape is quite effective, and that it significantly reduces side and rear impacts into heavy trailers in the dark.

Other findings and conclusions are as follows:

- Annual benefits: When all heavy trailers have conspicuity tape, the tape will be saving an estimated 191 to 350 lives per year, preventing approximately 3,100 to 5,000 injuries per year, and preventing approximately 7,800 crashes per year, relative to a hypothetical fleet in which none of the trailers have the tape.
- Crash reductions by lighting conditions: In dark conditions (combining the subsets of ''dark-not-lighted,'' ''dark-lighted,'' ''dawn,'' and ''dusk''), the tape reduces side and rear impacts into heavy trailers by 29 percent. The reduction is statistically significant (confidence bounds: 19 to 39 percent).
- The tape is by far the most effective in dark-not-lighted conditions. The tape reduces side and rear impacts into heavy trailers by 41 percent. The reduction is statistically significant (confidence bounds: 31 to 51 percent).
- In dark-lighted, dawn, and dusk conditions, the tape did not significantly reduce crashes. The tape also did not significantly reduce crashes during daylight.

The following effectiveness estimates are the percentage reductions of various subgroups of the side and rear impacts into heavy trailers in dark conditions. As stated above, tape reduces these crash involvements by 29 percent, overall.

- Conspicuity tape is especially effective in preventing the more severe crashes, specifically, injury crashes. Impacts resulting in fatal or nonfatal injuries to at least one driver are reduced by 44 percent.
- The tape is more effective when the driver of the impacting vehicle is under 50. The crash reduction is 44 percent when the driver of the impacting vehicle is 15 to 50 years old, but only 20 percent when that driver is more than 50 years old. A possible explanation of this difference is that older drivers are less able to see, recognize and/or react to the tape in time to avoid hitting the trailer.
- The tape may be somewhat more effective in preventing rear impacts (43 percent) than side impacts (17 percent) into trailers; however, this difference is not consistent in the two States.
- The tape is effective in both clear (28 percent) and rainy/foggy weather conditions (31percent).
- The tape is especially effective on flatbed trailers (55 percent). It could be that these low-profile vehicles were especially difficult to see in the dark before they were treated with tape.
- Dirt on the tape significantly diminished tape effectiveness in rear impacts. Clean tapereduces rear impacts by 53 percent but dirty tape by only 27 percent.

These findings are evidence that large trailers are difficult to see in dark not lighted conditions and that conspicuity tape improves their visibility and reduces crashes in a dramatic way. Large trailers and large SUTs share a common general appearance and standard lighting requirements (with the exception of tape, which is required on large trailers, but is optional on SUTs). As such, the agency believes that the dramatic increase in safety that has been observed in trailers because of conspicuity tape may also be realized for SUTs. However, while the general appearance and standard lighting equipment is similar for large trailers and large SUTs, the agency recognizes that differences in visibility may exist between the two vehicle types that could result in a different effectiveness for tape applied to SUTs than has been observed thus far in large trailers. The agency seeks comment on such potential differences and the best way to accurately estimate the effectiveness that tape can be expected to have on SUT crash risk.

*b. NHTSA's Preliminary Estimate of Cost and Benefits of Requiring Tape on SUTs*

NHTSA has preliminarily examined the cost and benefits of requiring new SUTs (SUTs with a GVWR greater than 4,536 kg (10,000 lb)) to have and maintain retroreflective tape on the sides, rear, and upper corners of the vehicles, based on the findings of the agency's 2001 evaluation [42] of the effectiveness of retroreflective tape on heavy trailers. In our analysis, we only considered vehicle crashes into the rear and side of SUTs in dark-not-lighted conditions and used the same effectiveness (41 percent) of retroreflective tape in dark-not-lighted conditions for heavy trailers. Our analysis is discussed in this section.

To obtain a preliminary look at the potential value of conspicuity tape on SUTs, the agency examined fatal crashes involving SUTs over a four-year period (2010 through 2013). We estimate that there was an average of 34 fatalities annually in crashes into SUTs for which conspicuity tape could be an effective countermeasure in terms of assisting to avoid or mitigate these crashes. The 34 fatalities occurred in vehicle crashes in dark not lighted conditions into the rear and sides [43] of SUTs. These are the conditions for which conspicuity tape was shown to be 41 percent effective in mitigating crashes into trailers. Among these 34 fatalities, 21 occurred in crashes where the front end of a vehicle impacted the rear end of an SUT.

As described above, conspicuity systems on trailers were most effective in dark-not-lighted condition for side and rear impacts. The target population for the conspicuity systems can be established considering dark-not-lighted crashes for which the SUT is struck in the sides or rear. If we assume an effectiveness of 41 percent (based on the observed effectiveness of these systems on heavy trailers) to these fatalities, we can establish a rough estimate of 14 fatalities annually could be prevented by the application of conspicuity systems to SUTs.

Preliminary Estimate of Cost

NHTSA made a preliminary estimate of the cost of requiring new SUTs to have conspicuity tape. The cost of installing the tape was calculated based on the cost of the material itself and the cost to install the tape.

The cost of the material depends on the length of tape needed for SUTs, which depends on the vehicles' size. NHTSA evaluated data from a U.S. Department of Commerce ''Vehicle Inventory and Use Survey'' (VIUS),[44] which is a random sample survey of physical and operational characteristics of private and commercial trucks and truck-tractors registered or licensed in the 50 States and the District of Columbia.

The 1997 VIUS survey data, which is the most recent data available, indicates

[42] ''The Effectiveness of Retroreflective Tape on Heavy Trailers,'' March 2001, NHTSA Technical Report, DOT HS 809 222, *supra.*

[43] Crashes into the rear and side of SUTs were identified by initial contact point (values ranging from 2 o'clock to 10 o'clock) and damaged area (left, right, and/or back) field in FARS data files.

[44] U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau. The survey sample includes about 131,000 trucks surveyed to measure the characteristics of nearly 73 million trucks registered in the U.S.

that the weighted average length of SUTs from the front bumper to the rear of the vehicle is 1029 cm (33 feet (ft), 9 inches (in)). A survey of SUTs by NHTSA indicates that the average length from the front bumper to the end of the cab is 229 cm (7 ft, 6 in). Assuming a requirement would not apply conspicuity tape to the front cab length of SUTs, the average length that would be covered by conspicuity tape is 800 cm (26 ft, 3 in). In addition, 244 cm (8 ft) of tape would be applied along the width of the SUT at the rear of the vehicle, and two pairs of 30 cm (1 ft) strips would be applied to outline the upper rear of the SUT. The total length of tape applied to an average SUT is estimated to be 1164 cm (38 ft, 2 in).

We estimate that the 2-inch wide conspicuity tape can be purchased by SUT single-stage manufacturers for about $0.53 per linear foot. The distributors that sell the tape to smaller fleets mark up the cost of the tape from about 15 percent to 30 percent, which amounts to $0.61 to $0.69 per linear foot. NHTSA used $0.61 per linear foot for the cost (the average of $0.53 and $0.69) of the conspicuity tape.

As for the cost to apply the tape, NHTSA estimated in the final regulatory evaluation for the FMVSS No. 108 conspicuity rulemaking that 30 minutes is needed to apply conspicuity tape on all categories of trailers. NHTSA has also assumed that it would take 30 minutes to apply the tape to SUTs at an hourly rate of $22.20 per hour.

This yields labor costs of $11.10 (for 30 minutes labor) to apply tape to 50 percent of the length of the sides and the entire rear width and upper rear corners of an average SUT (a total of 1164 cm (38 ft, 2 in) of tape. Tape cost is estimated at $0.61 per linear foot (or per 30.48 cm), resulting in an estimated cost of tape at $23.28 per SUT. The total cost for labor and materials is estimated at ($23.28 + $11.10) x 1.51 consumer markup = $51.91 per SUT. (1.51 is the standard markup NHTSA uses to go from variable costs (labor and material) to consumer costs. The 1.51 markup includes fixed costs, manufacturer profit and dealer markups.)

NHTSA estimates that 578,631 new Class 3–8 trucks (GVWR greater than 4,536 kg (10,000 lb) are sold annually. Thus, the total consumer costs required for applying conspicuity tape to new SUTS is estimated to be approximately $30.0 million annually ($51.91 x 578,631 = $30,036,735).

TABLE 4—ANNUAL COST OF APPLYING RETROREFLECTIVE TAPE TO THE SIDES, REAR, AND UPPER CORNERS OF NEW SUTS

| | |
|---|---|
| Cost Per Vehicle | $51.91 |
| Annual sales of Class 3–8 SUTs in 2012. | 578,631 |
| Total Cost All applicable new SUTs. | $30.0 million |

Preliminary Estimate of Benefits

NHTSA made a preliminary estimate of the benefits of requiring new SUTs to have conspicuity tape. The benefit of the tape is a reduction in the number of crashes and severity of injuries, although in this preliminary analysis we examined fatal crashes only. While any future analysis by the agency would include injuries and property damage, our preliminary evaluation demonstrates the potential for conspicuity tape to be a cost effective solution in preventing and/or mitigating crashes involving SUTs.

NHTSA analyzed the Fatality Analysis Reporting System (FARS) data files for the years 2010 through 2013. The analysis determined that on average 34 lives per year are lost annually in vehicles striking the sides or rear of SUTs in dark-not-lighted conditions (see Table 5). If conspicuity systems are as effective in these crashes as they have been on heavy trailer crashes, there is a potential to prevent 14 fatalities a year.

TABLE 5—PRELIMINARY BENEFITS OF CONSPICUITY SYSTEMS ON SUTS

| | |
|---|---|
| Target Population | 34 |
| Effectiveness | 41% |
| Fatalities Prevented | 14 |

Estimated Cost Per Fatality Prevented

The estimated costs per fatality prevented for a retroreflective tape requirement for SUTs are shown in Table 6.

TABLE 6—COST PER FATALITY PREVENTED

| | 3 percent |
|---|---|
| Total Cost | $30 Million |
| Fatality Prevented | 14 |
| Cost/Fatality Prevented | $2.1 million |

Guidance from the U.S. Department of Transportation [45] identifies $9.1 million as the value of a statistical life (VSL) to be used for Department of Transportation analyses assessing the benefits of preventing fatalities for the base year of 2012. Per this guidance, VSL in 2014 is $9.2 million. While not directly comparable, the preliminary estimates for conspicuity systems on SUTs ($2.1 million per fatality prevented) is a strong indicator that these systems will be cost effective (current VSL $9.2 million).

[45] See *http://www.dot.gov/sites/dot.dev/files/docs/VSL%20Guidance_2013.pdf.* The guidance starts with a $9.1 million VSL in the base year of 2012 and then estimates a 1.07 percent increase in VSL each year after the base year to reflect the estimated growth rate in median real wages for the next 30 years.

## VI. Request for Comment on Requiring Retroreflective Tape on SUTs

NHTSA requests comments that would help the agency assess and make judgments on the benefits, costs and other impacts of requiring SUTs to have retroreflective tape. In providing a comment on a particular matter or in responding to a particular question, interested persons are asked to provide any relevant factual information to support their opinions, including, but not limited to, statistical and cost data and the source of such information. For easy reference, the questions below are numbered consecutively.

1. The agency assumed retroreflective tape would be 41 percent effective in preventing side and rear crashes into SUTs in dark-not-lighted conditions, based on the effectiveness NHTSA found for the tape in reducing side and rear impacts into heavy trailers. We seek comment on this effectiveness estimate. How effective are conspicuity systems at reducing crashes when applied to SUTs? Are there effectiveness studies specific to SUTs or statistical methods that could provide evidence that the effectiveness will be similar to that observed on heavy trailers?

2. While some fleet operations may be voluntarily applying conspicuity tape to their SUTs, our current crash databases do not include information on whether an SUT involved in a crash has conspicuity tape. The agency seeks input on ways that our analysis can better account for the voluntary installation of tape on SUTs.

3. Should all types of SUTs (box trucks, tow trucks, dual-wheeled pickups, etc.) be required to have conspicuity tape or only particular types of SUTs? What are the distinguishing characteristics of an SUT that make conspicuity tape needed?

4. What would be the cost of applying conspicuity tape on SUTs, including installation and materials?

5. Does conspicuity tape need to be replaced during the lifetime of the vehicle? How often and what sections of the vehicle need reapplication of conspicuity tape?

6. Are there any reasons that the agency should consider different patterns of application for SUTs as compared to trailers (different colors or locations)?

7. Should conspicuity tape be required on both the sides and the rear of the applicable SUTs, or should the agency consider application of the tape on the rear only?

8. Should NHTSA consider requiring current vehicles to be retrofitted with conspicuity tape? In March 1999, the Federal Highway Administration (FHWA) directed motor carriers engaged in interstate commerce to retrofit heavy trailers manufactured before December 1993 with some form of conspicuity treatment by June 1, 2001. In 2000, the Federal Motor Carrier Safety Administration (FMCSA) was established to perform motor carrier safety functions and operations, and authority for issuing and enforcing Federal Motor Carrier Safety Regulations was transferred to FMCSA. In 2000, NHTSA was delegated authority to promulgate safety standards for commercial motor vehicles and equipment already in use when the standards are based upon and similar to an FMVSS. See 49 CFR 1.95.[46]

## VII. Rulemaking Analyses

*Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures*

The agency has considered the impact of this ANPRM under Executive Orders (E.O.) 12866 and 13563 and the Department of Transportation's regulatory policies and procedures.

In this ANPRM, the agency requests comments that would help NHTSA assess and make judgments on the benefits, costs and other impacts, of strategies that increase the crash protection to occupants of vehicles crashing into the rear of SUTs and/or that increase the likelihood of avoiding a crash into SUTs. Strategies discussed in this ANPRM are possible amendments to the FMVSSs to: (a) expand FMVSS Nos. 223 and 224, to require upgraded guards on SUTs; and (b) amend FMVSS No. 108, to require the type of retroreflective material on the rear and sides of SUTs that is now required to be placed on the rear and sides of heavy trailers to improve the conspicuity of the vehicles to other motorists.

The agency has made preliminary estimates of the costs and benefits of the two above strategies. NHTSA requests comments on these estimates. Information from the commenters will help the agency further evaluate the course of action NHTSA should pursue in this rulemaking on SUTs.

*On Requiring SUTs to Have Underride Guards*

A requirement for SUTs to comply with CMVSS No. 223 would require 59 percent of newly manufactured SUTs to be equipped with CMVSS No. 223 rear impact guards.[47] The estimated incremental minimum to average cost of equipping newly covered SUTs with CMVSS No. 223 guards ranges from $307 to $453 per vehicle. The total annual fleet cost of equipping new SUTs with CMVSS No. 223 guards ranges from $105 million to $155 million. The estimate of minimum to average additional weight of equipping SUTs with CMVSS No. 223 guards is 76.8 kg (169 lb) to 95.5 kg (210 lb) per vehicle. The estimate of minimum additional fuel cost during the lifetime of the vehicle due to the additional weight of the guard ranges from $316 million to $514 million. Therefore, the total minimum to average annual cost (including fuel costs) of requiring SUTs to have CMVSS No. 223 rear impact guards is estimated to be $421 million to $669 million.

For estimating the benefits of requiring SUTs to have CMVSS No. 223 guards, NHTSA estimated the annual number of fatalities in light vehicle rear impact crashes with PCI into the rear of SUTs. The real world data indicated that there are annually 33 light vehicle occupant fatalities in impacts into the rear of SUTs that resulted in PCI. Only 30 percent of these impacts are at closing speeds less than or equal to 56 km/h (35 mph) for which CMVSS No. 223 compliant rear impact guards could prevent PCI.

The benefits analysis also included an estimate of the annual number of injuries in light vehicle crashes with PCI into the rear of SUTs. Non-PCI crashes were not considered as part of the target population for estimating benefits. This is because the IIHS test data (see Appendix B to this preamble) show that when PCI was prevented, the dummy injury measures were significantly below the injury assessment reference values specified in FMVSS No. 208. In non-PCI crashes into the rear of SUTs and trailers, the IIHS test data indicated that the passenger vehicle's restraint system would mitigate injury.

The benefits analysis in Appendix A estimates the equivalent lives saved (ELS) from a requirement for SUTs to have CMVSS No. 223 guards. The ELS are approximately 5.7 to 6.3 lives. The cost per ELS (3 and 7 percent discounted) is $106.7 million to $164.7 million, for each equivalent life saved. A summary of the analysis estimating incremental costs, benefits, and cost per equivalent lives saved is shown below in Table 7.

TABLE 7—ESTIMATES OF MATERIAL, INSTALLATION, AND FUEL COSTS OF EQUIPPING APPLICABLE SUTS (CLASS 3–8) WITH CMVSS REAR IMPACT GUARDS, RESULTING INCREMENTAL BENEFITS OF LIVES SAVED AND INJURIES PREVENTED, AND COST PER EQUIVALENT LIVES SAVED

| Material + Installation + Fuel Costs | |
|---|---|
| Minimum to average incremental cost of CMVSS guard per SUT | $307–$453. |
| Number of SUTs needing guards annually | 341,392. |
| Total incremental cost of CMVSS guards in SUT fleet | $104.9M–$154.6M. |
| Minimum to average incremental weight of CMVSS guard per SUT | 169 lb–210 lb. |
| Minimum to average incremental lifetime fuel cost per SUT | $924.7–$1,505.3. |
| Minimum to average incremental fuel cost for SUT fleet | $316M–$514M. |
| Total minimum to average incremental cost of CMVSS guards +fuel for SUT fleet | $421M–$669M. |

[46] FMCSA is delegated the authority to promulgate safety standards for commercial motor vehicles and equipment already in use when the standards are not based upon and similar to an FMVSS. 49 CFR 1.87.

[47] Since the definition of wheels back and low chassis vehicles in 393.86(b) allows more vehicles to be excluded from requiring rear impact guards than CMVSS No. 223, when SUTs are required to comply with CMVSS No. 223, a larger percentage would need to have rear impact guards. This is further explained in Appendix A.

TABLE 7—ESTIMATES OF MATERIAL, INSTALLATION, AND FUEL COSTS OF EQUIPPING APPLICABLE SUTS (CLASS 3–8) WITH CMVSS REAR IMPACT GUARDS, RESULTING INCREMENTAL BENEFITS OF LIVES SAVED AND INJURIES PREVENTED, AND COST PER EQUIVALENT LIVES SAVED—Continued

| Benefits Estimates | |
|---|---|
| Target Population (light vehicle occupant fatalities in crashes with PCI into the rear of applicable SUTs) average to high injury estimates. | 20 lives; 99–182 MAIS 1 injuries; 33–82 MAIS 2 and 17–27 MAIS 3–5 injuries. |
| Estimated effectiveness of CMVSS guards | 0.25 for fatalities, 0.2 for injuries. |
| Equivalent lives saved (undiscounted) average to high estimates | 5.7–6.3. |
| Equivalent lives saved (3% discounted) average to high estimates | 4.4–4.9. |
| Equivalent lives saved (7% discounted) average to high estimates | 3.3–3.7. |
| **Cost/Benefit Analysis** | |
| Cost per equivalent lives saved (3% discount) | $106.7M–$152.9M. |
| Cost per equivalent lives saved (7% discount) | $113.9M–$164.7M. |

*On Requiring SUTs to Have Retroreflective (Conspicuity) Tape*

NHTSA made a preliminary estimate of the cost of requiring new SUTs to have conspicuity tape. The cost of installing the tape was calculated based on the cost of the material itself and the cost to install the tape. The total cost for labor and materials is estimated at $23.28 + $11.10 x 1.51 consumer markup = $51.91 per SUT. NHTSA estimates that 578,631 new Class 3–8 trucks (GVWR > 10,000 lb) are sold annually. Thus, the total consumer costs required for applying conspicuity tape to new SUTs is estimated to be approximately $30.0 million annually ($51.91 x 578,631 = $30,036,735).

NHTSA made a preliminary estimate of the benefits of requiring new SUTs to have conspicuity tape. The agency estimates that a requirement would prevent 14 fatalities. The estimated costs per fatality prevented for a retroreflective tape requirement for SUTs are shown in Table 8.

TABLE 8—COST PER FATALITY PREVENTED

| | 3 percent discounted |
|---|---|
| Fatality Prevented | 14 |
| Cost/Fatality Prevented | $2.1 million |

*Regulation Identifier Number*

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

*Plain Language*

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please write to us with your views.

*Privacy Act*

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.*

## VIII. Submission of Comments

*How can I influence NHTSA's thinking on this rulemaking?*

In developing this ANPRM, we tried to address the concerns of all our stakeholders. Your comments will help us improve this rulemaking. We invite you to provide different views on options we discuss, new approaches we have not considered, new data, descriptions of how this ANPRM may affect you, or other relevant information. We welcome your views on all aspects of this ANPRM, but request comments on specific issues throughout this document. Your comments will be most effective if you follow the suggestions below:

—Explain your views and reasoning as clearly as possible.

—Provide solid technical and cost data to support your views.

—If you estimate potential costs, explain how you arrived at the estimate.

—Tell us which parts of the ANPRM you support, as well as those with which you disagree.

—Provide specific examples to illustrate your concerns.

—Offer specific alternatives.

—Refer your comments to specific sections of the ANPRM, such as the units or page numbers of the preamble.

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments to the docket electronically by logging onto *http://www.regulations.gov* or by the means given in the **ADDRESSES** section at the beginning of this document.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.*

*How do I submit confidential business information?*

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given in the **FOR FURTHER INFORMATION CONTACT** section. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the docket. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

*Will the agency consider late comments?*

We will consider all comments that the docket receives before the close of business on the comment closing date indicated in the **DATES** section. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider it in developing the next step in this rulemaking, we will consider that comment as an informal suggestion for future rulemaking action.

*How can I read the comments submitted by other people?*

You may read the comments received by the docket at the address given in the **ADDRESSES** section. You may also see the comments on the Internet (*http://regulations.gov*).

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the docket for new material.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476 at 19477–78).

**Note:** the following appendices will not appear in the CFR.

## Appendix A to Preamble—Cost-Benefit Evaluation of Requiring Single Unit Trucks (SUTs) to Have CMVSS No. 223 Guards

*Introduction*

This appendix provides NHTSA's analysis of the cost and benefits of requiring new SUTs to have CMVSS No. 223 rear impact guards. The analysis's findings, which are discussed in detail in this appendix, are summarized in the following Table A–1.[48]

TABLE A–1—ESTIMATES OF MATERIAL, INSTALLATION, AND FUEL COSTS OF EQUIPPING APPLICABLE SUTS WITH CMVSS REAR IMPACT GUARDS, RESULTING INCREMENTAL BENEFITS OF LIVES SAVED AND INJURIES PREVENTED, AND COST PER EQUIVALENT LIVES SAVED

| **Material + Installation + Fuel Costs** | |
|---|---|
| Minimum to average incremental cost of CMVSS guard per SUT | $307–$453. |
| Number of SUTs needing guards annually | 341,392. |
| Total incremental cost of CMVSS guards in SUT fleet | $104.9M–$154.6M. |
| Minimum to average incremental weight of CMVSS guard per SUT | 169 lb–210 lb. |
| Minimum to average incremental lifetime fuel cost per SUT | $924.7–$1,505.3. |
| Minimum to average incremental fuel cost for SUT fleet | $316M–$514M. |
| Total minimum to average incremental cost of CMVSS guards + fuel for SUT fleet | $421M–$669M. |
| **Benefits Estimates** | |
| Target Population (light vehicle occupant fatalities in crashes with PCI into the rear of applicable SUTs) average to high injury estimates. | 20 lives; 99–182 MAIS 1 injuries; 33–82 MAIS 2 and 17–27 MAIS 3–5 injuries. |
| Estimated effectiveness of CMVSS guards | 0.25 for fatalities, 0.2 for injuries. |
| Equivalent lives saved (undiscounted) average to high estimates | 5.7–6.3. |
| Equivalent lives saved (3% discounted) average to high estimates | 4.4–4.9. |
| Equivalent lives saved (7% discounted) average to high estimates | 3.3–3.7. |
| **Cost Per Equivalent Lives Saved** | |
| Cost per equivalent lives saved (3% discount) | $106.7M–$152.9M. |
| Cost per equivalent lives saved (7% discount) | $113.9M–$164.7M. |

*Estimating the Population of Covered SUTs*

Currently, rear impact protection for SUTs is regulated by FMCSR regulation 49 CFR 393.86(b), which requires that certain SUTs used in interstate commerce have a guard if there is no vehicle parts or equipment within the area where the rear impact guard location is prescribed. (The bottom plane of the area is not more than 762 mm (30 inches) above the ground, the forward-most plane of the area is not more than 610 mm (24 inches) forward of the rear extremity, and the lateral planes of the area are not more than 457 mm (18 inches) from the side extremity of the SUT.)

CMVSS No. 223 requires rear impact guards on trailers[49] that do not have equipment or vehicle parts within the area where the rear impact guard is prescribed to be located. (The bottom plane of the area is not more than 560

[48] Earlier in the preamble, NHTSA requested comment on this analysis and posed a series of questions seeking information to help make the analysis more complete. For example, the agency noted that this analysis did not include the cost of changes to SUTs to accommodate CMVSS No. 223 guards, such as strengthening of rear beams, frame rails, and the floor of vehicles, or cost resulting from the reduction in payload resulting from increased weight of the SUT due to installation of a CMVSS No. 223 guard.

[49] Pole trailers, pulpwood trailers, horizontal discharge trailers, and some other types of trailers are excluded.

mm (22 inches) above the ground, the forward-most plane of the area is not more than 305 mm (12 inches) forward of the rear extremity, and the lateral planes of the area are not more than 100 mm (4 inches) from the side extremity of the trailer.)

The geometric requirements for the guards in CMVSS No. 223 are similar to that in FMVSS No. 224. The contrast between the geometric requirements of the guards in FMCSR 393.86(b) and CMVSS No. 223 is shown in Figure A–1.

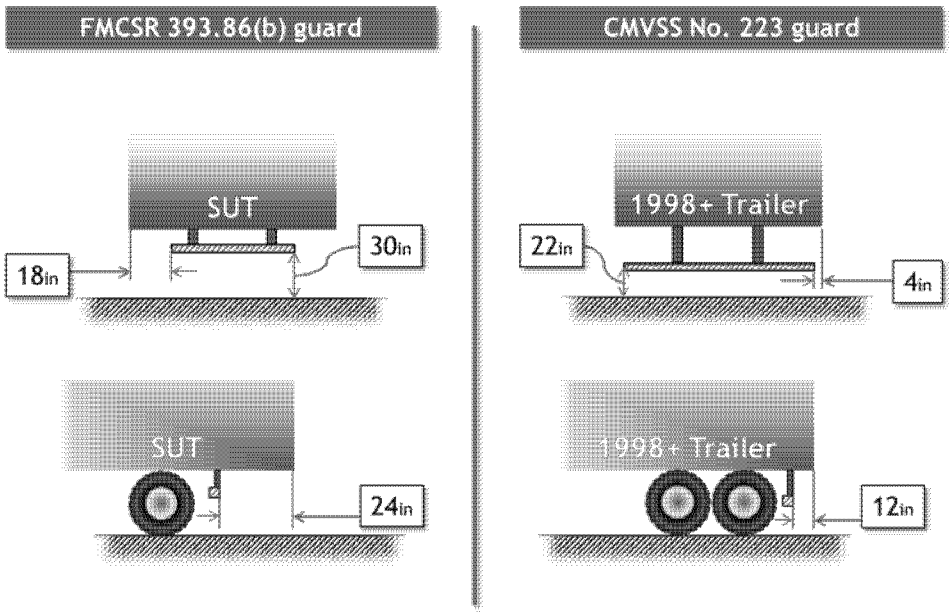



**Figure A-1: Depiction of rear impact protection requirements for single unit trucks and trailers (not to scale).**

The various underride guard standards exclude certain vehicles from their requirements due to reasons such as impediments to equipping a guard in a specified area or because the design of the vehicle renders a guard unnecessary to prevent underride. FMVSS No. 224 and CMVSS No. 223 have similar exclusions of vehicles, in contrast to FMCSA 393.86(b). For example, in FMCSR 393.86(b), a ''wheels back vehicle'' is one where the vehicle's rearmost axle is not more than 610 mm forward of the rear extremity of the vehicle, while in FMVSS No. 224 and CMVSS No. 223, a ''wheels back'' trailer is one where the rearmost axle is not more than 305 mm forward of the rear extremity of the vehicle. Another example is definitions of a ''low chassis'' vehicle. In FMCSR 393.86(b), a ''low chassis vehicle'' is one where the ground clearance of the bottom edge of the chassis which extends to the rearmost part of the vehicle is less than or equal to 762 mm, while in FMVSS No. 224 and CMVSS No. 223, a low chassis trailer is one where the ground clearance of the bottom edge of the chassis which extends to the rearmost part of the vehicle is less than or equal to 560 mm. If NHTSA were to require SUTs to comply with CMVSS No. 223, then some SUTs that were previously excluded by the FMCSR from having guards because they were considered wheels back or low chassis vehicles under FMCSR 393.86(b) would no longer qualify as wheels back or low chassis vehicles under CMVSS No. 223. These vehicles therefore would have to be equipped with rear impact guards in accordance with CMVSS No. 223.

UMTRI [50] evaluated the rear geometry of SUTs involved in fatal crashes in the 2008 and 2009 TIFA data files and estimated that 38 percent of SUTs were configured so as to be included under FMCSA 393.86(b) based on vehicle design, as shown below in Table A–2. However, UMTRI estimated that only 18 percent of SUTs were equipped with rear impact guards. The remaining 20 percent of the SUTs that appeared, based on vehicle design, to be included in the requirement to have a guard but did not have one, likely were not used in interstate commerce and so not covered by FMCSR 393.86(b).

[50] Heavy-Vehicle Crash Data Collection and Analysis to Characterize Rear and Side Underride and Front Override in Fatal Truck Crashes, DOT HS 811 725, March 2013.

TABLE A–2—PERCENTAGE OF SUTS BY THEIR REAR GEOMETRY AND WHETHER A REAR IMPACT GUARD WAS REQUIRED ACCORDING TO UMTRI'S EVALUATION OF SUTS INVOLVED IN FATAL CRASHES IN THE 2008–2009 TIFA DATA FILES

| Type of rear geometry | Percentage of SUTs |
|---|---|
| Rear Impact Guard Required: | |
| Guard present | 18 |
| Guard not present | 20 |
| Rear Impact Guard Not Required: | |
| Excluded vehicle | 8 |
| Wheels back vehicle | 27 |
| Low chassis vehicle | 9 |
| Wheels back and low chassis vehicle | 2 |
| Equipment | 16 |

NHTSA examined the rear geometry of SUTs in the 2008 and 2009 TIFA data files from the 2013 UMTRI study to determine the vehicles that would need to have rear impact guards in accordance with CMVSS No. 223 and the vehicles that would be excluded (as within an excluded type of vehicle, *i.e.,* wheels back, low chassis, rear equipment, special vehicles). The examination (Table A–3) shows that 59

percent of SUTs would need rear impact guards according to CMVSS No. 223.

Since UMTRI's evaluation (Table A–2) indicates that only 18 percent of SUTs that had a rear geometry that did not outwardly qualify as an excluded vehicle under FMCSR 393.86(b) had guards,[51] 18 percent of SUTs (those now with guards meeting FMCSR 393.86(b)) would need upgraded CMVSS No. 223 guards, and 41 percent (= 59 –18) of SUTs now without rear impact guards would need CMVSS No. 223 guards.

TABLE A–3—PERCENTAGE OF SUTS BY THEIR REAR GEOMETRY IN THE 2008–2009 TIFA DATA FILES AND WHETHER A GUARD WOULD BE REQUIRED ACCORDING TO CURRENT FMCSR 393.86(b) SPECIFICATIONS AND TO CMVSS NO. 223 SPECIFICATIONS

| Type of rear geometry | Classification per FMCSR 393.86(b) (percent) | Classification per CMVSS No. 223 (percent) |
|---|---|---|
| Rear impact guard required | 38 | 59 |
| Wheels back and/or low chassis vehicle | 38 | 20 |
| Equipment in rear and/or excluded vehicle | 24 | 21 |

The agency evaluated SUTs of Classes 3 to 8 (SUTs with a GVWR greater than 10,000 lb) as shown in Table A–4 for upgrading to CMVSS No. 223 requirements. The annual truck sales for 2012 were obtained from the Ward's Automotive Yearbook 2013 by the Ward's Automotive Group [52] and are presented in Table A–5.

TABLE A–4—SUT CLASSIFICATION AND EXAMPLES [53]—WEIGHT CATEGORY DEFINITIONS FROM 49 CFR 565, "VEHICLE IDENTIFICATION NUMBER (VIN) REQUIREMENTS"

| Vehicle class | Weight range (lb) | Examples |
|---|---|---|
| 3 | 10,000–14,000 | Walk-In, Box Truck, City Delivery, Heavy-Duty Pickup. |
| 4 | 14,001–16,000 | Large Walk-In, Box Truck, City Delivery. |
| 5 | 16,001–19,500 | Bucket Truck, Large Walk-In, City Delivery. |
| 6 | 19,501–26,000 | Beverage Truck, Rack Truck. |
| 7 | 26,001–33,000 | Refuse truck, Furniture truck. |
| 8 | 33,001 and over | Cement Truck, Dump Truck. |

TABLE A–5—ANNUAL SALES OF SUTS IN 2012

| SUT Class | Sales in 2012 |
|---|---|
| 3 | 232,755 |
| 4 | 9,431 |
| 5 | 54,898 |
| 6 | 39,978 |
| 7 | 46,854 |
| 8 | 194,715 |
| Total Class 3–8 truck sales in 2012 = | 578,631 |

The total sales volume of SUTs of Class 3–8 in 2012 was 578,631. Assuming that the classification of SUTs in the 2008–2009 TIFA data files as shown in Table A–3 is representative of the SUT fleet, then 59 percent of the SUTs sold annually would require CMVSS No. 223 guards. Therefore, applying CMVSS No. 223 to SUTs would affect approximately 341,692 (= $0.59 \times 578{,}631$) SUTs sold annually.[54]

*Costs*

Cost of Rear Impact Guards

In 2013, NHTSA conducted a study to develop cost and weight estimates for rear impact guards on heavy trailers.[55] Using the cost estimates for rear impact guards obtained from this study, in this section we estimate the cost of equipping SUTs with the guards.

In the 2013 study, the researchers estimated the cost and weight of FMCSR 393.86(b) rear impact guards, FMVSS No. 223 rear impact guards, and CMVSS No. 223 rear impact guards (Table A–6). All costs are presented in 2012 dollars. In estimating the cost and weight of guards, an engineering analysis of the guard system for each trailer was conducted, including material composition, manufacturing and construction methods and processes, component size, and attachment methods. We note, however, that the authors did not take into account the construction, costs, and weight changes in the trailer structure that would be needed to withstand loads from the stronger guards. Thus, a limitation of this analysis is the fact that the authors did not evaluate the changes in design of the rear beam, frame rails, and floor of the trailer when replacing a rear impact guard compliant with FMCSR 393.86(b) with an FMVSS No. 224 compliant guard and then to a CMVSS No. 223 compliant guard.

[51] UMTRI estimated that although 38 percent of the SUTs involved in fatal crashes were required to have rear impact guards (based on the truck rear geometry according to FMCSR 393.86(b)), only 18 percent were equipped with them. It is likely that the remaining 20 percent of the SUTs that were configured so as not to be considered among the vehicles excluded from FMCSA 393.86(b) based on vehicle design, but that did not have a guard, were not used in interstate commerce.

[52] Ward's Automotive group, ISBN Number 978–0–910589–31–4, Southfield, MI 2013. *http://wardsauto.com/.*

[53] Source: Oak Ridge National Laboratory, Center for Transportation Analysis, Oak Ridge, TN *http://cta.ornl.gov/vtmarketreport/heavy_trucks.shtml.*

[54] I.e., these vehicles would be required to be equipped with rear impact guards meeting CMVSS No. 223.

[55] Cost and weight analysis for rear impact guards on heavy trucks, Docket No. NHTSA–2011–0066–0086, June 2013.

TABLE A–6—COST (2012 DOLLARS) AND WEIGHT OF DIFFERENT TYPES OF REAR IMPACT GUARDS

| Type of rear impact guard | Trailer model year/Make | *Guard assembly* | *Installation cost* | *Total cost* | Weight (lb) |
|---|---|---|---|---|---|
| FMCSR 393.86(b) | *1993 Great Dane* | $64.35 | $41.31 | $105.66 | 78 |
| FMVSS No. 224 | *2001 Great Dane* | 150.97 | 108.14 | 259.11 | 172 |
| CMVSS No. 223 | *2012 Great Dane* | 188.36 | 151.00 | 339.36 | 193 |
| | *2012 Manac* | 297.62 | 245.09 | 542.72 | 307 |
| | *2012 Stoughton* | 244.38 | 219.11 | 463.49 | 191 |
| | *2012 Wabash* | 440.49 | 152.93 | 593.42 | 243 |

The average cost of a CMVSS rear impact guard is $485, which is $226 more than an FMVSS No. 224 guard and $379 more than an FMCSR 393.86(b) guard. In comparing the Great Dane rear impact guards, the 2012 Great Dane guard (the least expensive CMVSS No. 223 guard studied) is $234 more expensive than the 1993 guard (FMCSR 393.86(b) guard).

NHTSA used the incremental cost of $234 to $379 [56] (from Table A–6) to estimate costs of upgrading SUTs presently with FMCSR 393.86(b) guards to CMVSS No. 223 guards. The agency used the incremental cost of $339 to $485 [57] (from Table A–6) to estimate costs of equipping SUTs presently without guards with CMVSS No. 223 guards. These incremental costs do not take into account additional construction, costs, and weight changes needed in the SUT structure to withstand loads from the upgraded guards. Thus, the agency believes that the lower cost estimates may not represent the true incremental cost of equipping SUTs with rear impact guards. An analysis was therefore also conducted using the average incremental costs.

In the new SUT fleet, 18 percent of the fleet now equipped with FMCSR guards would be upgraded to CMVSS guards, and 41 percent of the fleet now without guards would need CMVSS guards. Therefore, the weighted incremental cost of CMVSS guards for applicable SUTs is $307 to $453, as shown in Table A–7.

TABLE A–7—ESTIMATING THE WEIGHTED INCREMENTAL COST OF EQUIPPING CMVSS NO. 223 GUARDS ON APPLICABLE SUTS

| | Cost |
|---|---|
| Minimum cost of CMVSS No. 223 compliant guard (a1) = | $339 |
| Average cost of CMVSS No. 223 compliant guard (a2) = | 485 |
| Incremental minimum cost of CMVSS guard over FMCSR guard (b1) = | 234 |
| Incremental average cost of CMVSS guard over FMCSR guard (b2) = | 379 |
| Percentage of SUTs that have FMCSR guards and would need CMVSS guards (c1) = | 18% |
| Percentage of SUTs that do not have guards and would need CMVSS guards (c2) = | 41% |
| Weighted minimum cost per SUT to equip Canadian guard (c1*b1+c2*a1)/(c1+c2) = | 307 |
| Weighted average cost per SUT to equip Canadian guard (c1*b2+c2*a2)/(c1+c2) = | 453 |

Based on these data, the agency estimated the total annual incremental material and installation cost of requiring new applicable SUTs to be equipped with CMVSS No. 223 rear impact guards (shown in Table A–8).

TABLE A–8—ANNUAL INCREMENTAL MATERIAL AND INSTALLATION COST OF REQUIRING CMVSS NO. 223 GUARDS ON NEW SUTS

| | Lower bound | Average |
|---|---|---|
| Total Number of SUTs Needing CMVSS Guards (a) | 341,692 | |
| Incremental Cost of CMVSS Guard (b) | $307 | $453 |
| Total cost for truck fleet (a × b) | $104,942,055 | $154,619,794 |

Lifetime Fuel Costs

Using the data in Table A–6, the average weight of a CMVSS No. 223 compliant guard is 234 lb, which is 156 lb greater than an FMCSR 393.86(b) guard. In comparing the Great Dane rear impact guards, the 2012 Great Dane guard is 115 lb heavier than the 1993 Great Dane guard.

In the new SUT fleet, 18 percent equipped with FMCSR guards would be upgraded to CMVSS guards and 41 percent without any guards would need CMVSS guards. The weighted incremental increase in the weight of SUTs was obtained in a similar manner as the weight incremental cost shown in Table A–9.

[56] $234 is the lowest incremental cost to upgrade from an FMCSR 393.86(b) guard to a CMVSS No. 223 guard and $379 represents the average incremental cost.

[57] $339 is the lowest incremental cost to upgrade from no guard to a CMVSS No. 223 guard and $485 represents the average incremental cost.

TABLE A–9—ESTIMATING THE WEIGHTED INCREMENTAL WEIGHT INCREASE OF EQUIPPING CMVSS NO. 223 COMPLIANT GUARDS ON APPLICABLE SUTS

| | Weight (lb) |
|---|---|
| Minimum weight of CMVSS No. 223 compliant guard (a1) = | 193 |
| Average weight of CMVSS No. 223 compliant guard (a2) = | 234 |
| Incremental minimum weight of CMVSS guard over FMCSR guard (b1) = | 115 |
| Incremental average weight of CMVSS guard over FMCSR guard (b2) = | 156 |
| Percentage of SUTs that have FMCSR guards and would need CMVSS guards (c1) = | 18% |
| Percentage of SUTs that don't have guards and would need CMVSS guards (c2) = | 41% |
| Weighted minimum weight increase per SUT to equip Canadian guard (c1*b1+c2*a1)/(c1+c2) = | 169 |
| Weighted average weight increase per SUT to equip Canadian guard (c1*b2+c2*a2)/(c1+c2) = | 210 |

Therefore, the minimum to average increased weight of equipping CMVSS guards for applicable SUTs is 169 lb to 210 lb. The added weight would increase the fuel consumption costs during the lifetime of the vehicle, costs that have to be discounted to present rate to determine the total present value annual cost of equipping SUTs with CMVSS No. 223 rear impact guards.

The vehicle miles of travel and the fuel economy for heavy vehicles is shown in Table A–10.

TABLE A–10—ANNUAL VEHICLE MILES OF TRAVEL AND FUEL ECONOMY PER SUT (2008 TO 2011) [58]

| | 2008 | 2009 | 2010 | 2011 |
|---|---|---|---|---|
| Average miles traveled per SUT | 15,306 | 14,386 | 13,469 | 13,239 |
| Average fuel economy per SUT (mpg) | 7.4 | 7.4 | 7.3 | 7.3 |

Using the base fuel economy of 7.3 miles per gallon (mpg) shown in Table A–10 for the year 2011, the reduced new fuel economy for Class 3–8 SUTs due to the minimum to average added weight of 169 lb–210 lb (for CMVSS No. 223 guards) was computed (as shown in Table A–11) using the standard formula: [59]

*New fuel economy = (base vehicle weight/[base vehicle weight + added weight]) ^0.8* (base fuel economy)*

The average weight of Class 3, Class 4–6, Class 7, and Class 8 SUTs (shown in Table A–11) was estimated from Table A–4. The average weight of Class 4–6 SUTs was weighted by their respective sales volume shown in Table A–5. The average weight of Class 8 (weight range 33,001 and over) trucks was assumed to be 40,000 lb.

TABLE A–11—ESTIMATING NEW FUEL ECONOMY (MPG) USING THE STANDARD FORMULA

| SUT Class | Average weight (lb) | Average weight + 169 lb | Average weight + 210 lb | Base fuel economy (mpg) | New fuel economy (+169 lb) (mpg) | New fuel economy (+210 lb) (mpg) |
|---|---|---|---|---|---|---|
| 3 | 12,000 | 12169 | 12210 | 7.3 | 7.218686 | 7.199288 |
| 4–6 | 19418 | 19587 | 19628 | 7.3 | 7.249507 | 7.237390 |
| 7 | 29500 | 29669 | 29710 | 7.3 | 7.266675 | 7.258652 |
| 8 | 40000 | 40169 | 40210 | 7.3 | 7.275390 | 7.269455 |

The method of deriving discount rates is presented in Table A–12 for Class 3 SUTs as an example. The 3 percent and 7 percent discount rates for Class 3, Class 4–6, Class 7, and Class 8 SUTs are summarized in Table A–13.

[58] Data from Oakridge National Laboratories (ORNL) market report at *http://cta.ornl.gov/vtmarketreport/pdf/chapter3_heavy_trucks.pdf* (see Figure 78 on page 100).

[59] This standard formula for estimating the impact of marginal weight increases on fuel economy is based on light vehicle data. However, it is the best available method for estimating changes in fuel economy due to weight increases at this time and so is used here for heavy vehicles.

**Table A-12.** Derivation of discount rates (for Class 3 SUTs as an example).

| Age | VMT | Surv. | Wgt. VMT | % of VMT | 3% | 7% | Weighted 3% | Weighted 7% |
|---|---|---|---|---|---|---|---|---|
| 1 | 30222 | 1 | 30222 | 7.98% | 0.9853 | 0.9667 | 0.079 | 0.077 |
| 2 | 29072 | 1 | 29072 | 7.67% | 0.9566 | 0.9035 | 0.073 | 0.069 |
| 3 | 27966 | 0.997 | 27882 | 7.36% | 0.9288 | 0.8444 | 0.068 | 0.062 |
| 4 | 26901 | 0.992 | 26686 | 7.04% | 0.9017 | 0.7891 | 0.064 | 0.056 |
| 5 | 25878 | 0.983 | 25438 | 6.71% | 0.8755 | 0.7375 | 0.059 | 0.050 |
| 6 | 24893 | 0.969 | 24121 | 6.37% | 0.85 | 0.6893 | 0.054 | 0.044 |
| 7 | 23945 | 0.951 | 22772 | 6.01% | 0.8252 | 0.6442 | 0.050 | 0.039 |
| 8 | 23034 | 0.929 | 21399 | 5.65% | 0.8012 | 0.602 | 0.045 | 0.034 |
| 9 | 22158 | 0.901 | 19964 | 5.27% | 0.7778 | 0.5626 | 0.041 | 0.030 |
| 10 | 21314 | 0.869 | 18522 | 4.89% | 0.7552 | 0.5258 | 0.037 | 0.026 |
| 11 | 20503 | 0.832 | 17058 | 4.50% | 0.7332 | 0.4914 | 0.033 | 0.022 |
| 12 | 19723 | 0.791 | 15601 | 4.12% | 0.7118 | 0.4593 | 0.029 | 0.019 |
| 13 | 18972 | 0.746 | 14153 | 3.74% | 0.6911 | 0.4292 | 0.026 | 0.016 |
| 14 | 18250 | 0.698 | 12739 | 3.36% | 0.671 | 0.4012 | 0.023 | 0.013 |
| 15 | 17556 | 0.648 | 11376 | 3.00% | 0.6514 | 0.3749 | 0.020 | 0.011 |
| 16 | 16888 | 0.596 | 10065 | 2.66% | 0.6324 | 0.3504 | 0.017 | 0.009 |
| 17 | 16245 | 0.543 | 8821 | 2.33% | 0.614 | 0.3275 | 0.014 | 0.008 |
| 18 | 15627 | 0.49 | 7657 | 2.02% | 0.5961 | 0.306 | 0.012 | 0.006 |
| 19 | 15032 | 0.438 | 6584 | 1.74% | 0.5788 | 0.286 | 0.010 | 0.005 |
| 20 | 14460 | 0.388 | 5610 | 1.48% | 0.5619 | 0.2673 | 0.008 | 0.004 |
| 21 | 13910 | 0.339 | 4715 | 1.24% | 0.5456 | 0.2498 | 0.007 | 0.003 |
| 22 | 13380 | 0.294 | 3934 | 1.04% | 0.5297 | 0.2335 | 0.005 | 0.002 |
| 23 | 12871 | 0.251 | 3231 | 0.85% | 0.5142 | 0.2182 | 0.004 | 0.002 |
| 24 | 12381 | 0.212 | 2625 | 0.69% | 0.4993 | 0.2039 | 0.003 | 0.001 |
| 25 | 11910 | 0.177 | 2108 | 0.56% | 0.4847 | 0.1906 | 0.003 | 0.001 |
| 26 | 11457 | 0.146 | 1673 | 0.44% | 0.4706 | 0.1781 | 0.002 | 0.001 |
| 27 | 11021 | 0.119 | 1311 | 0.35% | 0.4569 | 0.1665 | 0.002 | 0.001 |
| 28 | 10601 | 0.095 | 1007 | 0.27% | 0.4436 | 0.1556 | 0.001 | 0.000 |
| 29 | 10198 | 0.075 | 765 | 0.20% | 0.4307 | 0.1454 | 0.001 | 0.000 |
| 30 | 9810 | 0.059 | 579 | 0.15% | 0.4181 | 0.1359 | 0.001 | 0.000 |
| 31 | 9437 | 0.045 | 425 | 0.11% | 0.4059 | 0.127 | 0.000 | 0.000 |
| 32 | 9077 | 0.034 | 309 | 0.08% | 0.3941 | 0.1187 | 0.000 | 0.000 |
| 33 | 8732 | 0.025 | 218 | 0.06% | 0.3826 | 0.1109 | 0.000 | 0.000 |
| 34 | 8400 | 0.019 | 160 | 0.04% | 0.3715 | 0.1037 | 0.000 | 0.000 |
| 35 | 8080 | 0.013 | 105 | 0.03% | 0.3607 | 0.0969 | 0.000 | 0.000 |
| | | | 378907 | 1.000 | | | 0.7917 | 0.6120 |

The overall discount rate for Class 3–8 SUTs was determined as the weighted average of the discount rates shown in Table A–13 (weighted by the sales volume shown in Table A–5).

TABLE A–13—DISCOUNT RATES FOR CLASS 3, CLASS 4–6, CLASS 7, AND CLASS 8 SUTS AND THE DISCOUNT RATES FOR THE AGGREGATE CLASS 3–8

[Weighted by sales volume]

| Discount rate | Class 3 | Class 4–6 | Class 7 | Class 8 | Overall discount rate (Class 3–8 weighted average) |
|---|---|---|---|---|---|
| 3 Percent | 0.79165 | 0.78643 | 0.77162 | 0.74705 | 0.77408 |
| 7 Percent | 0.61196 | 0.60759 | 0.58533 | 0.54827 | 0.58758 |

The cost of diesel fuel during the lifetime of an SUT (2017 to 2051) was obtained from the Annual Energy Outlook 2014 AEO2014 worksheet in 2012 dollars.[60] The tax for diesel fuel (estimated at $0.54 per gallon) was obtained from the American Petroleum Institute (API).[61] The calculation for the incremental lifetime cost of fuel due to minimum increase in weight of the vehicle (169 lb) due to installing CMVSS No. 223 compliant guards is shown in Table A–14 for Class 3 SUTs as an example.

[60] Annual Energy Outlook 2014, U.S. Energy Information Administration, *http://www.eia.gov/forecasts/aeo/.*

[61] *http://www.api.org/statistics/fueltaxes/upload/State_Motor_Fuel_Excise_Tax_Update.pdf.*

**Table A-14.** Calculation of increased lifetime fuel costs per SUT requiring CMVSS No. 223 compliant guards (for Class 3 SUTs with 169 lb increased weight as an example).

| | | | | 3% discount | | 7% discount | |
|---|---|---|---|---|---|---|---|
| Cost of diesel | Fuel Consumption per year | | Difference | fuel costs | | fuel costs | |
| fuel - taxes | base (a) | new (b) | (a) - (b) | base | new | base | new |
| (2012 dollars) | gallons | gallons | | | | | |
| $3.3475 | 4,140.00 | 4,186.63 | 46.63 | $10,971.31 | $11,094.89 | $8,480.97 | $8,576.51 |
| $3.4058 | 3,982.47 | 4,027.33 | 44.86 | $10,737.65 | $10,858.61 | $8,300.36 | $8,393.86 |
| $3.3393 | 3,819.47 | 3,862.49 | 43.02 | $10,096.93 | $10,210.67 | $7,805.07 | $7,892.99 |
| $3.1433 | 3,655.59 | 3,696.77 | 41.18 | $9,096.67 | $9,199.14 | $7,031.85 | $7,111.06 |
| $3.0041 | 3,484.67 | 3,523.92 | 39.25 | $8,287.35 | $8,380.70 | $6,406.24 | $6,478.40 |
| $2.9552 | 3,304.29 | 3,341.51 | 37.22 | $7,730.43 | $7,817.51 | $5,975.73 | $6,043.04 |
| $2.9571 | 3,119.41 | 3,154.55 | 35.14 | $7,302.64 | $7,384.90 | $5,645.04 | $5,708.63 |
| $2.9939 | 2,931.31 | 2,964.33 | 33.02 | $6,947.53 | $7,025.79 | $5,370.53 | $5,431.03 |
| $3.0706 | 2,734.84 | 2,765.65 | 30.81 | $6,648.03 | $6,722.92 | $5,139.02 | $5,196.91 |
| $3.1319 | 2,537.24 | 2,565.82 | 28.58 | $6,290.74 | $6,361.60 | $4,862.83 | $4,917.61 |
| $3.2007 | 2,336.78 | 2,363.10 | 26.32 | $5,921.05 | $5,987.74 | $4,577.05 | $4,628.61 |
| $3.2758 | 2,137.11 | 2,161.18 | 24.07 | $5,542.10 | $5,604.53 | $4,284.12 | $4,332.38 |
| $3.3280 | 1,938.78 | 1,960.62 | 21.84 | $5,107.97 | $5,165.51 | $3,948.53 | $3,993.01 |
| $3.3781 | 1,745.00 | 1,764.66 | 19.66 | $4,666.60 | $4,719.17 | $3,607.35 | $3,647.99 |
| $3.4370 | 1,558.40 | 1,575.95 | 17.55 | $4,240.27 | $4,288.03 | $3,277.79 | $3,314.71 |
| $3.4843 | 1,378.80 | 1,394.33 | 15.53 | $3,803.20 | $3,846.04 | $2,939.93 | $2,973.04 |
| $3.5430 | 1,208.36 | 1,221.97 | 13.61 | $3,389.22 | $3,427.40 | $2,619.91 | $2,649.42 |
| $3.5771 | 1,048.94 | 1,060.75 | 11.82 | $2,970.40 | $3,003.85 | $2,296.16 | $2,322.02 |
| $3.6233 | 901.92 | 912.08 | 10.16 | $2,587.04 | $2,616.18 | $1,999.82 | $2,022.34 |
| $3.6641 | 768.56 | 777.22 | 8.66 | $2,229.34 | $2,254.45 | $1,723.31 | $1,742.73 |
| $3.7128 | 645.96 | 653.23 | 7.28 | $1,898.66 | $1,920.04 | $1,467.69 | $1,484.22 |
| $3.7643 | 538.87 | 544.94 | 6.07 | $1,605.81 | $1,623.90 | $1,241.32 | $1,255.30 |
| $3.8184 | 442.55 | 447.54 | 4.99 | $1,337.77 | $1,352.83 | $1,034.11 | $1,045.76 |
| $3.8891 | 359.56 | 363.61 | 4.05 | $1,107.03 | $1,119.50 | $855.75 | $865.39 |
| $3.9271 | 288.78 | 292.03 | 3.25 | $897.77 | $907.89 | $693.99 | $701.81 |
| $3.9694 | 229.14 | 231.72 | 2.58 | $720.04 | $728.15 | $556.60 | $562.87 |
| $4.0028 | 179.66 | 181.68 | 2.02 | $569.30 | $575.71 | $440.08 | $445.03 |
| $4.0433 | 137.96 | 139.51 | 1.55 | $441.59 | $446.57 | $341.36 | $345.20 |
| $4.1130 | 104.77 | 105.95 | 1.18 | $341.15 | $344.99 | $263.71 | $266.69 |
| $4.1911 | 79.29 | 80.18 | 0.89 | $263.06 | $266.03 | $203.35 | $205.64 |
| $4.2456 | 58.17 | 58.83 | 0.66 | $195.52 | $197.72 | $151.14 | $152.84 |
| $4.3008 | 42.28 | 42.75 | 0.48 | $143.94 | $145.56 | $111.27 | $112.52 |
| $4.3567 | 29.90 | 30.24 | 0.34 | $103.14 | $104.30 | $79.73 | $80.63 |
| $4.4133 | 21.86 | 22.11 | 0.25 | $76.39 | $77.25 | $59.05 | $59.71 |
| $4.4707 | 14.39 | 14.55 | 0.16 | $50.93 | $51.50 | $39.37 | $39.81 |
| Total costs | | | | $134,318.56 | $135,831.58 | $103,830.13 | $104,999.71 |
| Difference | | | | | $1,513.02 | | $1,169.59 |

Tables A–15(a) and A–15(b) present the summary analysis for determining the total incremental lifetime fuel cost of equipping Class 3–8 SUTs with CMVSS No. 223 guards that results in increase in SUT weight by a minimum of 169 lb to an average of 210 lb. The discounted incremental lifetime fuel cost per SUT for the different class SUTs shown in columns 2 and 3 of Table A–15(a) and Table A–15(b) was obtained as shown in Table A–14 for Class 3 SUTs. The annual number of SUTs in each class requiring CMVSS No. 223 guards was estimated to be 59 percent (as shown in Table A–3) of the annual sales volume. The total minimum incremental fuel cost for each SUT class (last two columns of Table A–15(a)) is the product of the number of SUTs of the class requiring CMVSS No. 223 guards and the increased fuel cost per SUT for that Class of SUTs (*e.g.* for Class 3 SUTs with 169 lb weight increase, 3 percent discounted total minimum incremental fuel costs = $1,513.02 × 137,446). A similar analysis of total average incremental fuel cost for average weight increase of 210 lb is shown in Table A–15(b).

The total minimum incremental fuel cost for all SUTs (second to last row in Table A–15(a)) is the sum of the total

minimum incremental fuel cost for each SUT class shown in the last two columns of Table A–15(a). The average incremental fuel cost per SUT for all Class 3–8 SUTs (last row in Table A–15(a)) with 169 lb weight increase is obtained by dividing the total minimum incremental fuel cost for the annual SUT fleet by the total number of SUTs with CMVSS guards (*e.g.* for 3 percent discount, average incremental fuel cost per SUT (Class 3–8) = $1,212 = $414,129,456/341,692). The average incremental fuel cost per SUT for all Class 3–8 SUTs with 210 lb weight increase is shown in Table A–15(b).

TABLE A–15—INCREMENTAL LIFETIME FUEL COSTS PER SUT, SALES VOLUME PER SUT CLASS, ANNUAL NUMBER OF SUTS REQUIRING CMVSS NO. 223 GUARDS, TOTAL INCREMENTAL FUEL COSTS BY CLASS OF SUT AND FOR ALL SUTS REQUIRING CMVSS GUARDS, AND THE INCREMENTAL FUEL COST PER CLASS 3–8 SUTS

[(a) (For weight increase = 169 lb)]

| Class | Increased minimum lifetime fuel cost per SUT (169 lb weight increase) | | Annual sales volume | SUTs that would have CMVSS No. 223 guards | Total minimum incremental lifetime fuel costs (169 lb weight increase) | |
|---|---|---|---|---|---|---|
| | 3 percent | 7 percent | | | 3 percent | 7 percent |
| 3 | $1,513.02 | $1,169.59 | 232,755 | 137,446 | $207,958,428 | $160,754,780 |
| 4–6 | 1,345.48 | 1,039.50 | 104,307 | 61,595 | 82,875,115 | 64,028,366 |
| 7 | 1,004.81 | 762.22 | 46,854 | 27,668 | 27,801,137 | 21,089,132 |
| 8 | 830.51 | 609.53 | 194,715 | 114,983 | 95,494,776 | 70,085,316 |
| Total Number of SUTs with CMVSS guards = | | | | 341,692 | | |
| Total minimum incremental fuel cost for Class 3–8 SUTs proposed to have CMVSS guards = | | | | | 414,129,456 | 315,957,594 |
| Average minimum incremental fuel cost per Class 3–8 SUTs proposed to have CMVSS guards = | | | | | 1,212.00 | 924.69 |

[(b) (For weight increase = 210 lb)]

| Class | Increased average lifetime fuel cost per SUT (210 lb weight increase) | | Annual sales volume | SUTs that would have CMVSS No. 223 guards | Total average incremental lifetime fuel costs (210 lb weight increase) | |
|---|---|---|---|---|---|---|
| | 3 percent | 7 percent | | | 3 percent | 7 percent |
| 3 | $1,879.01 | $1,452.50 | 232,755 | 137,446 | $258,261,947 | $199,640,105 |
| 4–6 | 1,671.16 | 1,291.12 | 104,307 | 61,595 | 102,935,155 | 79,526,524 |
| 7 | 1,248.11 | 946.78 | 46,854 | 27,668 | 34,532,905 | 26,195,655 |
| 8 | 1,031.65 | 757.15 | 194,715 | 114,983 | 118,622,180 | 87,058,930 |
| Total Number of SUTs with CMVSS guards= | | | | 341,692 | | |
| Total average incremental fuel cost for Class 3–8 SUTs proposed to have CMVSS guards= | | | | | 514,352,187 | 392,421,214 |
| Average incremental fuel cost per Class 3–8 SUTs | | | | | 1,505.31 | 1,148.46 |

The weighted minimum incremental increase in lifetime fuel cost per SUT (for Class 3–8 SUTs) at 3 percent discounting is $1,212 and that at 7 percent discounting is $924.7.[62] The weighted average incremental increase in lifetime fuel cost per SUT (for Class 3–8 SUTs) at 3 percent discounting is $1,505 and that at 7 percent discounting is $1,148.5. The total minimum incremental increase in lifetime fuel cost in the Class 3–8 SUT fleet is $414.1M a 3 percent discount rate and $315.9M at 7 percent discount rate. The total average incremental increase in lifetime fuel cost in the Class 3–8 SUT fleet is $514.3M a 3 percent discount rate and $392.4M at 7 percent discount rate.

Table A–16 presents the total fleet incremental cost (sum of incremental equipment and installation cost in Table A–8 and fuel cost in Table A–15) to the new applicable SUTs to be equipped with CMVSS No. 223 compliant rear impact guards.

TABLE A–16—TOTAL INCREMENTAL FLEET COST OF EQUIPPING APPLICABLE NEW SUTS WITH CMVSS NO. 223 REAR IMPACT GUARDS (EQUIPMENT/INSTALLATION COST IN TABLE A–8 + MINIMUM FUEL COST IN TABLE A–15)

| | Equipment + installation costs | Fuel cost | | Total costs | |
|---|---|---|---|---|---|
| | | 3% | 7% | 3% | 7% |
| Low Estimate | $104,942,055 | $414,129,456 | $315,957,594 | $519,071,511 | $420,899,649 |
| Average Estimate | 154,619,794 | 514,352,187 | 392,421,214 | 668,971,981 | 547,041,007 |

[62] The incremental fuel costs at 3 percent and 7 percent discounting include tax for diesel fuel.

NHTSA estimated an average maintenance and repair expense for a rear impact guard over the vehicle's lifetime of $15.[63] This maintenance and repair cost is relatively small compared to the lifetime fuel cost and was not taken into consideration in the present analysis. Reduced revenue from reduced payload of commercial operations due to increase in vehicle weight was not taken into consideration because the percentage of SUTs that are currently operating at their GVWR limit is not known. Taking into consideration the reduced revenue that could result from increase in vehicle weight would further increase the cost of requiring rear impact guards on SUTs. Therefore, this analysis is a conservative estimate of the cost.

*Benefits*

For estimating the benefits of requiring covered SUTs to be equipped with CMVSS No. 223 guards, NHTSA estimated the annual number of fatalities in light vehicle rear impact crashes with PCI into the rear of SUTs. Additionally, NHTSA estimated the annual number of injuries in light vehicle crashes with PCI into the rear of SUTs. Non-PCI crashes were not considered as part of the target population for estimating benefits. This is because the IIHS test data (see Appendix B to the preamble) show that when PCI was prevented, the dummy injury measures were significantly below the injury assessment reference values specified in occupant crash protection standards. In non-PCI crashes into the rear of SUTs and trailers, the IIHS test data indicated that the passenger vehicle's restraint system would mitigate injury.

Among the 104 light vehicle occupant fatalities resulting from impacts with the rear of SUTs, 80 occurred in impacts with SUTs without rear impact guards while the remaining 24 were in impacts to SUTs with guards. PCI was associated with 33 annual light vehicle occupant fatalities resulting from impacts into the rear of SUTs; 25 of these fatalities were in impacts with SUTs without rear impact guards and 8 with SUTs with guards (see Figure A–2 below).


| | Light vehicle fatalities in crashes into the rear of trailers & SUTs | | Light vehicle fatalities in PCI crashes into the rear of trailers & SUTs | |
|---|---|---|---|---|
| | Annual # | Percentage | Annual # | Percentage |
| SUT+Guard | 24 | 7% | 8 | 5% |
| SUT/No Guard | 80 | 22% | 25 | 17% |
| Trailer+Guard | 125 | 35% | 72 | 48% |
| Excluded Trailer/Other | 133 | 37% | 45 | 30% |
| Total | 362 | | 150 | |

**Figure A-2: Annual light vehicle occupant fatalities in impacts into the rear of SUTs and trailers categorized by the geometry of the rear of the impacted vehicle and the extent of underride.**

[63] Allen, Kirk, ''An In-Service Analysis of Maintenance and Repair Expenses for the Anti-Lock Brake System and Underride Guard for Tractors and Trailer,'' March 2009, DOT HS 811 109.

As explained earlier in this analysis, if CMVSS No. 223 were to apply to SUTs, 59 percent of new SUTs would be required to have a CMVSS No. 223 guard (see Table A–3, *supra*). The 41 percent of SUTs that would be excluded from meeting CMVSS No. 223 requirements would be wheels back and low chassis vehicles that have vehicle structure in the rear that could prevent PCI or vehicles with equipment in the rear for which installing rear impact guards may not be practicable and may interfere with equipment operation. Since the extent of underride was determined by the extent of deformation and intrusion of the vehicle, based on our examination of TIFA cases it is likely that some light vehicle crashes into the rear of excluded SUTs that resulted in PCI did not actually underride the truck but sustained PCI because of other circumstances such as crash speed or short front end of the vehicle. Therefore, the target population of light vehicle occupant fatalities with PCI which may be addressed by equipping SUTs with CMVSS No. 223 compliant rear impact guards is estimated to be 19.5 (=33 × 0.59).

Approximately 30 percent of the impacts into the rear of SUTs with PCI are less than or equal to 56 km/h (35 mph) (See Figure A–3 below).

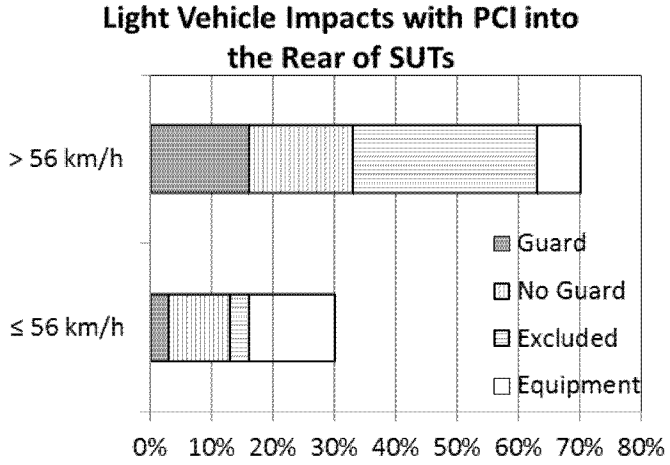



**Figure A-3: Percentage of fatal light vehicle crashes into the rear of SUTs that resulted in passenger compartment intrusion - categorized by the relative speed of the crash, presence of rear impact guard, exclusion, and equipment in rear of vehicle.**

While CMVSS No. 223 requirements are intended for mitigating PCI in light vehicle rear impacts at speeds less than or equal to 56 km/h (35 mph),[64] CMVSS No. 223 rear impact guards may not be able to mitigate all fatalities in such crashes because some of the crashes may be low overlap (30 percent or less).[65] The IIHS data indicated that 8 of the 9 CMVSS No. 223 guards were not able to prevent PCI in a 56 km/h crash with 30 percent overlap of a Chevrolet Malibu. Also, the guards may not be able to prevent fatalities even if PCI is prevented because some fatalities may not be a result of PCI but are due to other circumstances (*e.g.* unrestrained status of occupants, elderly and other vulnerable occupants) which would be unaffected by an improved rear impact guard.[66]

For the purpose of this analysis, NHTSA assumed that CMVSS No. 223 compliant guards on SUTs would be able to prevent about 85% of light vehicle occupant fatalities with PCI in impacts into the rear of SUTs at crash speeds less than or equal to 35 mph. However, since only 30 percent of the target population of light vehicle crashes with PCI into the rear of SUTs are at speeds less than or equal to 56 km/h, CMVSS No. 223 compliant guards would only be effective for a portion of the target population. Therefore NHTSA estimated an overall effectiveness of 25 percent (≈30% × 85%) for CMVSS No. 223 rear impact guards in preventing fatalities in light vehicle crashes into the rear of SUTs.[67] We believe this is an upper estimate of CMVSS No. 223 guard effectiveness in preventing fatalities.[68]

In the final regulatory evaluation for the January 24, 1996 final rule establishing FMVSS Nos. 223 and 224 (61 FR 2004), NHTSA assumed an effectiveness range of 10 to 25 percent for rear impact guards in preventing fatalities in crashes with PCI (all speeds) into the rear of trailers. The 25 percent effectiveness estimated for the current analysis (based on 2008–2009 TIFA data and the IIHS crash test data) is the higher value of the assumed effectiveness range of rear impact guards in the 1996 final rule.

To estimate the incidence and characteristics of nonfatal injuries to light vehicle occupants in impacts to the rear of SUTs resulting in underride, the

[64] Transport Canada testing of minimally compliant CMVSS No. 223 rear impact guards indicated that such guards could prevent PCI in light vehicle impacts with full overlap of the guard at crash speeds up to 56 km/h. See Boucher D., David D., ''Trailer Underride Protection—A Canadian Perspective,'' SAE Paper No. 2000–01–3522.

[65] Overlap refers to the percentage of impacting vehicle front end width that engages the rear impact guard.

[66] CMVSS No. 223 compliant rear impact guards may mitigate the severity of impact into the rear of SUTs at speeds greater than 56 km/h, but NHTSA is unable to quantify this possible benefit at this time. We seek comment on this issue.

[67] The agency's 2010 study—''The Effectiveness of Underride Guards for Heavy Trailers,'' October, 2010, DOT HS 811 375—estimated an effectiveness of 27 percent from data collected in Florida and 83 percent from data collected in North Carolina for FMVSS No. 223 compliant rear impact guards in preventing fatalities. These two estimates are considerably different and not statistically significant, possibly due to small sample size, and so associated with some uncertainty. Therefore, these effectiveness estimates were not utilized in the current analysis. Instead the agency relied on real world crash data and the test data to estimate rear impact guard effectiveness.

[68] Review of 2009 TIFA data files of light vehicle impacts with PCI into the rear of SUTs indicated that only 55 percent of the fatally injured occupants were restrained.

agency analyzed the NASS–CDS data files for the years 1999–2012. Specifically, the cases examined were light vehicle frontal impacts into the rear of SUTs with a GVWR greater than or equal to 10,000 lb, where the light vehicle underrides the SUT resulting in PCI of the windshield or A-pillar of the light vehicle.

The analysis showed that rear underride crashes of a light vehicle into the rear of SUTs with a non-fatal injury to light vehicle occupants represent only 0.3 percent of the population of all crashes involving SUTs. The analysis estimated annualized weighted injuries of different severity levels in light vehicle impacts into the rear of SUTs resulting in underride with PCI. Table A–17 presents the results of this analysis of 1999–2012 NASS–CDS data files. There were a total of 150 injuries of MAIS 1–5 severity.

TABLE A–17—MAIS [69] INJURY DISTRIBUTION AND ANNUALIZED WEIGHTED ESTIMATES OF INJURIES TO LIGHT VEHICLE OCCUPANTS IN FRONTAL IMPACTS INTO THE REAR OF SUTS WITH UNDERRIDE RESULTING PCI. (1999–2012 NASS–CDS DATA FILES)

| MAIS level | Occupant count | Weighted count | Annualized weighted count | 95% confidence interval for annualized weighted count | Percent of total |
|---|---|---|---|---|---|
| 1 | 13 | 1,398 | 99 | (17, 182) | 66 |
| 2 | 5 | 459 | 33 | (0, 82) | 21.7 |
| 3 | 9 | 145 | 10 | (1, 20) | 6.8 |
| 4 | 2 | 105 | 7 | sample too small | 5 |
| 5 | 0 | 0 | 0 | sample too small | 0 |
| 7 | 1 | 11 | 1 | sample too small | 0.5 |
| Total | 30 | 2,118 | 151 | (57, 245) | 100 |

NHTSA examined each case individually to obtain more information about the injuries. The files showed that many of the injuries shown in Table A–17 were not directly attributable to PCI resulting from underride. For example, one case involved a passenger van with six separate injured occupants. Only two of these injured passengers were seated in the front row were subject to possible injury from PCI. Thus, we believe that Table A–17 likely provides an overestimate of the number of annual light vehicle occupant injuries resulting from SUT underride with PCI.

NHTSA assumed 20 percent effectiveness in preventing injuries in light vehicle crashes with PCI into the rear of SUTs. CMVSS No. 223 guards are effective in mitigating PCI in light vehicle impacts into the rear of SUTs at speeds less or equal to 56 km/h (35 mph), which is about 30 percent of all such impacts with PCI.[70] Additionally, we expect the effectiveness of rear impact guards for preventing injuries to be lower than that for fatalities since occupant injuries could occur from interior vehicle contacts even if PCI is prevented. The 20 percent effectiveness estimate takes into consideration that CMVSS No. 223 requirements are intended for mitigating PCI in light vehicle rear crashes (with greater than 30 percent overlap) at speeds less than or equal to 56 km/h (35 mph). It also takes into account that some injuries are due to circumstances (*e.g.* unrestrained status of occupants, elderly and other vulnerable occupants) which would not be affected by an improved rear impact guard.

Table A–18 presents the target population (estimated fatalities and injuries addressable by CMVSS No. 223 guards on applicable SUTs), the effectiveness estimates, and the estimated benefits of equipping applicable SUTs with CMVSS No. 223 guards.

TABLE A–18—TARGET POPULATION, EFFECTIVENESS, AND BENEFITS ESTIMATES

| | Fatality | MAIS 1 | MAIS 2 | MAIS 3 | MAIS 4 | MAIS 5 |
|---|---|---|---|---|---|---|
| Target population (a) | 19.5 | 99 | 33 | 10 | 7 | 0 |
| Effectiveness (b) | 0.25 | 0.2 | 0.2 | 0.2 | 0.2 | 0.2 |
| Benefits (a × b) | 4.9 | 19.8 | 6.6 | 2 | 1.4 | 0 |

NHTSA monetized the benefits, converting nonfatal injuries into portions of a fatality to calculate the number of equivalent fatalities (equivalent lives saved) (ELS) that are prevented by SUTs with CMVSS No. 223 guards. This involves dividing the value of each injury severity category by the value of fatality to determine how many injuries equal a fatality. Comprehensive values, which include both economic impacts and loss of quality (or value) of life considerations, developed by NHTSA [71] were used to determine the relative value of nonfatal injuries to fatalities. The comprehensive costs and the relative fatality ratio developed by NHTSA for each injury severity are listed in Table A–19. The reported costs are in 2000 dollars, but the relative values between injuries and fatalities would not change if costs are adjusted to present value.

[69] MAIS is the maximum severity injury for an occupant according to the Abbreviated Injury Scale (AIS). MAIS 1 is of minor severity, MAIS 2 of moderate severity, MAIS 3–5 are serious to critical injuries, MAIS 7 are injuries of unknown severity.

[70] As noted earlier, CMVSS No. 223 compliant rear impact guards may mitigate the severity of impact into the rear of SUTs at speeds greater than 56 km/h, but NHTSA is unable to quantify this possible benefit at this time. We seek comment on this issue.

[71] Blincoe, L., et al., The Economic Impact of Motor Vehicle Crashes, 2000, Washington, DC, DOT HS 809 446, May 2002

TABLE A–19—COMPREHENSIVE COSTS AND RELATIVE FATALITY RATIOS

| Injury severity | Comprehensive costs (2000 $) | Relative fatality ratio |
|---|---|---|
| MAIS 1 | 15,017 | 0.0028 |
| MAIS 2 | 157,958 | 0.0436 |
| MAIS 3 | 314,204 | 0.0804 |
| MAIS 4 | 731,580 | 0.1998 |
| MAIS 5 | 2,402,997 | 0.6656 |
| Fatality | 3,366,388 | 1.0000 |

Table A–20 presents the undiscounted ELS using the relative fatality ratios shown in Table A–19.

TABLE A–20—UNDISCOUNTED EQUIVALENT LIVES SAVED (ELS) USING AVERAGE NUMBER OF ANNUALIZED INJURIES IN TABLE A–15

| | Fatality | MAIS 1 | MAIS 2 | MAIS 3 | MAIS 4 | MAIS 5 |
|---|---|---|---|---|---|---|
| Fatality/injury reduced | 4.9 | 19.8 | 6.6 | 2 | 1.4 | 0 |
| Relative fatality ratio | 1 | 0.0028 | 0.0436 | 0.0804 | 0.1998 | 0.6656 |
| ELS | 4.9 | 0.0554 | 0.2878 | 0.1608 | 0.2797 | 0.0000 |
| Total ELS | 5.65 | | | | | |

Since there is some uncertainty in the target population of injuries, the upper bound 95 percent confidence interval estimates of the weighted injury counts shown in Table A–17 were also considered in estimating benefits and total equivalent lives as shown in Table A–21.

TABLE A–21—TARGET POPULATION, BENEFITS, AND UNDISCOUNTED EQUIVALENT LIVES SAVED USING THE UPPER BOUND OF INJURY ESTIMATES IN TABLE A–17.

| | Fatality | AIS 1 | AIS 2 | AIS 3 | AIS 4 | AIS 5 |
|---|---|---|---|---|---|---|
| Fatality+max injury (a) | 19.5 | 182 | 82 | 20 | 7 | 0 |
| Effectiveness (b) | 0.25 | 0.2 | 0.2 | 0.2 | 0.2 | 0.2 |
| Benefits (a x b) | 4.9 | 36.4 | 16.4 | 4 | 1.4 | 0 |
| Relative fatality ratio | 1 | 0.0028 | 0.0436 | 0.0804 | 0.1998 | 0.6656 |
| ELS | 4.9 | 0.1019 | 0.7150 | 0.3216 | 0.2797 | 0.0000 |
| Total ELS | 6.29 | | | | | |

Since fatalities and injuries occur during the lifetime of the vehicle, they are discounted to present value using the discount rates determined in Table A–13. The 3 percent and 7 percent discounted benefits in terms of ELS are presented in Table A–22.

TABLE A–22—3 AND 7 PERCENT DISCOUNTED ELS

| Discount rate | Undiscounted | 3% | 7% |
|---|---|---|---|
| Discount Factors (from Table A–10) | | 0.7741 | 0.5876 |
| Total ELS from Table A–18 (using average injury estimates) | 5.65 | 4.37 | 3.32 |
| Total ELS from Table A–19 (using upper bound of injury estimates) | 6.29 | 4.87 | 3.69 |

The cost per equivalent lives saved was determined using the total costs in Table A–16 and the discounted ELS in Table A–22 and is presented in Table A–23. The cost per ELS is in the range of $106.7 million to $164.7 million.[72]

[72] Note that this analysis uses low and average estimates of the costs, and average and high estimates of the benefits of equipping CMVSS No. 223 compliant guards on applicable SUTs.

TABLE A–23—COSTS PER ELS AT 3 PERCENT AND 7 PERCENT DISCOUNT RATES

| | Benefits (average) | Benefits (high) |
|---|---|---|
| **3 percent discount rate** | | |
| Total cost (low estimate) | $118,658,542 | $106,679,764 |
| Total cost (average estimate) | 152,925,441 | 137,487,362 |
| **7 percent discount rate** | | |
| Total cost (low estimate) | 126,755,433 | 113,959,260 |
| Total cost (average estimate) | 164,743,353 | 148,112,236 |

Guidance from the U.S. Department of Transportation [73] identifies $9.1 million as the value of a statistical life (VSL) to be used for Department of Transportation analyses assessing the benefits of preventing fatalities for the base year of 2012. Per this guidance, VSL in 2014 is $9.2 million. The cost per ELS of a rule to require SUTs to have CMVSS No. 223 guards ($106.7 million to $164.7 million) is far greater than the current VSL ($9.2 million).

**Appendix B to Preamble—Summary of IIHS's Evaluation of Rear Impact Guards**

In 2011, IIHS published results of crash tests in which the front of a model year (MY) 2010 Chevrolet Malibu (a midsize sedan) impacted the rear of trailers equipped with a rear impact guard (full overlap of the rear impact guard with the front end of the Sedan).[74] A 50th percentile male Hybrid III dummy (HIII 50M) was in each of the front outboard seating positions of the Malibu. Two trailer/guard designs (2007 Hyundai and 2011 Wabash trailers) were evaluated. The two guard designs were certified to FMVSS No. 223 requirements, and the Wabash also met the more stringent CMVSS No. 223 requirements. A 2010 Chevrolet Malibu was crashed into a trailer at 56 km/h (35 mph).

The test results showed that the full overlap 56 km/h (35 mph) crash test of the Malibu with the guard of the Hyundai trailer (built to only FMVSS No. 223 requirements) resulted in catastrophic underride (underride almost to the B-pillar) with PCI of the Chevrolet Malibu. On the other hand, the rear impact guard on the Wabash trailer, also certified to meet CMVSS No. 223 requirements, prevented PCI in 35 mph crash tests.

Table B–1 summarizes the results of the initial two IIHS 56 km/h (35 mph) full-width crash tests. In the first test, the 2007 Hyundai guard was ripped from the trailer's rear cross member early in the crash, allowing the Malibu to underride the trailer almost to the B-pillar. The heads of both dummies were struck by the hood of the Malibu as it deformed against the rear surface of the trailer. Under the same test conditions, the main horizontal member of the 2011 Wabash guard bent forward in the center but remained attached to the vertical support members, which showed no signs of separating from the trailer chassis.

TABLE B–1—RESULTS OF IIHS INITIAL ROUND OF 56 KM/H CRASH TESTS OF THE 2010 CHEVROLET MALIBU INTO THE REAR OF TRAILERS

| Conditions | Trailer | Guard performance | Underride | Max. longitudinal A-pillar deformation (cm) |
|---|---|---|---|---|
| 100% overlay | 2007 Hyundai | Attachments failed | Catastrophic | 80 |
| | 2011 Wabash | Good | None | 0 |

Table B–2 summarizes the peak injury measures [75] of the HIII 50M dummies in the front seating positions of the Malibu. For comparison purposes, Table B–2 also presents the HIII 50M dummy injury measures in the full frontal 56 km/h rigid barrier crash test of the 2010 Chevrolet Malibu conducted as part of NHTSA's New Car Assessment Program (NCAP). Head injury measures recorded by the dummies in the tests with severe underride were much higher than those reported for the Malibu's NCAP rigid wall test at the same speed. Chest acceleration and deflection measures were generally higher in tests without PCI than those with PCI.[76] The driver and passenger injury measures in the Malibu full overlap crash test with the Wabash trailer (where the guard prevented PCI) was similar to the injury measures in the Malibu NCAP frontal crash test.

[73] See *http://www.dot.gov/sites/dot.dev/files/docs/VSL%20Guidance_2013.pdf.* The guidance starts with a $9.1 million VSL in the base year of 2012 and then estimates a 1.07 percent increase in VSL each year after the base year to reflect the estimated growth rate in median real wages for the next 30 years.

[74] Details of the tests and test results are available at Brumbelow, M.L., ''Crash Test Performance of Large Truck Rear Impact Guards,'' 22nd International Conference on the Enhanced Safety of Vehicles (ESV), 2011. *http://www-nrd.nhtsa.dot.gov/pdf/esv/esv22/22ESV-000074.pdf.*

[75] HII 50M dummy injury measures are those applicable to current model passenger vehicles as specified in FMVSS No. 208, see *http://www.ecfr.gov/cgi-bin/text-idx?SID=77e2aab5d088f2e9b46d15606090f9b0&node=se49.6.571_1208&rgn=div8.*

[76] When PCI was prevented by the rear impact guard, the accelerations on the vehicle are higher which results in higher chest injury measures.

TABLE B–2—IIHS INITIAL ROUND OF TESTING—INJURY MEASURES OF DUMMIES IN FRONT SEATING POSITIONS OF THE MALIBU

| Test | | | Head resultant acceleration (g) | Head injury criterion (15 ms) | Chest resultant acceleration (3 ms clip, g) | Chest displacement (mm) | Left femur force (kN) | Right femur force (kN) |
|---|---|---|---|---|---|---|---|---|
| Injury Assessment Reference Values ..... | | | | 700 | 60 g | 63 mm | 10(kN) | 10(kN) |
| Full-width ... | Hyundai ..... | Driver ..... | 128 | 754 | 21 | 19 | 0.3 | 0.3 |
| | | Passenger | 107 | 557 | 14 | 20 | 0.1 | 0.1 |
| | Wabash ..... | Driver ..... | 54 | 328 | 36 | 38 | 2.2 | 1.2 |
| | | Passenger | 50 | 319 | 36 | 37 | 2.3 | 1.8 |
| | NCAP (rigid wall). | Driver ..... | 49 | 330 | 43 | 40 | 2.0 | 1.2 |
| | | Passenger | 55 | 389 | 42 | 32 | 0.5 | 0.8 |

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

**Raymond R. Posten,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2015–17973 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 300

**[Docket No. 150122068–5068–01]**

**RIN 0648–BE84**

## International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Effort and Catch Limits and Other Restrictions and Requirements

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

**ACTION:** Proposed rule; proposed specifications.

**SUMMARY:** NMFS proposes and seeks comments on a proposed rule and proposed specifications to be issued under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act). The proposed rule would establish a framework under which NMFS would specify limits on fishing effort and catches, as well as spatial and temporal restrictions on particular fishing activities and other requirements, in U.S. fisheries for highly migratory fish species in the western and central Pacific Ocean (WCPO). NMFS would issue the specifications as needed to implement conservation and management measures adopted by the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC). The proposed rule also would require that certain U.S. fishing vessels operating in the WCPO obtain ''IMO numbers.'' The proposed rule also includes changes to regulations regarding tuna catch retention requirements for purse seine vessels, requirements to install and carry vessel monitoring system (VMS) units, daily reporting requirements, and other changes that are administrative in nature.

Using the proposed regulatory framework described above, NMFS proposes restrictions on the use of fish aggregating devices by purse seine vessels in 2015.

These actions are necessary to satisfy the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, to which it is a Contracting Party.

**DATES:** Comments on the proposed rule or proposed specifications must be submitted in writing by August 7, 2015.

**ADDRESSES:** You may submit comments on the proposed rule, proposed specifications, and the regulatory impact review (RIR) prepared for the proposed rule and proposed specifications, identified by NOAA–NMFS–2015–0072, by either of the following methods:

• *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0072,*

2. Click the ''Comment Now!'' icon, complete the required fields, and

3. Enter or attach your comments.

—OR—

• *Mail:* Submit written comments to Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, might 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 and address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

An initial regulatory flexibility analysis (IRFA) prepared under authority of the Regulatory Flexibility Act is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this document.

Copies of the RIR and the programmatic environmental assessment (PEA) prepared for National Environmental Policy Act (NEPA) purposes are available at *www.regulations.gov* or may be obtained from Michael D. Tosatto, Regional Administrator, NMFS PIRO (see address above).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Michael D. Tosatto, Regional Administrator, NMFS PIRO (see address above) and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Tom Graham, NMFS PIRO, 808–725–5032.

**SUPPLEMENTARY INFORMATION:**

### Background on the Convention

The Convention on the Conservation and Management of Highly Migratory

Fish Stocks in the Western and Central Pacific Ocean (Convention) focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS. The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the WCPO. To accomplish this objective, the Convention established the Commission, which includes Members, Cooperating Non-members, and Participating Territories. The United States of America is a Member. American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands are Participating Territories.

As a Contracting Party to the Convention and a Member of the Commission, the United States is obligated to implement conservation and management measures adopted by the Commission and other decisions of the Commission. The WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the Commission. The WCPFC Implementation Act further provides that the Secretary of Commerce shall ensure consistency, to the extent practicable, of fishery management programs administered under the WCPFC Implementation Act and the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*), as well as other specific laws (see 16 U.S.C. 6905(b)). The Secretary of Commerce has delegated the authority to promulgate regulations under the WCPFC Implementation Act to NMFS. A map showing the boundaries of the area of application of the Convention (Convention Area), which comprises the majority of the WCPO, can be found on the WCPFC Web site at: *www.wcpfc.int/doc/convention-area-map.*

## Implementation of Commission Decisions

To date NMFS has implemented the Commission's decisions through regulations establishing specific requirements, restrictions, and prohibitions. This proposed rule includes several such specific regulations, and it also includes more general regulations that would establish a framework within which NMFS could establish specific requirements and restrictions. Under the framework, NMFS would issue and seek public comment on proposed specifications through announcements in the **Federal Register**, and subsequently issue final specifications through announcements in the **Federal Register**. The specifications would be designed to satisfy the obligations of the United States with respect to particular provisions of conservation and management measures adopted by the Commission. The specifications could include fishing effort limits, catch limits, and other restrictions on particular fishing activities during specific periods and/or in specific areas.

This proposed action is described in the following sections under four categories. The first three categories are regulatory changes, and include: (1) Framework to implement Commission decisions; (2) requirement to obtain IMO number; and (3) other regulatory changes. The last category proposes specifications for the purse seine fishery for 2015; specifically: (4) purse seine fish aggregation device (FAD) restrictions.

## Regulatory Changes

This proposed rule includes several elements, described in detail below, that would be included in the regulations at 50 CFR part 300 Subpart O under three categories. The first would establish a framework to implement Commission decisions, the second would require that certain fishing vessels be issued IMO numbers, and the third would make changes to several existing regulations to implement Commission decisions, some of which are administrative in nature.

### *1. Framework To Implement Commission Decisions*

The proposed rule would establish a framework under which NMFS would specify fishing effort limits, catch limits, and other restrictions and requirements in U.S. fisheries for HMS in the Convention Area to implement particular decisions of the Commission. The framework would not be used to implement all Commission decisions, but rather those that are amenable to the framework process, such as quantitative fishing effort limits and catch limits, and spatial and/or temporal restrictions on specific fishing activities. For the purpose of describing the proposed framework, all such restrictions and requirements are called ''limits.''

*Purpose of framework:* The purpose of a framework is to make it possible to manage fisheries more responsively under conditions requiring ''real time'' management. Such conditions exist in the context of the Convention because the Commission makes decisions that must be implemented by its members quickly—often within 60 days of the decision. The framework proposed here would allow NMFS to implement Commission decisions more rapidly than it would be able to without such a framework. The proposed framework, which would be codified at 50 CFR part 300, subpart O, contains the parameters within which NMFS could take specific actions, including the types of actions it could take, as well as the procedures for doing so. Limits implemented by NMFS under the proposed framework, called ''specifications,'' would be announced in the **Federal Register**. Except when warranted and allowed by law, specifications would be subject to prior public notice and comment. The limits specified under the framework would likely, but not always, be time-limited.

*Types and details of limits:* The types of limits that would be specified under the framework include quantitative limits on the weight or number of fish that may be caught, retained, transshipped, landed, and/or sold; quantitative limits on the amount of fishing effort that may be expended, such as in terms of amounts of time vessels spend at sea or engaged in fishing or engaged in particular fishing activities or other measures of fishing effort, such as the number of gear sets or deployments of gear; and restrictions or prohibitions on particular fishing activities in certain areas and/or periods.

Most recent Commission decisions do not apply in territorial seas or archipelagic waters. Accordingly, the framework regulations would state that any specified limit would not—unless otherwise indicated in the specification—apply in the territorial seas or archipelagic waters of the United States or any other nation, as defined by the domestic laws and regulations of that nation and recognized by the United States. If a Commission decision does apply in territorial seas and/or archipelagic waters, the specification issued by NMFS to implement that decision would specify that it does apply in those areas.

For each limit specified under the framework, NMFS would identify the area and period in which it applies, and as appropriate, the vessel types, gear types, species, fish sizes, and any other relevant attributes to which it applies. For spatial or temporal limits, NMFS would also specify the specific activities that would be restricted in the area or period, and for quantitative limits, NMFS would specify the restrictions

and requirements that would go into effect after the limit is reached and the applicable dates of those restrictions and requirements. These restrictions and requirements could include a prohibition on the catch, retention, transshipment and/or landing of specific species or specific sizes of specific species, a prohibition on the use of specific fishing gears or methods, restrictions on specific fishing activities, and reporting or other requirements.

*Fisheries affected:* In the decisions of the Commission, the three Participating Territories of the United States—American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam—often are treated separately from the United States. For example, the fisheries of the territories often are subject to different controls and limits than are the fisheries of the United States. Therefore, to implement the Commission decisions, it is necessary to distinguish the fisheries from each other because fishing vessels from the Participating Territories are flagged vessels of the United States. The proposed regulatory framework would include criteria to distinguish the fisheries from each other, for the purpose of attributing fishing effort and catch among the fisheries, and determining to which vessels a given restriction applies. The proposed criteria mirror those used in previous regulations issued under the WCPFC Implementation Act. Under the proposed criteria, all fishing activities by U.S. fishing vessels would be considered to be part of a fishery of the United States except as follows:

1. Except as provided under paragraphs 2 and 3 below, if catch is landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, the catch and associated fishing effort are considered part of a fishery of the territory in which it is landed, provided that: (a) It was not caught using purse seine gear; (b) it was not caught in any portion of the U.S. exclusive economic zone (EEZ) other than the portion of the U.S. EEZ surrounding the territory in which it was landed; and (c) it was landed by a fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

2. Except as provided under paragraph 3 below, if catch is made by longline gear by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under 50 CFR 665.801(c), the catch and associated fishing effort are considered part of a fishery of American Samoa, provided that: (a) It was not caught in any portion of the U.S. EEZ other than the portion of the U.S. EEZ surrounding American Samoa; and (b) it was landed by a fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

3. If catch or fishing effort is made by a vessel that is included in a specified fishing agreement under 50 CFR 665.819(c), the catch and associated fishing effort are considered part of a fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, according to the terms of the agreement to the extent the agreement is consistent with 50 CFR 665.819(c) and other applicable laws, provided that: (a) The start date specified in 50 CFR 665.819(c)(9)(i) has occurred or passed; and (b) NMFS has not made a determination under 50 CFR 665.819(c)(9)(iii) that the catch or fishing effort exceeds any limit allocated to the territory that is a party to the agreement.

*Allocation of limits:* Under the proposed framework, NMFS could allocate a Commission-mandated limit among different fisheries sectors, such as among groups of fishing vessels that use different types of fishing gear. For example, given a Commission decision to limit catches of a particular species irrespective of the type of fishing gear used to catch it, NMFS could decide to allocate the limit between the longline and the purse seine fisheries, using the proposed framework to establish specific limits for each of the two fisheries. NMFS could also use the framework to specify limits for particular fisheries even when the Commission-mandated limit is not specific to particular fisheries.

The proposed framework would not be used to allocate Commission-mandated limits among individual fishing vessels (except in the case where a single fishing vessel comprises an entire sector or fishery). This would not preclude NMFS from allocating Commission-mandated limits among individual fishing vessels through separate regulations.

*Framework procedures:* The framework's procedures for specifying limits would be as follows: NMFS would publish in the **Federal Register** a notice of the proposed specification and a request for public comment on the proposed specification. The proposed specification would include all the relevant characteristics of the limit. After consideration of public comment received on the proposed specification, NMFS would publish in the **Federal Register** a notice of the final specification.

*Consequences of limits being reached:* For quantitative limits, NMFS would monitor catch or fishing effort with respect to the specified limit using data submitted in vessel logbooks and other available information. When NMFS estimates or projects that the specified limit has been or will be reached, NMFS would publish a notification to that effect in the **Federal Register**. For quantitative limits, this notification would include an advisement that specific activities will be restricted, and/or that certain requirements will be in place, during a specific period. The notification would specify the restrictions and requirements and the specific activities to which they apply and the start and end dates and times of those restrictions. The start date of the restrictions and requirements would not be earlier than 7 days after the date of filing the closure notice for public inspection at the Office of the Federal Register.

*2. Requirement To Obtain IMO Number*

This element of the proposed rule would apply to all U.S. fishing vessels (including those participating in the fisheries of the U.S. Participating Territories) that are used for commercial fishing for highly migratory fish stocks in the Convention Area either on the high seas or in waters under the jurisdiction of a foreign nation, and the gross tonnage of which is at least 100 GRT (gross register tons) or 100 GT (gross tons) ITC. This requirement would implement a decision of the Commission made in 2013 as part of CMM 2013–10, ''WCPFC Record of Fishing Vessels and Authorization to Fish.'' CMM 2013–10 requires each member of the Commission, including the United States, to maintain a record of its fishing vessels that are authorized to fish in the Convention Area beyond its area of national jurisdiction, and to periodically share the information in its record with the Commission. As reflected in CMM 2013–10, in 2013 the Commission decided to require that an additional piece of information be included in members' records for fishing vessels whose gross tonnage is at least 100 GRT or 100 GT: The International Maritime Organization (IMO) number or Lloyd's Register number. An IMO number, also known as an IMO ship identification number, is the number issued for a ship or vessel under the ship identification number scheme established by the International Maritime Organization. An IMO number is unique and stays with the vessel for its life, regardless of changes in the vessel's flag, name, ownership, or other attributes. As used in CMM 2013–10, ''Lloyd's Register number,'' or ''LR number,'' has the same meaning as IMO

number except that the former refers to the number issued for a vessel that is not required—under IMO agreements—to be issued an IMO number. The administrator of the IMO ship identification number scheme issues both types of numbers using the same numbering scheme. Hereafter in this proposed rule, ''IMO number'' is used to refer to both IMO numbers and Lloyd's Register numbers. Currently, IMO numbers are issued on behalf of the IMO by IHS Maritime, the current administrator of the IMO ship identification number scheme.

For each of the subject fishing vessels described above, this proposed rule would require that the owner of the fishing vessel ensure that an IMO number has been issued for the vessel. Furthermore, satisfying this requirement, if applicable, would be made a prerequisite for eligibility to receive a WCPFC Area Endorsement. The WCPFC Area Endorsement is the endorsement required—along with a high seas fishing permit—for a U.S. fishing vessel to be used for commercial fishing for HMS on the high seas in the Convention Area (see 50 CFR 300.212).

If not already issued, the vessel owner may request that an IMO number be issued by following the instructions given by IHS Maritime, available at: *www.imonumbers.lrfairplay.com/default.aspx*. There is no fee for making such a request or having an IMO number issued, but specific information about the fishing vessel and its ownership and management must be provided to the administrator of the scheme.

Because IHS Maritime is not affiliated with the U.S. government and its actions are outside the control of NMFS and the U.S. government, the proposed rule includes a process for fishing vessel owners to claim to NMFS that they are unable—through no fault of their own—to obtain IMO numbers. NMFS would review the claim, assist the fishing vessel owner as appropriate, and if it determines that it is infeasible or impractical for the fishing vessel owner to comply with the requirement, NMFS would issue an exemption from the requirement for a specific or indefinite amount of time. The exemption would become void if ownership of the fishing vessel changes.

*3. Other Regulatory Changes*

The proposed rule includes several other changes to the existing regulations to enhance clarity and promote efficiency, some of which are administrative in nature.

First, this rule proposes to remove the regulations requiring that U.S. purse seine vessels carry WCPFC observers on fishing trips in the Convention Area (50 CFR 300.223(e)) because the applicable dates of the requirements, which extended through December 31, 2014, have passed. NMFS emphasizes that U.S. purse seine vessels operating in the Convention Area are, and will likely continue to be, subject to requirements to carry WCPFC observers under the current regulations at 50 CFR 300.215. Under this section, U.S. fishing vessels operating in the Convention Area must carry a WCPFC observer when directed to do so by NMFS. NMFS has issued such directions to purse seine vessel owners for 2015, and anticipates doing so in subsequent years.

Second, this rule proposes to revise the definition of ''fishing day'' to remove the reference to 50 CFR 300.223. As currently defined at 50 CFR 300.211, the term applies only to the regulations at 50 CFR 300.223, ''Purse seine fishing restrictions,'' which establish limits on purse seine fishing effort, restrictions on the use of FADs, and other restrictions that apply to purse seine fishing. Because under this proposed rule some restrictions of those types would be established under a new regulatory section devoted to the framework, NMFS proposes to revise the term ''fishing day'' to apply more broadly to all the regulations in 50 CFR part 300 subpart O, but it would continue to be limited to the activities of purse seine fishing vessels. Under this proposed rule, ''fishing day'' would mean, for fishing vessels equipped with purse seine gear, any day in which a fishing vessel searches for fish, deploys a FAD, services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch.

Third, this rule proposes to remove certain elements of the existing regulations that require purse seine vessels in the Convention Area to retain on board all the catch of three species of tuna (bigeye tuna, yellowfin tuna, and skipjack tuna), with certain exceptions (50 CFR 300.223(d)), because they are obsolete. When the first version of these regulations was established in 2009 (final rule published August 4, 2009; 74 FR 38544), the catch retention requirements were made contingent on a continuing determination by NMFS that there are an adequate number of WCPFC observers available for the purse seine vessels of all members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements. This contingency was based on the provisions of the Commission decision being implemented at the time, CMM 2008–01, which included a qualifier that the catch retention requirements were subject to implementation by Commission members of 100 percent observer coverage for purse seine vessels. However, CMM 2014–01, a successor to CMM 2008–01, which is currently in effect, does not include any such qualifier for the catch retention requirements. Thus, this proposed rule would remove paragraphs (1) and (2) of 50 CFR 300.223(d), which contain the contingencies.

Fourth, this rule proposes to make changes to the requirements related to the installation and operation of vessel monitoring system (VMS) units on fishing vessels that are used to fish commercially for HMS on the high seas in the Convention Area. The current regulations at 50 CFR 300.219 require the owner and the operator (*i.e.,* the master or other individual aboard and in charge of the vessel) of any such vessel to expressly authorize NMFS and the Commission to receive and relay transmissions from the VMS unit. NMFS proposes to revise those regulations to provide NMFS and the Commission with an implicit authorization to receive and relay transmissions from the unit. In other words, under the proposed change, an explicit written authorization from the vessel owner and operator would not be needed for NMFS and the Commission to receive and relay transmissions from the VMS unit. NMFS recognizes this requirement is an unnecessary step and therefore is proposing to remove this requirement.

Finally, this rule proposes changes to the requirement for the owners or operators of U.S. purse seine vessels to submit to NMFS daily reports on how many sets were made on FADs. These reports enable NMFS to monitor the number of purse seine sets on FADs (''FAD sets'') to determine if they are within the established limits. The existing requirement, at 50 CFR 300.218(g), only goes into effect when NMFS publishes a notice in the **Federal Register** announcing that it is in effect. NMFS has never issued such a notice because there is currently no limit on the number of FAD sets. NMFS expects that the proposed framework to implement Commission decisions, as described earlier in the preamble, could be used to establish limits on FAD sets in the future. NMFS proposes to revise the daily FAD reporting requirement to make the daily report process more efficient, if FAD limits are put in place. Under the proposed revisions, NMFS would remove the requirement for the publication of a **Federal Register** notice,

and instead allow NMFS to contact vessel owners or operators directly with instructions on the timing and submission of the reports. This would give NMFS more flexibility in specifying when the reports are required. NMFS anticipates directing vessel owners or operators to submit the reports only in periods during which limits on FAD sets are in place. Under the proposed revised reporting requirement, if directed by NMFS, the owner or operator of any fishing vessel of the United States equipped with purse seine gear must report to NMFS, within 24 hours of the end of each day that the vessel is at sea in the Convention Area the number of purse seine sets that were made on FADs during the period and in the format and manner directed by the NMFS Pacific Islands Regional Administrator.

**Proposed Specifications**

Using the framework proposed to be established at 50 CFR 300.227, as described above, NMFS proposes specifications to implement particular provisions of CMM 2014–01, ''Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean,'' adopted at the Commission's Eleventh Regular Session, in December 2014. CMM 2014–01 is a successor to, and is only slightly modified from, CMM 2013–01. These and other WCPFC conservation and management measures are available at: *www.wcpfc.int/conservation-and-management-measures*.

The stated general objective of CMM 2014–01, and several of its predecessor CMMs, is to ensure that the stocks of bigeye tuna, yellowfin tuna, and skipjack tuna in the WCPO are, at a minimum, maintained at levels capable of producing their maximum sustainable yield as qualified by relevant environmental and economic factors. CMM 2014–01 includes specific objectives for each of the three stocks; the common objective is that the fishing mortality rate is to be reduced to or maintained at levels no greater than the fishing mortality rate associated with maximum sustainable yield.

The provisions of CMM 2014–01 apply on the high seas and in EEZs in the Convention Area; that is, they do not apply in territorial seas or archipelagic waters.

CMM 2014–01 went into effect February 3, 2015, and is generally applicable for the 2015–2017 period. The CMM includes provisions for purse seine vessels, longline vessels, and other types of vessels that fish for HMS.

The specifications proposed here are for 2015 only. NMFS anticipates proposing specifications for subsequent years separately, and generally on a year-by-year basis.

The only provisions of the CMM that would be implemented in the specifications proposed here are those related to restrictions on the use of FADs in purse seine fisheries. For reasons of timing, NMFS intends to implement the CMM's provisions for longline fisheries, specifically, the provisions requiring that longline catches of bigeye tuna in the Convention Area in 2015 be limited to specified levels, through a separate rulemaking that would not make use of the framework proposed in this document (the catch limit for 2015 would be established in regulations at 50 CFR 300.224, as done in previous years). However, for years subsequent to 2015, NMFS anticipates using the proposed framework to establish longline bigeye tuna catch limits, as well as to implement other Commission decisions.

Below, the proposed specification related to purse seine FAD restrictions is introduced by describing the relevant provisions of CMM 2014–01, or the ''Commission decision.'' That description is followed by a description of the basis for NMFS' proposed specification, and the proposed specification itself.

*4. Purse Seine FAD Restrictions*

*Commission decision:* Paragraphs 14–19 of CMM 2014–01 require WCPFC members to implement certain restrictions on the use of FADs by purse seine fishing vessels. All the restrictions are to be applied in the Convention Area between the latitudes of 20° N. and 20° S.

Paragraph 14 requires that WCPFC members prohibit specific activities related to FADs by their purse seine vessels during July through September (called a ''FAD prohibition period'' here) in each of 2015, 2016, and 2017. Paragraphs 15–18 require that WCPFC members impose additional restrictions on the use of FADs in 2015, 2016, and 2017, some of which are contingent on further Commission decision-making. Until those decisions are taken, paragraphs 15–18, read in combination, mean that the United States must either add a fourth month, October, to the July–September FAD prohibition period in each of 2015, 2016, 2017, or limit the number of FAD sets in each of those three years to 2,522. Finally, paragraph 18 also requires WCPFC members to prohibit setting on FADs on the high seas in the Convention Area in 2017.

*Basis for proposed specification:* To implement paragraphs 14–19 of CMM 2014–01 for 2015, NMFS proposes restrictions on the use of FADs by U.S. purse seine vessels as follows.

In accordance with paragraph 14 of the CMM, in 2015 there would be a FAD prohibition period from July through September. NMFS has already established this three-month FAD prohibition period in regulations at 50 CFR 300.223(b) (see final rule published December 2, 2014; 79 FR 71327). It would be reiterated in the specification proposed here. In addition, NMFS proposes to implement the first of the two FAD-related options in paragraphs 15–18; that is, adding October to the FAD prohibition period, because NMFS believes it is the more cost-effective of the two options, taking into account the objectives of the CMM, the expected economic impacts on U.S. fishing operations and the nation as a whole, and expected environmental and other effects. The expected environmental and economic effects of both options are described in the PEA, RIR, and IRFA prepared for this proposed specification.

The specific activities that would be prohibited during the FAD prohibition period in 2015 are the same as those during FAD prohibition periods established by NMFS since 2009 (see proposed specifications below).

NMFS does not propose changes to the definition of a FAD, and it would remain as currently defined at 50 CFR 300.211. Although the definition of a FAD does not include a vessel, the restrictions during the FAD prohibition periods would include certain activities related to fish that have aggregated in association with a vessel, or drawn by a vessel, as described below.

*Proposed specification for 2015:* From July 1 through October 31, 2015, owners, operators, and crew of fishing vessels of the United States shall not do any of the following activities in the Convention Area in the area between 20° N. latitude and 20° S. latitude:

(1) Set a purse seine around a FAD or within one nautical mile of a FAD.

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

(3) Deploy a FAD into the water.

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: (a) A FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and (b) A FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

(5) From a purse seine vessel or any associated skiffs, other watercraft or equipment, do any of the following, except in emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage: (a) Submerge lights under water; (b) suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or; (c) direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

**Classification**

The Administrator, Pacific Islands Region, NMFS, has determined that this proposed rule and these proposed specifications are consistent with the WCPFC Implementation Act and other applicable laws, subject to further consideration after public comment.

*Executive Order 12866*

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

*Regulatory Flexibility Act (RFA)*

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule and specifications, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** section of the preamble and in other sections of this **SUPPLEMENTARY INFORMATION** section of the preamble. The analysis follows:

Estimated Number of Small Entities Affected

Small entities include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' The Small Business Administration (SBA) has established size standards for all major industry sectors in the United States, including commercial finfish harvesters (NAICS code 114111). A business primarily involved in finfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $20.5 million for all its affiliated operations worldwide.

The proposed rule and specifications would apply to owners and operators of U.S. fishing vessels used for commercial fishing for HMS in the Convention Area. With the exception of the requirement to obtain an IMO number, the substantive elements of the rule and specifications (*i.e.,* those elements that could bring economic impacts to affected entities) would apply only to purse seine vessels. NMFS estimates that of all the U.S. fishing vessels to which the IMO number requirement would apply, only 7 do not already have an IMO number. Of the 7, 1 is a purse seine vessel, 4 are longline vessels, and 2 are troll vessels.

The number of purse seine vessels that would be affected by the purse seine specifications is the number of vessels licensed under the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (South Pacific Tuna Treaty, or SPTT). The current number of licensed vessels is 37. The maximum number allowed under the SPTT, apart from joint venture licenses, none of which have ever been issued, is 40.

Thus, the fish harvesting entities that would be affected by the proposed rule and specifications include about 37 purse seine vessels, 4 longline vessels, and 2 troll vessels.

Based on (limited) available financial information about the affected fishing vessels and the SBA's small entity size standards for commercial finfish harvesters, and using individual vessels as proxies for individual businesses, NMFS believes that all the affected fish harvesting businesses are small entities. NMFS used average per-vessel returns over recent years to estimate annual revenue because gross receipts and ex-vessel price information specific to the affected vessels are not available to NMFS. For the purse seine fishery, NMFS estimates that the average annual receipts over 2010–2012 for each purse seine vessel were less than the $20.5 million threshold for finfish harvesting businesses (the greatest was about $19 million) based on the catches of each vessel in the purse seine fleet during that period, and indicative regional cannery prices developed by the Pacific Islands Forum Fisheries Agency (available at *https://www.ffa.int/node/425#attachments*). Since 2012, cannery prices have declined dramatically, so the vessels' revenues in 2013 and 2014 have very likely declined as well. For the longline fishery, the ex-vessel value of catches by the Hawaii longline fleet in 2012 was about $87 million. With 129 active vessels in that year, per-vessel average revenues were about $0.7 million, well below the $20.5 million threshold for finfish harvesting businesses.

Recordkeeping, Reporting, and Other Compliance Requirements

The recordkeeping, reporting, and other compliance requirements are discussed below for each of the main elements of the proposed rule and proposed specifications, as described earlier in the **SUPPLEMENTARY INFORMATION** section of the preamble. Fulfillment of these requirements is not expected to require any professional skills that the affected vessel owners and operators do not already possess. The costs of complying with the proposed requirements are described below to the extent possible:

1. Framework To Implement Commission Decisions

The proposed framework would establish administrative procedures for implementing Commission decisions. It would not in itself establish any requirements for owners or operators of fishing vessels or other entities, so it is not discussed further in this IRFA.

2. Requirement To Obtain IMO Number

The requirement to obtain an IMO number would be a one-time requirement; once a number has been issued for a vessel, the vessel would be in compliance for the remainder of its life, regardless of changes in ownership. Most entities that would be required to obtain an IMO number already have them. NMFS estimates that 7 fishing vessels (that are currently in the fishery) would initially be subject to the requirement, and projects that as fishing vessels enter the fishery in the future, roughly two per year would be required to obtain IMO numbers. Completing and submitting the application form (which can be done online and requires no fees) would take about 30 minutes per applicant, on average. Assuming a value of labor of approximately $26 per hour and communication costs of about $1 per application, the (one-time) cost to each entity would be about $14.

3. Other Regulatory Changes

Among the proposed rule's other regulatory changes, only the change to the daily FAD reporting requirements has the potential to bring economic impacts to affected entities. Under the existing regulations, when NMFS triggers the daily FAD reporting requirement through an announcement in the **Federal Register**, the vessel owner or operator has to complete and submit the reports each day while the fishing vessel is at sea in the Convention Area. NMFS currently estimates this cost to be about $1,360 per vessel per year. Under the proposed change, the vessel owner or operator would have to complete and submit the reports only if and when directed by NMFS. Because the proposed purse seine FAD restrictions for 2015 do not include any FAD set limits, it is unlikely that NMFS would direct vessel operators to submit reports for 2015. Thus, the change would potentially reduce the reporting costs to affected purse seine entities during this period.

4. Purse Seine FAD Restrictions

The proposed FAD prohibition period in July–October in 2015 would substantially constrain the manner in which purse seine fishing could be conducted in that period in the Convention Area; vessels would be able to set only on free, or ''unassociated,'' schools.

The costs associated with the FAD restrictions cannot be quantitatively estimated, but the fleet's historical use of FADs can give a qualitative estimate of the costs. In the years 1997–2013, the proportion of sets made on FADs in the U.S. purse seine fishery ranged from less than 30 percent in some years to more than 90 percent in others. Thus, the importance of FAD sets in terms of profits appears to be quite variable over time, and is probably a function of many factors, including fuel prices (unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (*e.g.,* FAD fishing, which tends to result in greater catches of lower-value skipjack tuna and smaller yellowfin tuna and bigeye tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish). Thus, the costs of complying with the FAD restrictions would depend on a variety of factors.

In 2010–2013, the last 4 years for which complete data are available and for which there was 100 percent observer coverage, the U.S. WCPO purse seine fleet made about 39 percent of its sets on FADs. During the months when setting on FADs was allowed, the percentage was about 58 percent. The fact that the fleet has made such a substantial portion of its sets on FADs indicates that prohibiting the use of FADs for four months each year could bring substantial costs and/or revenue losses.

To mitigate these impacts, vessel operators might choose to schedule their routine vessel and equipment maintenance during the FAD prohibition periods. However, the limited number of vessel maintenance facilities in the region might constrain vessel operators' ability to do this. It also is conceivable that some vessels might choose not to fish at all during the FAD prohibition periods rather than fish without the use of FADs. Observations of the fleet's behavior in 2009–2013, when FAD prohibition periods were in effect, do not suggest that either of these responses occurred to an appreciable degree. The proportion of the fleet that fished during the two- and three-month FAD prohibition periods of 2009–2013 did not appreciably differ from the proportion that fished during the same months in the years 1997–2008, when no FAD prohibition periods were in place.

In summary, the economic impacts of the FAD prohibition period in 2015 cannot be quantified, but they could be substantial. Their magnitude would depend in part on market conditions, ocean conditions and the magnitude of any limits on allowable levels of fishing effort in foreign EEZs and on the high seas in the Convention Area.

Disproportionate Impacts

As indicated above, all affected entities are believed to be small entities, thus small entities would not be disproportionately affected relative to large entities. Nor would there be disproportionate economic impacts based on home port.

As indicted above, there could be disproportionate impacts according to vessel type and size and the types of fishing permits held.

Duplicating, Overlapping, and Conflicting Federal Regulations

NMFS has not identified any Federal regulations that duplicate, overlap with, or conflict with the proposed regulations, with the exception of a Federal regulation that duplicates to some extent the daily FAD reporting requirement that would be revised under the proposed rule. Existing regulations at 50 CFR 300.34 require that a record of catch, effort and other information must be maintained on board vessels licensed under the South Pacific Tuna Act, on catch report forms known as Regional Purse Seine Logsheets, or RPLs. The RPLs must be submitted to NMFS within two days of a vessel reaching port. The RPLs include the information that would be required to be reported under this proposed rule, such as, how many FAD sets were made on a given day. However, the timing of the RPL requirement is such that it would not provide NMFS with the information it needs to estimate and project FAD sets with respect to the proposed limit in a timely and reliable manner. For that reason, NMFS established the daily FAD reporting requirement that is duplicative in terms of the substance—but not the timing—of one element of the existing RPL reporting requirement. Under the revision proposed in this rule, that duplication would remain.

Alternatives to the Proposed Provisions

NMFS has sought to identify alternatives that would minimize the proposed provisions' economic impact on small entities (''significant alternatives''). Taking no action could result in lesser adverse economic impacts than the proposed action for many affected entities (but as described above, for some affected entities, the proposed provisions could be more economically beneficial than no-action), but NMFS has determined that the no-action alternative would fail to accomplish the objectives of the WCPFC Implementation Act, including satisfying the international obligations of the United States as a Contracting Party to the Convention, and NMFS does not prefer it for that reason. Alternatives identified for each of the main elements of the proposed rule and proposed specifications are discussed below:

1. Framework To Implement Commission Decisions

The proposed framework would not in itself establish any requirements for owners or operators of fishing vessels or other entities, so would not bring economic impacts. Thus, NMFS has not identified any significant alternatives.

2. Requirement To Obtain IMO Number

NMFS has not identified any significant alternatives to the IMO number requirement that would comport with U.S. obligations to implement the Commission decision regarding IMO numbers.

3. Other Regulatory Changes

None of the other proposed regulatory changes are expected to bring adverse

economic impacts to affected entities, so NMFS has not identified any significant alternatives.

4. Purse Seine FAD Restrictions

NMFS considered in detail one alternative to the proposed restrictions on the use of FADs. Under the alternative, purse seine vessels would be subject to a three-month (July–September) FAD prohibition period in 2015, and a limit of 2,522 FAD sets for the year. This alternative would be consistent with the options available to the United States under CMM 2014–01. The impacts of this alternative relative to those of the proposed action would depend on the total amount of fishing effort available to the U.S. purse seine fleet in the Convention Area in 2015. If total available fishing effort is relatively high, the proposed action would likely allow for more FAD sets than would this alternative, and thus likely cause lesser adverse impacts. The reverse would be the case for relatively low levels of total available fishing effort. For example, given the fleet's historical average FAD set ratio of 58 percent, and assuming an even distribution of sets throughout the year, the estimated ''breakeven'' point between the two alternatives would be 6,502 total available sets for the year. Although the amount of fishing effort that will be available to the fleet in the future, particularly under the SPTT, cannot be predicted with any certainty, 6,502 sets is substantially less than the amounts of fishing effort that have been available to the fleet since it has been operating under the SPTT. For that reason, NMFS expects that the proposed action likely would cause less severe economic impacts on the purse seine fleet and its participants than would this alternative, and NMFS prefers the proposed action for that reason.

*Paperwork Reduction Act*

This proposed rule contains three collection-of-information requirements that are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA).

The first collection has been submitted to OMB for review and approval under control number 0648–0595, ''Western and Central Pacific Fisheries Convention Vessel Information Family of Forms.'' This collection-of-information would be revised to include the requirement for the owners of certain fishing vessels to ensure that IMO numbers are issued for the vessels. This would be a one-time requirement; no renewals or updates would be required during the life of a vessel. A fishing vessel owner would request the issuance of an IMO number by submitting specific information about the vessel and its ownership and management to IHS Maritime, which issues IMO numbers on behalf of the International Maritime Organization. If a fishing vessel requires an exemption, the owner must provide the required information to NMFS. Providing the required information would bring a reporting burden of approximately 30 minutes per response.

The second collection, requirements related to installing and operating vessel monitoring system units, has been approved by OMB under control number 0648–0596, ''Vessel Monitoring System Requirements under the Western and Central Pacific Fisheries Convention.'' Public reporting burden for the VMS requirements is estimated to average 5 minutes per response for the activation reports and on/off reports, 4 hours per response for VMS unit purchase and installation, and 1 hour per response for VMS unit maintenance.

The third collection, the daily FAD reporting requirement, has been approved by OMB under control number 0648–0649, ''Transshipment Requirements under the WCPFC.'' Public reporting burden for the daily FAD report is estimated to average 10 minutes per response.

These estimated response times include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding these burden estimates, or any other aspect of the data collections, including whether the current and/or proposed collections are necessary for the performance of the functions of the agency, the accuracy of the agency's estimates of burden, ways to enhance the utility and clarity of information, and suggestions for reducing the burden, to Michael D. Tosatto, Regional Administrator, NMFS PIRO (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 50 CFR Part 300**

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: July 17, 2015.

**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 300 is proposed to be amended as follows:

## PART 300—INTERNATIONAL FISHERIES REGULATIONS

### Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

■ 1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

**Authority:** 16 U.S.C. 6901 *et seq.*

■ 2. In § 300.211, revise the definition of ''Fishing day'' to read as follows:

**§ 300.211 Definitions.**

* * * * *

*Fishing day* means, for fishing vessels equipped with purse seine gear, any day in which a fishing vessel searches for fish, deploys a FAD, services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch.

* * * * *

■ 3. In § 300.217, add paragraph (c) to read as follows:

**§ 300.217 Vessel identification.**

* * * * *

(c) *IMO numbers.* (1) For the purpose of this section, an IMO number is the unique number issued for a vessel under the ship identification number scheme established by the International Maritime Organization or, for vessels that are not strictly subject to that scheme, the unique number issued by the administrator of that scheme using the scheme's numbering format, sometimes known as a Lloyd's Register number or LR number.

(2) The owner of a fishing vessel of the United States used for commercial fishing for HMS in the Convention Area, either on the high seas or in waters under the jurisdiction of any nation other than the United States, shall request and obtain an IMO number for the vessel if the gross tonnage of the vessel, as indicated on the vessel's current Certificate of Documentation issued under 46 CFR part 67, is at least 100 GRT or 100 GT ITC. An IMO number may be requested for a vessel by following the instructions given by the administrator of the IMO ship identification number scheme; those instructions are currently available on

the Web site of IHS Maritime, at: *www.imonumbers.lrfairplay.com/default.aspx*.

(3) In the event that the owner of a fishing vessel subject to the requirement of paragraph (c)(2) of this section, after following the instructions given by the administrator of the IMO ship identification number scheme, is unable to obtain an IMO number for the fishing vessel, the fishing vessel owner may request an exemption from the requirement from the Pacific Islands Regional Administrator. The request must be sent by mail to the Pacific Islands Regional Administrator or by email to *pir.wcpfc@noaa.gov* and must include the vessel's name, the vessel's official number, a description of the steps taken to request an IMO number, and a description of any responses from the administrator of the IMO ship identification number scheme.

(4) Upon receipt of a request for an exemption under paragraph (c)(3) of this section, the Pacific Islands Regional Administrator will, to the extent he or she determines appropriate, assist the fishing vessel owner in requesting an IMO number. If the Pacific Islands Regional Administrator determines that it is infeasible or impractical for the fishing vessel owner to obtain an IMO number for the fishing vessel, he or she will issue an exemption from the requirements of paragraph (c)(2) of this section for the subject fishing vessel and its owner and notify the fishing vessel owner of the exemption. The Pacific Islands Regional Administrator may limit the duration of the exemption. The Pacific Islands Regional Administrator may rescind an exemption at any time. If an exemption is rescinded, the fishing vessel owner must comply with the requirements of paragraph (c)(2) of this section within 30 days of being notified of the rescission. If the ownership of a fishing vessel changes, an exemption issued to the former fishing vessel owner becomes void.

■ 4. In § 300.218, revise paragraph (g) to read as follows:

**§ 300.218 Reporting and recordkeeping requirements.**

* * * * *

(g) *Daily FAD reports.* If directed by NMFS, the owner or operator of any fishing vessel of the United States equipped with purse seine gear must report to NMFS, for the period and in the format and manner directed by the Pacific Islands Regional Administrator, within 24 hours of the end of each day that the vessel is at sea in the Convention Area, the number of purse seine sets were made on FADs during that day.

* * * * *

■ 5. In § 300.219, revise paragraphs (c)(1) and (5) to read as follows:

**§ 300.219 Vessel monitoring system.**

* * * * *

(c) * * *

(1) *VMS unit.* The vessel owner and operator shall install and maintain on the fishing vessel, in accordance with instructions provided by the SAC and the VMS unit manufacturer, a VMS unit that is type-approved by NMFS for fisheries governed under the Act. The vessel owner and operator shall arrange for a NMFS-approved mobile communications service provider to receive and relay transmissions from the VMS unit to NMFS. NMFS makes available lists of type-approved VMS units and approved mobile communications service providers. NMFS and the Commission are authorized to receive and relay transmissions from the VMS unit.

* * * * *

(5) *Related VMS requirements.* Installing, carrying and operating a VMS unit in compliance with the requirements in part 300 of this title, part 660 of this title, or part 665 of this title relating to the installation, carrying, and operation of VMS units shall be deemed to satisfy the requirements of paragraph (c) of this section, provided that the VMS unit is operated continuously and at all times while the vessel is at sea, the VMS unit is type-approved by NMFS for fisheries governed under the Act, and the specific requirements of paragraph (c)(4) of this section are complied with. If the VMS unit is owned by NMFS, the requirement under paragraph (c)(4) of this section to repair or replace the VMS unit will be the responsibility of NMFS, but the vessel owner and operator shall be responsible for ensuring that the VMS unit is operable before leaving port or starting the next trip.

* * * * *

■ 6. In § 300.222:

■ a. Remove paragraphs (x) and (z);

■ b. Redesignate paragraphs (y) and (aa) as paragraphs (x) and (y), respectively;

■ c. Redesignate paragraphs (bb) through (ww) as (z) through (uu), respectively; and

■ d. Add paragraphs (vv) and (ww) to read as follows:

**§ 300.222 Prohibitions.**

* * * * *

(vv) Fail to obtain an IMO number for a fishing vessel as required in § 300.217(c).

(ww) Fail to comply with any of the limits, restrictions, prohibitions, or requirements specified under § 300.227.

■ 7. In § 300.223, revise paragraph (d), and remove and reserve paragraph (e) to read as follows:

**§ 300.223 Purse seine fishing restrictions.**

* * * * *

(d) *Catch retention.* An owner and operator of a fishing vessel of the United States equipped with purse seine gear must ensure the retention on board at all times while at sea within the Convention Area any bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), or skipjack tuna (*Katsuwonus pelamis*), except in the following circumstances and with the following conditions:

(1) Fish that are unfit for human consumption, including but not limited to fish that are spoiled, pulverized, severed, or partially consumed at the time they are brought on board, may be discarded.

(2) If at the end of a fishing trip there is insufficient well space to accommodate all the fish captured in a given purse seine set, fish captured in that set may be discarded, provided that no additional purse seine sets are made during the fishing trip.

(3) If a serious malfunction of equipment occurs that necessitates that fish be discarded.

(e) [Reserved]

* * * * *

■ 8. Add § 300.227 to subpart O to read as follows:

**§ 300.227 Framework for catch and fishing effort limits.**

(a) *General.* To implement conservation and management measures adopted by the Commission, the Pacific Islands Regional Administrator may specify limits on catch or fishing effort by fishing vessels of the United States in the Convention Area, and other fishing-related restrictions and requirements (collectively called ''limits''). The limits will be designed to satisfy the obligations of the United States with respect to particular provisions of Commission-adopted conservation and management measures. For each specified limit, the Pacific Islands Regional Administrator will specify the area and period in which it applies, and as appropriate, the vessel types, gear types, species, fish sizes, and any other relevant attributes to which it applies. In addition to quantitative limits on catches and fishing effort, the Pacific Islands Regional Administrator may specify areas or periods in which particular fishing activities are restricted or

prohibited, and other fishing-related requirements. For each specified quantitative limit, the Pacific Islands Regional Administrator will also specify the prohibitions and requirements that would go into effect after the limit is reached and the applicable dates of those prohibitions.

(b) *Application in territorial seas and archipelagic waters.* Unless stated otherwise in particular specifications, the limits specified under the framework shall not apply in the territorial seas or archipelagic waters of the United States or any other nation, as defined by the domestic laws and regulations of that nation and recognized by the United States.

(c) *Types of limits.* The types of limits that may be specified under this section include, but are not limited to:

(1) Limits on the weight or number of fish or other living marine resources of specific types and/or sizes that may be caught, retained, transshipped, landed, and/or sold;

(2) Limits on the amount of fishing effort that may be expended, such as the amount of time vessels spend at sea (*e.g.,* days at sea) or engaged in fishing (*e.g.,* fishing days), the amount of time vessels spend engaged in particular fishing activities (*e.g.,* trolling hours), and the quantity of specific fishing activities (*e.g.,* number of hooks set; number of longline sets or purse seine sets; number of purse seine sets made on FADs; number of FADs deployed); and

(3) Areas or periods in which particular activities are restricted or prohibited, such as periods during which it is prohibited to set purse seines on FADs or to use FADs in specific other ways.

(d) *U.S. and territorial fisheries.* For the purpose of distinguishing the fisheries of the United States and the fisheries of the United States territories from each other under limits specified under this section, as needed to implement Commission conservation and management measures, such as to determine the vessels to which a specified limit applies or to attribute catch or fishing effort against a specified limit, all fishing activity of a fishing vessel of the United States, including its catch and fishing effort, is, for the purpose of this section, considered part of a fishery of the United States except as follows:

(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, if catch is landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, the catch and associated fishing effort are considered part of a fishery of the territory in which it is landed, provided that:

(i) It was not caught using purse seine gear;

(ii) It was not caught in any portion of the EEZ other than the portion of the EEZ surrounding the territory in which it was landed; and

(iii) It was landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(2) Except as provided in paragraph (d)(3) of this section, if catch is made by longline gear by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under § 665.801(c) of this title, the catch and associated fishing effort are considered part of a fishery of American Samoa, provided that:

(i) It was not caught in any portion of the EEZ other than the portion of the EEZ surrounding American Samoa; and

(ii) It was landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(3) If catch or fishing effort is made by a vessel that is included in a specified fishing agreement under § 665.819(c) of this title, the catch and associated fishing effort are considered part of a fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, according to the terms of the agreement to the extent the agreement is consistent with § 665.819(c) of this title and other applicable laws, provided that:

(i) The start date specified in § 665.819(c)(9)(i) of this title has occurred or passed; and

(ii) NMFS has not made a determination under § 665.819(c)(9)(iii) of this title that the catch or fishing effort exceeds any limit allocated to the territory that is a party to the agreement.

(e) *Allocation of limits among sectors or vessels.* (1) The Pacific Islands Regional Administrator may allocate a Commission-mandated limit among particular sectors or groups of fishing vessels of the United States, such as for vessels that use different types of fishing gear. In other words, the Pacific Islands Regional Administrator may specify separate limits for different sectors or groups of fishing vessels even when not required to do so under the Commission's conservation and management measures.

(2) The Pacific Islands Regional Administrator may not, under this framework, allocate a Commission-mandated limit among individual fishing vessels of the United States. In other words, the Pacific Islands Regional Administrator may not, under this framework, specify limits for individual fishing vessels of the United States, except in the case where there is only one fishing vessel in a sector or group of fishing vessels that is subject to the limit. This does not preclude NMFS from allocating Commission-mandated limits among individual fishing vessels through other regulations.

(f) *Procedures for specifying limits.* (1) For each specified limit, the Pacific Islands Regional Administrator will publish in the **Federal Register** a notice of the proposed catch or fishing effort limit specification and a request for public comment on the proposed specification, unless exempted under the Administrative Procedure Act, 5 U.S.C. 553. The specification will include the characteristics of the limit and the restrictions that will go into effect if the limit is reached.

(2) For each specified limit that is subject to prior notice and public comment, the Pacific Islands Regional Administrator will consider any public comment received on the proposed specification, and publish in the **Federal Register** a notice of the final catch or fishing effort limit specification, if appropriate.

(g) *Notification of limits being reached.* For quantitative limits, NMFS will monitor catch or fishing effort with respect to the specified limit using data submitted in vessel logbooks and other available information. When NMFS estimates or projects that the specified limit has or will be reached, the Pacific Islands Regional Administrator will publish notification to that effect in the **Federal Register**.

(h) *Prohibitions after limit is reached.* For quantitative limits, the **Federal Register** notice published under paragraph (g) of this section will include an advisement that specific activities will be prohibited during a specific period. The notice will specify the prohibitions and their start and end dates. The start date of the prohibitions may not be earlier than 7 days after the date of filing for public inspection at the Office of the Federal Register the notice to be published under paragraph (g) of this section. The prohibited activities may include, but are not limited to, possessing, retaining on board, transshipping, landing, or selling specific types and/or sizes of fish or other living marine resources, and fishing with specified gear types or methods in specified areas. The Pacific Islands Regional Administrator may, based on revised estimates or projections of catch or fishing effort with respect to specified limits, rescind or modify the prohibitions specified

under this section. The Pacific Islands Regional Administrator will publish notice of any such rescissions or modifications in the **Federal Register**.

[FR Doc. 2015–18050 Filed 7–22–15; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register
Vol. 80, No. 141
Thursday, July 23, 2015

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Proposed Collection; Comment Request—WIC Federal and State Agreements (Form FNS–339)

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections. The proposed information collection is a request for a revision of a currently approved collection of information relating to the reporting burden associated with completing and submitting form FNS–339, the Federal and State Agreement for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC); the WIC Farmers' Market Nutrition Program (FMNP); and/or the Senior Farmers' Market Nutrition Program (SFMNP).

**DATES:** Written comments on this notice must be received on or before September 21, 2015.

**ADDRESSES:** Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Julie Brewer, Chief, Policy Branch, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 520, Alexandria, VA 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 3101 Park Center Drive, Room 520, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Julie Brewer at 703–305–2746.

**SUPPLEMENTARY INFORMATION:**

*Title:* WIC Federal and State Agreements.

*Form Number:* FNS–339.

*OMB Number:* 0584–0332.

*Expiration Date:* November 30, 2015.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* The Federal-State Special Supplemental Nutrition Program Agreement (Form FNS–339) collects information that is used by the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the WIC Farmers' Market Nutrition Program (FMNP), and the Senior Farmers' Market Nutrition Program (SFMNP). At the Federal level, the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), administers the WIC Program and the FMNP under Section 17 of the Child Nutrition Act (CNA) of 1966, as amended, and the SFMNP under 7 U.S.C. 3007. The Federal-State Agreement is the annual contract between USDA and each State agency seeking to operate one or more of the following programs: (1) WIC, (2) FMNP, and (3) SFMNP.

The agreement requires the signature of the Chief State agency official and includes a certification/assurance regarding drug free workplace, a certification regarding lobbying, and a disclosure of lobbying activities. The signed agreement is the contract between USDA and each State agency that administers WIC, FMNP and/or SFMNP, thereby authorizing USDA to release funds to the State agencies for the administration of the Program(s) in the jurisdiction of the State in accordance with the provisions of 7 CFR parts 246, 248, and/or 249. The State agency agrees to accept Federal funds for expenditure in accordance with applicable statutes and regulations and to comply with all provisions of such statutes and regulations.

The number of respondents (agencies administering WIC, FMNP and SFMNP) has decreased from 142 to 124, decreasing the total annual burden from 35.5 to 31 hours.

*Affected Public:* State, Territorial and Tribal Agencies.

*Respondent Type:* The Chief Health Officer of the WIC State agency, or the Chief Agency Official of the FMNP or SFMNP State agency (*e.g.,* a State Commissioner of Agriculture or Agency on Aging), if not administered by the WIC State agency in that State.

*Estimated Number of Respondents:* There will be an estimated 124 respondents. This includes an unduplicated count of respondents that are responsible for the operation of 90 WIC Programs, 48 FMNPs and 51 SFMNPs.

*Estimated Frequency of Responses per Respondent:* 1. There is one response per agency for the Program(s) for which they are involved.

*Estimated Total Annual Responses:* 124 responses.

*Estimated Time per Response:* The estimated time of each response is 15 minutes (.25 hours).

It takes respondents approximately 7.5 minutes (.125 hours) to read and sign the required form. Additionally, respondents spend another 7.5 minutes (.125 hours) making photocopies and filing each year. Therefore, the number of hours spent per each of the 124 reports per year is 0.25 hours totaling the requested 31 burden hours.

*Estimated Total Annual Burden on Respondents:* The total estimated annual burden is 31 hours.

| Affected public | Form | Estimated number of respondents | Number of responses per respondent | Total annual responses | Estimated total hours per response | Estimated total burden hours |
|---|---|---|---|---|---|---|
| State, Territorial, and Tribal Governments | FNS–339 | 124 | 1 | 124 | .25 | 31 |
| Total Burden | | 124 | 1 | 124 | .25 | 31 |

Dated: July 16, 2015.

**Audrey Rowe,**

*Administrator, Food and Nutrition Service.*

[FR Doc. 2015–18063 Filed 7–22–15; 8:45 am]

**BILLING CODE 3410–30–P**

## DEPARTMENT OF AGRICULTURE

### National Institute of Food and Agriculture

### Notice of Intent To Renew a Currently Approved Information Collection

**AGENCY:** National Institute of Food and Agriculture (NIFA), USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Office of Management and Budget (OMB) regulations (5 CFR 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces the National Institute of Food and Agriculture's (NIFA) intention to request approval for the renewal of a currently approved information collection for Children, Youth, and Families at Risk (CYFAR).

**DATES:** Written comments on this notice must be received by September 21, 2015 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

**ADDRESSES:** Written comments concerning this notice and requests for copies of the information collection may be submitted by any of the following methods: Email: *rmartin@nifa.usda.gov;* Fax: 202–720–0857; Mail: Office of Information Technology (OIT), NIFA, USDA, STOP 2216, 1400 Independence Avenue SW., Washington, DC 20250–2216.

**FOR FURTHER INFORMATION CONTACT:** Robert Martin, eGovernment Program Leader; Email: *rmartin@nifa.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Children, Youth, and Families at Risk (CYFAR) Year End Report.

*OMB Number:* 0524–0043.

*Expiration Date of Current Approval:* January 31, 2016.

*Type of Request:* Intent to seek renewal of a currently approved information collection for three years.

*Abstract:* Funding for the Children, Youth, and Families at Risk (CYFAR) community project grants is authorized under section 3(d) of the Smith-Lever Act (7 U.S.C. 341 *et seq.*), as amended, and other relevant authorizing legislation, which provides jurisdictional basis for the establishment and operation of Extension educational work for the benefit of youth and families in communities. The CYFAR funding program supports community-based programs serving children, youth, and families in at-risk environments. CYFAR funds are intended to support the development of high quality, effective programs based on research and to document the impact of these programs on intended audiences. The CYFAR Year End Report collects demographic and impact data from each community site to conduct impact evaluations of the programs on its intended audience.

The collection of information serves several purposes. It allows NIFA staff to gauge if the program is reaching the target audience and make programmatic improvements. This collection also allows program staff to demonstrate the impacts and capacity that is developed in the locales where federal assistance is provided.

The evaluation processes of CYFAR are consistent with the requirements of Congressional legislation and OMB. The Government Performance and Results Act (GPRA) of 1993 (Pub. L. 103–62), the Federal Activities Inventory Reform Act (FAIR) (Pub. L. 105–207), and the Agricultural, Research, Extension and Education Reform Act (AREERA) of 1998 (Pub. L. 105–185), together with OMB requirements, support the reporting requirements requested in this information collection. One of the five Presidential Management Agenda initiatives, Budget and Performance Integration, builds on GPRA and earlier efforts to identify program goals and performance measures, and link them to the budget process. The FAIR Act requires the development and implementation of a system to monitor and evaluate agricultural research and extension activities in order to measure the impact and effectiveness of research, extension, and education programs. AREERA requires a performance evaluation to be conducted to determine whether federally funded agricultural research, extension, and education programs result in public goods that have national or multi-state significance.

The immediate need of this information collection is to provide a means for satisfying accountability requirements. The long term objective is to provide a means to enable the evaluation and assessment of the effectiveness of programs receiving federal funds and to fully satisfy requirements of performance and accountability legislation in GPRA, the FAIR Act, and AREERA.

*Estimate of Burden:* There are currently CYFAR projects in 40 states. Each state and territory is required to submit an annual year end report which includes demographic and impact data on each of the community projects. NIFA estimates the burden of this collection to be 322 hours per response. There are currently 51 respondents, thus making the total annual burden of this collection an estimated 12,880 hours.

*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 will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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.

All responses to this notice will be summarized and included in the request to OMB for approval. All comments will become a matter of public record.

Done in Washington, DC, this 15 day of July, 2015.

**Ann Bartuska,**

*Deputy Under Secretary, Research, Education, and Economics.*

[FR Doc. 2015–18104 Filed 7–22–15; 8:45 am]

**BILLING CODE 3410–22–P**

## DEPARTMENT OF AGRICULTURE

### National Institute of Food and Agriculture

### Notice of Intent to Renew an Existing Information Collection

**AGENCY:** National Institute of Food and Agriculture, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, that implement the Paperwork Reduction Act of 1995, this notice announces the National Institute of Food and Agriculture's (NIFA) intention to request a renewal of an existing information collection.

**DATES:** Written comments on this notice must be received on or before September 21, 2015 to be assured of having their full effect.

**ADDRESSES:** You may submit comments by any of the following methods:

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

*Email: rmartin@nifa.usda.gov Fax:* (202) 720–0857

*Mail:* Office of Information Technology (OIT), NIFA, USDA, STOP 2216; 1400 Independence Avenue SW.; Washington, DC 20250–2216.

**FOR FURTHER INFORMATION CONTACT:** Robert Martin; Records Officer; Email: *rmartin@nifa.usda.gov*.

**SUPPLEMENTARY INFORMATION:**

**Proposed Collection**

*Title:* Veterinary Medicine Loan Repayment Program (VMLRP) Veterinarian Shortage Situation Nomination.

*OMB Number:* 0524–0046.

*Type of Request:* Request renewal of an existing information collection for three years.

*Abstract:* NIFA established a process to designate veterinarian shortage situations for the VMLRP as authorized under section 1415A of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (NARETPA). This information collection applies to Subpart A of 7 CFR part 3431.

*Estimate of Burden:* NIFA used burden estimates from the current REEPORT collection to estimate the burden, but anticipates the transactions for project initiation may be reduced because grant application information will be used to prepopulate many fields. The total annual burden for the non Research Performance Progress Report (RPPR) portion of this collection is 36,760 hours and 23,490 hours for the RPPR.

*Method of Collection:* The information collection (nomination form) is available on the NIFA Web site and nominators are required to make submissions by emailing the completed forms to *vmlrp@nifa.usda.gov*.

*Frequency of Response:* Annual nominations.

*Type of Respondents:* Animal Health Official of each state and insular area.

*Estimated Number of Respondents:* 57 respondents.

*Estimated Number of Responses:* 267 respondents (range of 1 to 8 for each nominating entity).

*Estimated Total Annual Burden on Respondents:* 534 hours.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection. All comments will become a matter of public record. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the VMLRP, including whether the information will have practical utility; (b) the accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information), including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the public burden through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Obtaining a Copy of the Information Collection:* A copy of the information collection and related instructions may be obtained free of charge by contacting Robert Martin by telephone, (202) 401–5924, or by email, *rmartin@nifa.usda.gov*. Information is also available at: *http://www.nifa.usda.gov/vmlrp*.

Done in Washington, DC this 15 day of July, 2015.

**Ann Bartuska,**

*Deputy Under Secretary Research, Education, and Economics.*

[FR Doc. 2015–18061 Filed 7–22–15; 8:45 am]

**BILLING CODE 3410–22–P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Information Collection Activity; Comment Request

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service, an agency of the U.S. Department of Agriculture (USDA) Rural Development mission area, invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

**DATES:** Comments on this notice must be received by July 23, 2015.

**FOR FURTHER INFORMATION CONTACT:** Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Ave. SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Fax: (202) 720–8435. Email: *Thomas.Dickson@wdc.usda.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that will be submitted to OMB for approval. *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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. Comments may be sent to: Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, USDA Rural Development, STOP 1522, 1400 Independence Ave.

SW., Washington, DC 20250–1522. Fax: (202) 720–8435.

*Title:* RUS Form 675, Certification of Authority.

*OMB Control Number:* 0572–0074.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* The Rural Utilities Service (RUS) manages loan programs in accordance with the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*) (RE Act). A major factor in managing loan programs is controlling the advance funds, including assuring that actual borrowers receive their funds. OMB Circular A–123, Management Accountability and Control, provides that information should be maintained on a current basis and that funds should be protected from unauthorized use. The use of RUS Form 675 allows effective control against unauthorized release of funds by providing a list of authorized borrower signatures against which signatures requesting funds are compared. Form 675 allows borrowers to keep RUS up to-date of changes in signature authority and controls release of funds only to authorized borrower representatives.

*Estimate of Burden:* Public reporting for this collection of information is estimated to average .10 hours per response.

*Respondents:* Not-for-profit institutions; Business or other for-profit.

*Estimated Number of Respondents:* 250.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 25.0 hours.

Copies of this information collection can be obtained from Thomas P. Dickson, Program Development and Regulatory Analysis, at (202) 690–1078. Fax: (202) 720–3485. Email: *Thomas Dickson@wdc.usda.gov*.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: July 16, 2015.

**Brandon McBride,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2015–18109 Filed 7–22–15; 8:45 am]

**BILLING CODE**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Information Collection Activity; Comment Request

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the United States Department of Agriculture (USDA) Rural Utilities Service (RUS) invites comments on the following information collections for which the RUS intends to request approval from the Office of Management and Budget (OMB).

**DATES:** Comments on this notice must be received by September 21, 2015.

**FOR FURTHER INFORMATION CONTACT:** Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, USDA Rural Utilities Service, 1400 Independence Avenue SW., STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Fax: (202) 720–8435 or email *Thomas.Dickson@wdc.usda.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies information collections that USDA Rural Development is submitting to OMB for extension.

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology. Comments may be sent to Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, USDA Rural Utilities Service, 1400 Independence Avenue SW., STOP 1522, Room 5164, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Fax: (202) 720–8435 or email *Thomas.Dickson@wdc.usda.gov*.

*Title:* Mergers and Consolidations of Electric Borrowers, 7 CFR 1717, subpart D.

*OMB Control Number:* 0572–0114.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* The Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*), as amended (RE Act) authorizes and empowers the administration of RUS to make and guarantee loans to furnish and improve electric service in rural areas. Due to deregulation and restructuring activities in the electric industry, RUS borrowers may find it advantageous to merge or consolidate to meet the challenges of industry change. This information collection addresses the requirements of RUS policies and procedures for mergers and consolidations of electric program borrowers.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 1.32 hours per response.

*Respondents:* Not for profit institutions; business or other for-profit entities.

*Estimated Number of Respondents:* 10.

*Estimated Number of Responses per Respondent:* 10.6.

*Estimated Total Annual Burden on Respondents:* 140 hours.

Copies of this information collection can be obtained from Rebecca Hunt, Program Development and Regulatory Analysis, at (202) 205–3660, Facsimile: (202) 720–8435, or email: *rebecca.hunt@wdc.usda.gov.* All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record

Dated: July 17, 2015.

**Brandon McBride,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2015–18055 Filed 7–22–15; 8:45 am]

**BILLING CODE 3410–15–P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### Information Collection Activity; Comment Request

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on the following information collections for which RUS intends to request approval from the Office of Management and Budget (OMB).

**DATES:** Comments on this notice must be received by September 21, 2015.

**FOR FURTHER INFORMATION CONTACT:** Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave. SW., STOP 1522, Room 5818, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Fax: (202) 720–8435. Email: *Thomas.Dickson@wdc.usda.gov*.

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies information collections that RUS is submitting to OMB for extension.

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology. Comments may be sent to Thomas P. Dickson, Acting Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, 1400 Independence Ave. SW., Washington, DC 20250–1522. Fax: (202) 690–4492.

*Title:* Use of Consultants Funded by Borrowers, 7 CFR part 1789.

*OMB Control Number:* 0572–0115.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* Section 18(c) of the Rural Electrification Act of 1936 (RE Act), as amended (7 U.S.C. 901 *et seq.*) authorizes RUS to use consultants voluntarily funded by borrowers for financial, legal, engineering and other technical services. Consultants may be used to facilitate timely action on loan applications by borrowers for financial assistance and for approvals required by RUS, pursuant to the terms of outstanding loans, or other wise. RUS may not require borrowers to fund consultants. The provision of section 18(c) may be utilized only at the borrower's request. This collection of information implements RUS policies and procedures for use of consultants funded by RUS Borrowers to facilitate timely action on a borrower's loan application for financial assistance and for RUS approvals.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 2 hours per response.

*Respondents:* Not for profit institutions; business or other for-profit entities.

Estimated Number of Respondents: 1.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2 hours.

Dated: July 16, 2015.

**Brandon McBride,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2015–18060 Filed 7–22–15; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[C–489–502]**

### Circular Welded Carbon Steel Pipes and Tubes From Turkey: Notice of Court Decision Not in Harmony With Final Results of Countervailing Duty Administrative Review and Notice of Amended Final Results of Countervailing Duty Administrative Review; 2011

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** On April 1, 2015, the United States Court of International Trade (the Court) issued *Toscelik II,*[1] which sustained the Final Remand Results [2] that the Department of Commerce (the Department) issued in connection with *Toscelik I,* concerning the Department's final results of administrative review of the countervailing duty order on circular welded carbon steel pipes and tubes from Turkey covering the period of review January 1, 2011, through December 31, 2011 (POR).[3] At issue were benefits that Toscelik Profil ve Sac Endustrisi AS (Toscelik) received in connection with land that Toscelik acquired from the Government of Turkey in 2008 and 2010. In the Final Remand Results, the Department restored the benchmark originally calculated for the 2008 land subsidy in the *2010 CVD Review* [4] and further explained aspects of the benchmark used to value the 2010 land subsidy. In addition, pursuant to a voluntary remand request, the Department examined and corrected, as necessary, duplication errors in the dataset used to calculate the land benchmark.[5]

Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken,*[6] as clarified by *Diamond Sawblades,*[7] the Department is notifying the public that the final judgment in this case is not in harmony with the Department's *Final Results.* The Department is also amending the *Final Results* with respect to Toscelik.

**DATES:** Effective date: April 11, 2015

**FOR FURTHER INFORMATION CONTACT:** John Conniff, 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) 482–1009.

**SUPPLEMENTARY INFORMATION:**

#### Background

On October 30, 2013, the Department issued the *Final Results*.[8] Toscelik challenged certain aspects of the *Final Results* at the Court. In *Toscelik I,* the Court held that the Department may not alter the nonrecurring benefit stream for the 2008 land parcel in a subsequent review—as the Department did in the *Final Results* when it changed the 2008 land subsidy benchmark—absent a demonstration that the original

[1] *See Toscelik Profil Ve SAC Endustrisi A.S.* v. *United States,* Court No. 13–00371, Slip. Op. 15–28 (CIT April 1, 2015) (*Toscelik II*).

[2] *See* Final Results Of Redetermination Pursuant To Court Remand, Court No. 13–00371, Slip Op. 15–28 (February 13, 2015) (Final Remand Results), which is available at *http://enforcement.trade.gov/remands/index.html.*

[3] *See Toscelik Profit ve Sac Endustrisi AS* v. *United States* Court No. 13–00371; Slip Op. 14–126 (CIT October 29, 2014) (*Toscelik I*); *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011,* 78 FR 64916 (October 30, 2013) (*Final Results*) and accompanying Issues and Decision Memorandum (Final IDM).

[4] *See Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review,* 77 FR 46713 (August 6, 2012) (*2010 CVD Review*) and accompanying Issues and Decision Memorandum (2010 CVD Review IDM).

[5] *See* Final Remand Results at 5–12.

[6] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[7] *See Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[8] *See Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011,* 78 FR 64916 (October 30, 2013) (*Final Results*) and accompanying Issues and Decision Memorandum (Final IDM).

determination ''is clearly erroneous and would work a manifest injustice.'' [9] The Court also granted the Department's voluntary remand request to examine possible double-counting errors in the land benchmark dataset, and instructed the Department to supply additional explanation regarding the use of simple averaging, the expansion of the dataset with additional prices, and the use of different benchmark prices for the 2008 and 2010 parcels.[10]

On February 13, 2015, the Department filed the Final Remand Results with the Court, in which it restored the benchmark originally calculated for the 2008 land subsidy in the *2010 CVD Review* and further explained aspects of the benchmark used to value the 2010 land subsidy. In addition, the Department examined and corrected as necessary duplication errors in the dataset used to calculate the benchmark for the 2010 land subsidy.[11] On April 1, 2015, the Court entered judgment sustaining the Final Remand Results.[12]

**Timken Notice**

In *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* 626 F.3d at 1381, the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The Court's judgment in *Toscelik II* sustaining the Final Remand Results constitutes a final decision of the Court that is not in harmony with the Department's *Final Results.* This notice is published in fulfillment of the publication requirement of *Timken.*

**Amended Final Results**

Because there is now a final court decision, the Department is amending the *Final Results* with respect to Toscelik. The revised net subsidy rate for Toscelik during the period January 1, 2011, through December 31, 2011, is as follows:

| Producer/exporter | Total net subsidy rate |
|---|---|
| Toscelik Profil ve Sac Endustrisi A.S. | *de minimis.* |

Since the Court's ruling is final and no party has appealed, the Department will instruct U.S. Customs and Border Protection to assess without regard to countervailing duties unliquidated entries of subject merchandise for the producer/exporter listed above during the POR.

**Cash Deposit Requirements**

Since the *Final Results,* the Department has established a new cash deposit rate for Toscelik.[13] Therefore, the cash deposit rate for Toscelik does not need to be updated as a result of these amended final results.

**Notification to Interested Parties**

This notice is issued and published in accordance with sections 516A(e), 751(a)(1), and 777(i)(1) of the Act.

Dated: July 16, 2015.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2015–18087 Filed 7–22–15; 8:45 am]

**BILLING CODE 3510–DS–P**

[9] *See Toscelik I* at 10.

[10] *Id.* at 14–16.

[11] *See* Final Remand Results at 5–12.

[12] *See Toscelik II* at 6.

[13] *See Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2012 and Rescission of Countervailing Duty Administrative Review,* in Part, 79 FR 51140 (August 27, 2014).

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XD829**

### Taking of Marine Mammals Incidental to Specified Activities; Construction of the East Span of the San Francisco-Oakland Bay Bridge

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

**ACTION:** Notice; issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to California Department of Transportation (CALTRANS) to incidentally harass, by Level B harassment only, four species of marine mammals during activities related to the construction of Pier 3 of the East Span of the San Francisco-Oakland Bay Bridge (SF–OBB) in California

**DATES:** This authorization is effective from July 15, 2015 through July 14, 2016.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

**Availability**

An electronic copy of CALTRANS' application and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the Internet at: *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a

marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

**Summary of Request**

On December 15, 2014, CALTRANS submitted its most recent request to NOAA requesting an IHA for the possible harassment of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina richardsii*), harbor porpoises (*Phocoena phocoena*), and gray whales (*Eschrichtius robustus*) incidental to construction associated with a replacement bridge for the East Span of the SF–OBB, in San Francisco Bay (SFB, or Bay), California.

An IHA was previously issued to CALTRANS for this activity on January 8, 2014 (79 FR 2421; January 14, 2014), based on activities described on CALTRANS' IHA application dated April 13, 2013. That IHA expired on January 7, 2015. Since the construction activity would continue for another two years, CALTRANS requests to renew its IHA. In its IHA renewal request, CALTRANS also states that there has been no change in the scope of work for the SF–OBB Project from what was outlined in its April 13, 2013, IHA application project description, the **Federal Register** notice for the proposed IHA (78 FR 60852; October 2, 2013), and the **Federal Register** notice for the issuance of that IHA (79 FR 2421; January 14, 2014). On November 10, 2003, NMFS issued the first project-related IHA authorizing the take of small numbers of marine mammals incidental to the construction of the SFOBB Project. CALTRANS has been issued a total of seven subsequent IHAs for the SF–OBB Project to date, excluding the application currently under review.

**Description of the Specified Activity**

*Overview*

Construction activities for the replacement of the SF–OBB East Span commenced in 2002 and are expected to be completed in 2016 with the completion of the bike/pedestrian path and eastbound on ramp from Yerba Buena Island. The new east span is now open to traffic.

This stage of the project covered under the IHA will include the mechanical dismantling of marine foundations of the East Span of the bridge as well as the installation of approximately 200 steel piles.

*Dates and Duration*

In-water activities are expected to begin in July 2015. Up to 128 days of pile driving may occur under the IHA. However, the schedule for this project is highly variable. As such, activities covered under this IHA may occur anytime between July 15, 2015 and July 14, 2016 which are the effective dates of the IHA.

*Specific Geographic Region*

The project site is located in San Francisco Bay around the east span of the SFOBB.

*Detailed Description of Activities*

We provided a description of the proposed action in our **Federal Register** notice announcing the proposed authorization (80 FR 23774; April 29, 2015). Please refer to that document; we provide only summary information here.

The proposed action would involve the mechanical dismantling of marine foundations and superstructure components of the East Span of the bridge as well as the installation of approximately 200 steel piles. These piles include 0.45-meter, 0.61-meter, 0.91-meter (18-inch, 24-inch, and 36-inch) diameter pipe piles, and 0.34 meter (14-inch) H-piles on up to 128 days. These piles will be installed in the water to construct temporary supports between Piers E4–E8, which will help with the dismantling process by providing support to the original bridge superstructure as it is taken down. Both vibratory and impact hammers could be used to install pipe piles depending on the substrate. In addition, CALTRANS would remove various bridge superstructures including trusses, road decks, and steel and concrete support towers. The concrete foundation of the bridge would be removed using various mechanical means including saw cutting, flame cutting, mechanical splitting, drilling, pulverizing, and/or hydrocutting. Some of the installed piles may be removed under this IHA, but the contractor has until 2018 to remove all 200 piles.

**Comments and Responses**

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on April 29, 2015 (80 FR 23774). During the 30-day public comment period, the Marine Mammal Commission submitted a letter. The letter is available on the Internet *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* All comments specific to CALTRANS' application that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

*Comment 1:* The Commission noted that during the last authorization marine mammal monitoring did not occur 100 percent of time spent on activities authorized under the IHA. The Commission believes that this results in underestimates the number of takes of marine mammals known to occur in the project area. Monitoring during all in-water sound-producing activities is the only way for CALTRANS and NMFS to be confident that the numbers of marine mammals taken are within the limits authorized and the least practicable impact occurs. For these reasons, the Commission recommended that NMFS require CALTRANS to implement full-time monitoring of Level A and B harassment zones during all in- water sound-producing activities (*i.e.,* pile driving and dismantling activities).

*Response 1:* NMFS does not agree with the Commission's recommendation. NMFS had discussed with CALTRANS specific protocols concerning marine mammal monitoring during its proposed in-water construction activities. As described in detail in the **Federal Register** notice for the previous proposed IHA (79 FR 2421; January 14, 2014) and in CALTRANS' IHA application, CALTRANS' planned construction includes installation of up to 635 temporary falsework piles, 1,925 steel sheet piles, and various mechanical dismantling activities over several years. The extent of the work made it infeasible and costly to implement marine mammal monitoring for Level A and B harassment zones at all times, particularly since some of the Level B harassment zones for vibratory pile driving extend to a radius of 2 km. CALTRANS will monitor the 180 and 190 dB exclusion zones and 160 dB behavioral harassment zone for all unattenuated impact pile driving of H-piles, and the 180 and 190 dB exclusion zones for attenuated impact pile driving and mechanical dismantling, thereby minimizing the possibility of injury. Further, for the purposes of better understand behavioral efforts, CALTRANS will also monitor the 160 dB behavioral harassment zone for 20% of the attenuated impact pile driving, and 120 dB behavioral harassment zone for 20% of vibratory pile driving and mechanic dismantling. Results have been extrapolated in past monitoring reports and will continue to be extrapolated in the future reports. Results of past monitoring reports are

discussed later in this notice in the section in Monitoring and reporting. CALTRANS, however, will not monitor the unattenuated impact pile proofing, which only lasts for less than one minute. Proposed proofing of piles will be limited to a maximum of two piles per day, and for less than 1 minute per pile, administering a maximum of twenty blows per pile. CALTRANS states, and NMFS agrees, that the logistics of scheduling and mobilizing a monitoring team for activities that will last less than one minute is not practical.

*Comment 2:* The Commission noted that each authorization under section 101(a)(5)(D) is a separate undertaking and should contain sufficient information to allow for meaningful public review and comment. The Commission recommended in 2013 that NMFS include in each proposed incidental harassment authorization it publishes in the **Federal Register** a detailed description of the proposed activities rather than referring to previous documents. NMFS agreed and stated that it would provide such detailed descriptions in the **Federal Register** notices moving forward (see 79 FR 2422). However, NMFS' current notice did not include such a description. The Commission again recommends that NMFS include in each proposed incidental harassment authorization published in the **Federal Register** a detailed description of the proposed activities rather than referring to previous documents.

*Response 2:* The CALTRANS bridge project is a multi-year, multi-stage construction initiative. The schedule and scope of this project have undergone multiple revisions. NMFS felt that it captured the essential elements of what is proposed to occur under the proposed authorization under review. NMFS has added additional information to the Detailed Description of Activity section of this **Federal Register** Notice. NMFS will include a comprehensive description of proposed activities in future proposed notices.

*Description of Marine Mammals in the Area of the Specified Activity*

There are four marine mammal species known to occur in the vicinity of the SF–OBB in California which may be subjected to Level B harassment. These are the Pacific harbor seal, California sea lion, gray whale, and harbor porpoise.

We have reviewed CALTRANS' detailed species descriptions, including life history information, for accuracy and completeness and refer the reader to Section 3 of CALTRANS' application as well as the proposed incidental harassment authorization published in the **Federal Register** (80 FR 23774) instead of reprinting the information here. Please also refer to NMFS' Web site (*www.nmfs.noaa.gov/pr/species/mammals*) for generalized species accounts which provide information regarding the biology and behavior of the marine resources that occur in SE Alaska. We provided additional information for the potentially affected stocks, including details of stock-wide status, trends, and threats, in our **Federal Register** notice of proposed authorization (80 FR 23774).

Table 1 lists marine mammal stocks that could occur in the vicinity of the SFOBB project that may be subject to Level B harassment and summarizes key information regarding stock status and abundance. Taxonomically, we follow Committee on Taxonomy (2014). Please see NMFS' Stock Assessment Reports (SAR), available at *www.nmfs.noaa.gov/pr/sars,* for more detailed accounts of these stocks' status and abundance.

TABLE 1—LIST OF MARINE MAMMAL SPECIES UNDER NMFS JURISDICTION THAT OCCUR IN THE VICINITY OF SF–OBB PROJECT AREA *

| Common name | Stock | Scientific name | ESA Status | Stock abundance | Population trend |
|---|---|---|---|---|---|
| Harbor Seal | California | *Phoca vitulina* | Not listed | 30,196 | Decreasing. |
| California sea lion | United States | *Zalophus californianus* | Not listed | 296,750 | Increasing. |
| Gray whale | Eastern North Pacific Stock. | *Eschrichtius robustus* | Not listed | 19,126 | Increasing. |
| Harbor porpoise | San Francisco-Russian River. | *Phocoena phocoena* | Not listed | 9,886 | Stable. |

* Estimated abundance numbers come primarily from NMFS 2014 Pacific Marine Mammal Stock Assessment Report (Carretta et al. 2014).

*Potential Effects of the Specified Activity on Marine Mammals*

The **Federal Register** notice of proposed authorization (80 FR 23744), incorporated here by reference, provides a general background on sound relevant to the specified activity as well as a detailed description of marine mammal hearing and of the potential effects of these construction activities on marine mammals.

*Anticipated Effects on Habitat*

We described potential impacts to marine mammal habitat in detail in our **Federal Register** notice of proposed authorization. In summary, the project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences for individual marine mammals or their populations

*Mitigation*

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, ''and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking'' for certain subsistence uses.

Measurements from similar pile driving events were coupled with practical spreading loss to estimate zones of influence (ZOI; see ''Estimated Take by Incidental Harassment''). ZOIs are often used to establish a mitigation zone around each pile (when deemed practicable) to prevent Level A harassment to marine mammals, and also provide estimates of the areas within which Level B harassment might occur. ZOIs may vary between different diameter piles and types of installation methods. CALTRANS will employ the following mitigation measures:

(a) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, and CALTRANS staff prior to the start of all

pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(b) For in-water heavy machinery work other than pile driving (using, *e.g.,* standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile).

*Monitoring and Shutdown for Pile Driving*

The following measures apply to CALTRANS' mitigation through shutdown and disturbance zones:

*Shutdown Zone*—For all pile driving activities, CALTRANS will establish shutdown zones in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria to define the areas where shutdown of activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury of marine mammals. For impact driving this is 235 meters. For vibratory driving, CALTRANS's activities are not expected to produce sound at or above the 180 dB rms injury criterion. Before the sizes of actual zones are determined based on hydroacoustic measurements, CALTRANS shall establish this zone based on prior measurements conducted during SF–OBB constructions, as described in Table 1 of this document. CALTRANS will also implement a minimum shutdown zone of 10 m radius for all marine mammals around all vibratory pile driving and removal activity and 100 m radius around any dismantling activity. These precautionary measures are intended to further reduce the unlikely possibility of injury from direct physical interaction with construction operations.

*Disturbance Zone*—Disturbance zones are the areas in which SPLs equal or exceed 120 dB rms (for continuous sound) for pile driving installation and removal. This is 2,000 meters for vibratory driving and 1,000 meters for impact driving. Disturbance zones provide utility for monitoring conducted for mitigation purposes (*i.e.,* shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see ''Monitoring and Reporting''). Nominal radial distances for disturbance zones are shown in Table 1.

TABLE 1—TEMPORARY EXCLUSION AND LEVEL B HARASSMENT ZONES FOR VARIOUS PILE DRIVING AND DISMANTLING ACTIVITIES

| Pile driving/dismantling activities | Pile size (m) | Distance to 120 dB re 1 µPa (rms) (m) | Distance to 160 dB re 1 µPa (rms) (m) | Distance to 180 dB re 1 µPa (rms) (m) | Distance to 190 dB re 1 µPa (rms) (m) |
|---|---|---|---|---|---|
| Vibratory Driving | 24 | 2,000 | NA | NA | NA |
| | 36 | 2,000 | NA | NA | NA |
| | Sheet pile | 2,000 | NA | NA | NA |
| Attenuated Impact Driving | 24 | NA | 1,000 | 235 | 95 |
| | 36 | NA | 1,000 | 235 | 95 |
| Unattenuated Proofing | 24 | NA | 1,000 | 235 | 95 |
| | 36 | NA | 1,000 | 235 | 95 |
| Unattenuated Impact Driving | H-pile | NA | 1,000 | 235 | 95 |
| Dismantling | | 2,000 | NA | 100 | 100 |

Once hydroacoustic measurements of pile driving and mechanical dismantling activities have been conducted, CALTRANS shall revise the sizes of the zones based on actual measurements.

*Use of Noise Attenuation Devices*—To reduce impact on marine mammals, CALTRANS shall use a marine pile driving energy attenuator (*i.e.,* air bubble curtain system), or other equally effective sound attenuation method (*e.g.,* dewatered cofferdam) for all impact pile driving, with the exception of pile proofing or impact driving of H-piles.

In order to document observed incidents of harassment, observers record all marine mammal observations, regardless of location. The observer's location, as well as the location of the pile being driven, is known from a GPS. The location of the animal is estimated as a distance from the observer, which is then compared to the location from the pile and the estimated ZOIs for relevant activities (*i.e.,* pile installation and removal). This information may then be used to extrapolate observed takes to reach an approximate understanding of actual total takes.

*Time Restrictions*—Work will occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In addition, all in-water construction will be limited to the period between July 15, 2015 and July 14, 2016.

*Soft Start*—The use of a soft start procedure is believed to provide additional protection to marine mammals by warning or providing a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from the hammer at reduced energy followed by a waiting period. This procedure is repeated two additional times. It is difficult to specify the reduction in energy for any given hammer because of variation across drivers and, for impact hammers, the actual number of strikes at reduced energy will vary because operating the hammer at less than full power results in ''bouncing'' of the hammer as it strikes the pile, resulting in multiple ''strikes.'' The project will utilize soft start techniques for both impact and vibratory pile driving. We require CALTRANS to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a thirty-second waiting period, with the procedure repeated two additional times. For impact driving, we require an

initial set of three strikes from the impact hammer at reduced energy, followed by a thirty-second waiting period, then two subsequent three strike sets. Soft start will be required at the beginning of each day's pile driving work and at any time following a cessation of pile driving of 20 minutes or longer (specific to either vibratory or impact driving).

*Power Down and Shut-down*—Although power down and shut-down measures will not be required for impact pile driving and removal activities due to the nature of sediments in the Bay, these measures will be required for mechanical dismantling activities. The contractor performing mechanical dismantling work will stop in-water noise generation.

*Monitoring*

*Monitoring Protocols*—Monitoring would be conducted before, during, and after pile driving, pile and mechanical dismantling. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown and that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted, except in the case of impact driving when driving will be allowed to continue. Monitoring will take place from thirty minutes prior to initiation through thirty minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than thirty minutes.

The following additional measures apply to visual monitoring:

(1) Monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Qualified observers are trained biologists, with the following minimum qualifications:

(a) Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

(b) Advanced education in biological science or related field (undergraduate degree or higher required);

(c) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);

(d) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(e) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(f) Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

(g) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(2) Prior to the start of pile driving activity, the shutdown zone will be monitored for 30 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the entire shutdown zone is visible (*i.e.*, when not obscured by dark, rain, fog, etc.).

If a marine mammal approaches or enters the shutdown zone during the course of vibratory pile driving operations, activity will be halted and delayed until he animal has voluntarily left and been visually confirmed beyond the shutdown zone. If a marine mammal is seen above water and then dives below, the contractor would wait 15 minutes for pinnipeds and harbor porpoise and 30 minutes for gray whale. If no marine mammals are seen by the observer in that time it will be assumed that the animal has moved beyond the exclusion zone.

Monitoring will be conducted throughout the time required to drive a pile. In impact driving situations, once the pile driving of a segment begins it will not be stopped until that segment has reached its predetermined depth due to the nature of the sediments underlying the Bay. If impact pile driving were to stop and then resumes, it would potentially have to occur for a longer time and at increased energy levels. If marine mammals enter the safety zone after pile driving of a segment has begun, pile driving will continue and marine mammal observers will monitor and record marine mammal numbers and behavior.

(3) The area within the Level B harassment zone shall be conducted by a minimum of three qualified NMFS-approved marine mammal observers (MMOs) placed in strategic locations that will afford visual coverage of these zones. Observers may be stationed on boats, Yerba Buena Island and/or Treasure Island, the new bridge or construction barges. Marine mammal presence within the Level B harassment zone will be monitored, but vibratory and impact pile driving as well as dismantling activity will not be stopped if marine mammals are found to be present. Any marine mammal documented within the Level B harassment zone during vibratory and impact driving or mechanical dismantling activities would constitute a Level B take (harassment), and will be recorded and reported as such.

*Mitigation Conclusions*

We have carefully evaluated CALTRANS' proposed mitigation measures and considered their effectiveness in past implementation to determine whether they are likely to effect the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals, (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation.

Any mitigation measure(s) we prescribe should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

(2) A reduction in the number (total number or number at biologically

important time or location) of individual marine mammals exposed to stimuli expected to result in incidental take (this goal may contribute to 1, above, or to reducing takes by behavioral harassment only).

(3) A reduction in the number (total number or number at biologically important time or location) of times any individual marine mammal would be exposed to stimuli expected to result in incidental take (this goal may contribute to 1, above, or to reducing takes by behavioral harassment only).

(4) A reduction in the intensity of exposure to stimuli expected to result in incidental take (this goal may contribute to 1, above, or to reducing the severity of behavioral harassment only).

(5) Avoidance or minimization of adverse effects to marine mammal habitat, paying particular attention to the prey base, blockage or limitation of passage to or from biologically important areas, permanent destruction of habitat, or temporary disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation, an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of CALTRANS' proposed measures, including information from monitoring of implementation of mitigation measures very similar to those described here under previous IHAs from other marine construction projects, we have determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

*Monitoring and Reporting*

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Any monitoring requirement we prescribe should improve our understanding of one or more of the following:

(1) An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of pile driving that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;

(3) An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

(4) An increased knowledge of the affected species; and

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

CALTRANS has submitted monitoring reports for each of the IHAs that have been issued to them for this project. NMFS received the most recent report on April 28, 2015 covering the IHA issued for the period between January 8, 2014 and January 7, 2015. CALTRANS observed all required monitoring and mitigation protocols during this period. Recorded takes were below permitted levels for all species except for harbor seals. After extrapolating observed numbers during 30 percent of driving activities, CALTRANS determined that 130 harbor seals were taken. This exceeded the allowable take limit of 50 stated in the IHA. CALTRANS reported that most of these seals were within the ZOI in Coast Guard Cove and Clipper Cove north of Yurba Buena Island (YBI) as well as an area 200–400 m off the southeast shore of YBI. Most seals appeared to be foraging and none showed any response to pile driving noise and continued to forage in those areas for up to several hours during pile driving. Based on the high number of harbor seal takes recorded, CALTRANS has requested an increase in takes under the IHA discussed in this **Federal Register** Notice. NMFS has approved an increase in harbor seal takes, which is discussed in a following section.

CALTRANS consulted with NMFS to create a marine mammal monitoring plan as part of the IHA application for this project.

*Visual Marine Mammal Observations*

- CALTRANS will implement onsite marine mammal monitoring for 100% of all unattenuated impact pile driving of H-piles for 180- and 190-dB re 1 μPa exclusion zones (235 meter radius) and 160-dB re 1 μPa Level B harassment zone, attenuated impact pile driving (except pile proofing) and mechanical dismantling for 180- and 190-dB re 1 μPa exclusion zones. CALTRANS will also monitor 20% of the attenuated impact pile driving for the 160-dB re 1 μPa Level B harassment zone (1,000 meter radius), and 20% of vibratory pile driving and mechanic dismantling for the 120-dB re 1 μPa Level B harassment zone (2,000 meter radius).
- Three individuals meeting the minimum qualification previously identified will monitor the Level A and B harassment zones during impact pile driving and the Level B harassment zone during vibratory pile driving and dismantling. Monitors may be stationed on boats, Yerba Buena Island and/or Treasure Island, the new bridge or construction barges.
- During impact pile driving, the area within 235 meters of pile driving activity will be monitored and maintained as marine mammal buffer area in which pile installation will not commence if any marine mammals are observed within or approaching the area of potential disturbance. If a marine mammal approaches or appears within the zone, pile driving of a segment will continue until that segment has reached its predetermined depth due to the nature of the sediments underlying the Bay.
- The area within the Level B harassment threshold for impact driving will be monitored by three field monitors stationed in a positon permitting visual access to the 1,000 meter limit of the Level B harassment zone. Marine mammal presence within this Level B harassment zone, if any, will be monitored, but impact pile driving activity will not be stopped if marine mammals are found to be present. Any marine mammal

documented within the Level B harassment zone during impact driving would constitute a Level B take (harassment), and will be recorded and reported as such.

• During vibratory pile driving, the area within 10 meters of pile driving activity will be monitored and maintained as a marine mammal buffer area in which pile installation will not commence or will be suspended temporarily if any marine mammals are observed within or approaching the area of potential disturbance. The Level B harassment area with a 2,000 meter radius will be monitored by three qualified observers stationed at strategic locations that provide adequate visual coverage of the disturbance zone. The monitoring staff will record any presence of marine mammals by species, will document any behavioral responses noted, and record Level B takes when sightings overlap with pile installation activities.

• During mechanical dismantling activities a 100 meters radius will be monitored and maintained as a marine mammal buffer area in which pile installation will not commence or will be suspended temporarily if any marine mammals are observed within or approaching the area.

• The individuals will scan the waters within each monitoring zone activity using binoculars (Vector 10X42 or equivalent), spotting scopes (Swarovski 20–60 zoom or equivalent), and visual observation.

• The area within which the Level B harassment thresholds could be exceeded during impact pile driving and vibratory pile driving will be monitored for the presence of marine mammals during all impact and vibratory pile driving. Marine mammal presence within these zones, if any, will be monitored but pile driving activity will not be stopped if marine mammals were found to be present. Any marine mammal documented within the Level B harassment zone will constitute a Level B take, and will be recorded and used to document the number of take incidents.

• If waters exceed a sea-state which restricts the observers' ability to make observations within the marine mammal buffer zone (the 235 meter radius) (*e.g.*, excessive wind or fog), impact pile installation will cease until conditions allow the resumption of monitoring.

• The waters will be scanned for 30 minutes before, during, and 30 minutes after any and all pile driving and removal activities.

• If marine mammals enter or are observed within the designated marine mammal buffer zone (the 235m radius) during or 30 minutes prior to pile driving, the monitors will notify the on-site construction manager to not begin until the animal has moved outside the designated radius.

• If a marine mammal approaches the Level A harassment zone prior to initiation of pile driving, CALTRANS cannot commence activities until the marine mammal (a) is observed to have left the Level A harassment zone or (b) has not been seen or otherwise detected within the Level A harassment zone for 30 minutes.

• The waters will continue to be scanned for at least 30 minutes after pile driving has completed each day, and after each stoppage of 30 minutes or greater.

*Data Collection*

We require that observers use approved data forms. Among other pieces of information, CALTRANS will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, CALTRANS will attempt to distinguish between the number of individual animals taken and the number of incidents of take. We require that, at a minimum, the following information be collected on the sighting forms:

• Date and time that monitored activity begins or ends;

• Construction activities occurring during each observation period;

• Weather parameters (*e.g.*, percent cover, visibility);

• Water conditions (*e.g.*, sea state, tide state);

• Species, numbers, and, if possible, sex and age class of marine mammals;

• Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;

• Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;

• Locations of all marine mammal observations; and

• Other human activity in the area.

*Reporting*

CALTRANS will notify NMFS prior to the initiation of the pile driving and dismantling activities for the removal of the existing east span. NMFS will be informed of the initial sound pressure level measurements for both pile driving and foundation dismantling activities, including the final exclusion zone and Level B harassment zone radii established for impact and vibratory pile driving and marine foundation dismantling activities.

Monitoring reports will be posted on the SF–OBB Project's biological mitigation Web site (*www.biomitigation.org*) on a weekly basis if in-water construction activities are conducted. Marine mammal monitoring reports will include species and numbers of marine mammals observed, time and location of observation and behavior of the animal. In addition, the reports will include an estimate of the number and species of marine mammals that may have been harassed as a result of activities.

CALTRANS will provide NMFS with a draft monitoring report within 90 days of the conclusion of the proposed construction work. This report will detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report must be submitted within 30 days after receipt of comments.

*Estimated Take by Incidental Harassment*

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: ''. . . any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

All anticipated takes would be by Level B harassment resulting from impact and vibratory pile driving/removal and involving temporary changes in behavior. Injurious or lethal takes are not expected due to the expected source levels and sound source characteristics associated with the activity, and the planned mitigation and monitoring measures are expected to further minimize the possibility of such take.

Given the many uncertainties in predicting the quantity and types of impacts of sound in every given situation on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound, based on the available science.

This practice potentially overestimates the numbers of marine mammals taken for stationary activities, as it is likely that some smaller number of individuals may accrue a number of incidences of harassment per individual than for each incidence to accrue to a new individual, especially if those individuals display some degree of residency or site fidelity and the impetus to use the site (*e.g.*, because of foraging opportunities) is stronger than the deterrence presented by the harassing activity.

CALTRANS has requested authorization for the incidental taking of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina richardsii*), harbor porpoises (*Phocoena phocoena*), and gray whales (*Eschrichtius robustus*) incidental to construction associated with a replacement bridge for the East Span of the SF–OBB, in San Francisco Bay (SFB, or Bay), California.

In order to estimate the potential incidents of take that may occur incidental to the specified activity, we must first estimate the extent of the sound field that may be produced by the activity and then consider in combination with information about marine mammal density or abundance in the project area. We provided detailed information on applicable sound thresholds for determining effects to marine mammals as well as describing the information used in estimating the sound fields, the available marine mammal density or abundance information, and the method of estimating potential incidences of take, in our **Federal Register** notice of proposed authorization (80 FR 23744; March 20, 2015).

Table 1 illustrated the 190 dB rms Level A harassment (injury) threshold for underwater noise for pinniped species could be exceeded at a distance of up to approximately 95 meters during impact pile driving activities, and the 180 dB rms Level A harassment (injury) threshold for cetacean species could be exceeded at a distance of up to approximately 235 meters during impact pile driving activities. Additionally, the 160 dB rms Level B harassment (behavioral disruption) threshold for impulsive source underwater noise for pinniped and cetacean species could be exceeded at a distance of up to approximately 1,000 meters during impact pile driving and the 120 dB Level B harassment threshold could be exceeded at 2,000 meters. Note that the actual area insonified by pile driving activities is significantly constrained by local topography relative to the identified threshold radii.

Marine mammal density estimates were based on marine mammal monitoring reports and marine mammal observations made during pile driving activities associated with the SF–OBB construction work authorized under prior IHAs. Pacific harbor seal densities were calculated and described in the **Federal Register** notice of proposed authorization (80 FR 23744; March 20, 2015). During monitoring for the East Span of the SF–OBB, there were 657 observations of harbor seals made during over 210 days from 2000 to 2014. Two densities were calculated because of the higher density of seals observed foraging near YBI and Treasure Island. Foraging seals tended to remain in the area for several hours while transiting seals passing under the SF–OBB were only observed 1–2 times. Therefore, densities east of Pier E3–E8 are much lower than the density than west of Pier E3.

The area of 2,000-meter threshold for the Level B behavioral harassment zone is 12.57 $km^2$ (12,570,000 $m^2$). Half of that area to the west of Piers E3–E8 (6.29 $km^2$) would have a higher density of harbor seals which are frequently observed in the three foraging areas. The range of seals observed within the foraging areas is 0–8 seals and the mean is 3.6 seals per day (combined for all three areas). The other half of the Level B harassment zone would have a lower density due to the infrequent observations of seals moving through the area. In addition the density of seals will vary with season therefore a density for the spring-summer season when seals spend more time onshore as they are pupping and molting and the fall/winter season.

This estimate of 460 harbor seal takes is above the number of seals that have been permitted for take in previous IHAs that have been issued related to this project. However, the estimate presented here represents a more complete picture of the marine mammal density in the project area and the potential for exposure to project activities.

California sea lions are based on CALTRANS observations over 15 years of monitoring on the Bay Bridge, 2000 to 2014, including baseline monitoring in 2003 before bridge construction began. It should be noted that monitoring was not year round and there was little monitoring required during the period of mid-2010 to mid-2013 due to no pile driving. During 2013 and 2014, there was a large increase in pile driving to construct temporary falsework and for mechanical dismantling so the current estimates of animals do include recent monitoring. California sea lion numbers fluctuate from year to year. For example, in 2014 no sea lions were observed in the harassment zone while in 2004, 36 sea lions were recorded near the Bay Bridge construction areas during pile driving. The larger number of sea lions in 2004 was probably related to a run of herring that was near the Bay Bridge and sea lions were observed feeding on dense aggregations of herring in the area. Therefore, an allowed take 50 sea lions is considered a conservative estimate.

Harbor porpoises were observed near the tower of the new Bay Bridge in 2013 and 2014. Each of those was a single animal and far out of their normal range for the Bay. If 1 or 2 pods of porpoises were to enter the construction area, then there might be up to 6 takes (pod size of 2–3 porpoises). Based on this NMFS believes that an allowed take of up to 10 harbor porpoises is conservative, but reasonable.

Gray whale take estimates were based on sighting reports collected by the Marine Mammal Center in Sausalito (the NMFS stranding facility for northern California). The Center collects whale sightings information from the general public, researchers, and the U.S. Coast Guard. For the gray whale, 5 permitted takes is likely to be a conservative, but reasonable, estimate as they have never been observed within any of the behavioral zones during monitoring. Additionally, there has only been one report of a gray whale swimming under the original East Span of the Bay Bridge a number of years ago.

Based on these results, and accounting for a certain level of uncertainty regarding the next phase of construction, NMFS concludes that at maximum 460 harbor seals, 50 California sea lions, 10 harbor porpoises, and 5 gray whales could be exposed to noise levels that could cause Level B harassment as a result of the CALTRAN' SF–OBB construction activities. These numbers represent 1.5%, <0.01%, <0.01% and 0.10% of the California stock harbor seal, the U.S. stock California sea lion, the Eastern North Pacific stock gray whale, and the San Francisco-Russian River stock harbor porpoise, respectively (Table 2).

TABLE 2—ESTIMATES OF THE POSSIBLE MAXIMUM NUMBERS OF MARINE MAMMALS TAKEN BY LEVEL B HARASSMENT AS A RESULT OF THE PROPOSED CALTRANS' SF–OBB CONSTRUCTION ACTIVITIES

| Species | Stocks | Level B takes | Percent population |
|---|---|---|---|
| **Pinnipeds** | | | |
| Harbor seal | California | 460 | 1.5 |
| California sea lion | U.S. | 50 | <0.01 |
| **Cetaceans** | | | |
| Gray whale | Eastern North Pacific | 5 | <0.01 |
| Harbor porpoise | San Francisco-Russian River | 10 | 0.10 |

**Analyses and Determinations**

*Negligible Impact Analysis*

Negligible impact is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival'' (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, the discussion of our analyses applies to all the species listed in Table 2, given that the anticipated effects of this pile driving project on marine mammals are expected to be relatively similar in nature. There is no information about the size, status, or structure of any species or stock that would lead to a different analysis for this activity.

Pile driving, pile removal and mechanical dismantling activities associated with the construction of a replacement bridge for the East Span of the SF–OBB, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated from pile driving. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving and removal are happening.

No injury, serious injury, or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The known potential for serious injury or mortality is minimized through the construction method and the implementation of the planned mitigation measures. Both vibratory hammers and impact hammers will be utilized based on local substrate conditions. Vibratory driving will be used wherever conditions are favorable for this technique. Vibratory driving does not have significant potential to cause injury to marine mammals due to the relatively low source levels produced and the lack of potentially injurious source characteristics. Impact pile driving produces short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks. When impact driving is necessary, required measures (implementation of shutdown zones) significantly reduce any possibility of injury. Given sufficient ''notice'' through use of soft start (for impact driving), marine mammals are expected to move away from a sound source that is annoying prior to its becoming potentially injurious. The likelihood that marine mammal detection ability by trained observers is high under the environmental conditions described for this area of San Francisco Bay further enables the implementation of shutdowns to avoid injury, serious injury, or mortality.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.*, Thorson and Reyff, 2006; HDR, 2012; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. In response to vibratory driving, pinnipeds (which may become somewhat habituated to human activity in industrial or urban waterways) have been observed to orient towards and sometimes move towards the sound. The pile driving activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in fitness for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the project area while the activity is occurring.

CALTRANS' proposed activities are localized and of short duration. The entire project area is limited to the East Span of the bridge and its immediate surroundings. The project will require the installation of a total of approximately 200 piles. Impact driving of pipe piles will be limited to a maximum of 20 piles per day and proofing of the pipe piles will not exceed a maximum of 2 piles per day—each pile would be driven with no more than 20 blows during a one-minute

period. Total hammer time is scheduled to occur over 128 days between July 15, 2015 and July 14, 2016. These localized and short-term noise exposures may cause brief startle reactions or short-term behavioral modification by the animals. These reactions and behavioral changes are expected to subside quickly when the exposures cease. Moreover, the proposed mitigation and monitoring measures are expected to reduce potential exposures and behavioral modifications even further. Additionally, no important feeding and/or reproductive areas for marine mammals are known to be near the proposed action area. Therefore, the take resulting from this CALTRANS project is not reasonably expected to and is not reasonably likely to adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival and, therefore, will have a negligible impact on the affected species or stocks.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the ''Anticipated Effects on Marine Mammal Habitat'' section. The project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior with no significant adverse impacts on habitat and; (3) the presumed efficacy of the proposed mitigation measures in reducing the effects of the specified activity to the level of least practicable impact. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activity will have only short-term effects on individuals. The specified activity is not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS finds that the total marine mammal take from CALTRANS' construction of a replacement bridge for the East Span of the SF–OBB will have a negligible impact on the affected marine mammal species or stocks.

*Small Numbers Analysis*

Table 2 demonstrates the number of animals that could be exposed to received noise levels that could cause Level B behavioral harassment for the proposed work associated with the replacement bridge construction. These numbers represent 1.5%, <0.01%, <0.01% and 0.10% of the California stock harbor seal, the U.S. stock California sea lion, the Eastern North Pacific stock gray whale, and the San Francisco-Russian River stock harbor porpoise, respectively (Table 3).

The numbers of animals authorized to be taken for all species are small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. For pinnipeds occurring in the vicinity of the SF–OBB project, there will almost certainly be some overlap in individuals present day-to-day, and these takes are likely to occur only within some small portion of the overall regional stock, such as the number of harbor seals that regularly use nearby haul-out rocks.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the proposed action, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

*Impact on Availability of Affected Species for Taking for Subsistence Uses*

There are no subsistence uses of marine mammals in the proposed project area; and, thus, no subsistence uses impacted by this action.

*Endangered Species Act (ESA)*

No marine mammal species listed under the ESA are expected to be affected by these activities. Therefore, we have determined that a section 7 consultation under the ESA is not required.

*National Environmental Policy Act (NEPA)*

NMFS' prepared an Environmental Assessment (EA) for the take of marine mammals incidental to construction of the East Span of the SF–OBB and made a Finding of No Significant Impact (FONSI) on November 4, 2003. Due to the modification of part of the construction project and the mitigation measures, NMFS reviewed additional information from CALTRANS regarding empirical measurements of pile driving noises for the smaller temporary piles without an air bubble curtain system and the use of vibratory pile driving. NMFS prepared a Supplemental Environmental Assessment (SEA) and analyzed the potential impacts to marine mammals that would result from the modification of the action. A Finding of No Significant Impact (FONSI) was signed on August 5, 2009. A copy of the SEA and FONSI is available upon request.

**Authorization**

As a result of these determinations, we have issued an IHA to CALTRANS for conducting the described activities related to the construction of the East Span of the San Francisco-Oakland Bay Bridge, from July 15, 2015 through July 14, 2016 provided the previously described mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 16, 2015.

**Perry Gayaldo,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

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**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XE040**

### Atlantic Coastal Fisheries Cooperative Management Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

**ACTION:** Notice; request for comments.

**SUMMARY:** The NMFS Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, has made a preliminary determination that an Exempted Fishing Permit renewal application from the Commercial

Fisheries Research Foundation contains all of the required information and warrants further consideration; and that the activities authorized under the Exempted Fishing Permit would be consistent with the goals and objectives of the Interstate Fisheries Management Plan for American lobster. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Coastal Fisheries Cooperative Management Act require publication of this notification to provide interested parties the opportunity to comment on Exempted Fishing Permit applications.

**DATES:** Comments must be received on or before August 7, 2015.

**ADDRESSES:** Written comments on this notice may be submitted by the following methods:

• *Email to: nmfs.gar.efp@noaa.gov.* Include in the subject line ''Comments on CFRF Lobster EFP.''

• *Mail to:* John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on CFRF Lobster EFP.''

**FOR FURTHER INFORMATION CONTACT:** Cynthia Hanson, NOAA Affiliate, 978–281–9180.

**SUPPLEMENTARY INFORMATION:** The Commercial Fisheries Research Foundation (CFRF) submitted a complete application for a 2-year renewal to an existing Exempted Fishing Permit (EFP) on June 25, 2015. The purpose of this study is to test electronic data collection while conducting research on the abundance and distribution of juvenile American lobster. Funding for this study will be provided through a NOAA grant, as part of the Saltonstall-Kennedy Grant Program. The EFP proposes to use a total of 36 ventless, untagged traps in Lobster Management Areas 2 and 3; covering statistical areas 464, 465, 512, 515, 522, 525, 526, 537, 561, 562, 613, 615, and 616. Maps depicting these areas are available on request.

The study would take place during regular fishing activity on 12 federally permitted commercial fishing vessels; 6 vessels in each of the two management areas. Sampling would occur during scheduled fishing trips on each vessel once per week in Area 2, and once every 10 days in Area 3. If an EFP extension is granted, there would be an additional 36 modified, untagged traps in the water during any given time, for a period of two years. Each participating vessel would have up to three modified traps attached to a regular trap trawl. Modifications to a conventional lobster trap would include a closed escape vent, single parlor, and smaller mesh size and entrance head.

The CFRF is requesting exemptions from the following Federal lobster regulations:

• Gear specifications in 50 CFR 697.21(c) to allow for closed escape vents, and smaller mesh and entrance heads;

• Trap limits as listed in 50 CFR 697.19(b) for Area 2, and 50 CFR 697.19(c) for Area 3, to be exceeded by 3 additional traps per fishing vessel for a total of 36 additional traps;

• Trap tag requirements, as specified in 50 CFR 697.19(i), to allow for the use of untagged traps; and

• Possession restrictions in 50 CFR 697.20(a), to allow for onboard biological sampling of juvenile, v-notched, and egg-bearing lobsters.

All lobsters caught by modified gear would remain onboard for a short period of time to allow for biological sampling and data collection, after which they would be returned to the water. Biological information will be collected on both kept and discarded lobsters, including: Carapace length; sex; and presence of eggs, v-notches, and shell disease. This study would use several data recording devices, including electronic calipers for length measurements, video cameras, and waterproof tablets. Once the vessels return to shore, data would be relayed to a central database and made available via the Atlantic Coastal Cooperative Statistic Program.

If approved, CFRF may request minor modifications and extensions to the EFP throughout the study period. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: July 17, 2015.

**Emily H. Menashes,**

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

[FR Doc. 2015–18054 Filed 7–22–15; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XD977**

### Taking of Marine Mammals Incidental to Specified Activities: Mukilteo Multimodal Project Tank Farm Pier Removal

**AGENCY:** National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice; proposed incidental harassment authorization; request for comments and information.

**SUMMARY:** Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an authorization to WSF to incidentally take, by harassment, small numbers of marine mammals for a period of 1 year.

**DATES:** Comments and information must be received no later than August 24, 2015.

**ADDRESSES:** Comments on the application should be addressed to Robert Pauline, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *itp.pauline@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 25-megabyte file size.

*Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application may be obtained by writing to the address specified above or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for a one-year authorization to incidentally take small numbers of marine mammals by harassment, provided that there is no potential for serious injury or mortality to result from the activity. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

**Summary of Request**

On November 6, 2014, Washington State Department of Transportation Ferries System (WSF) submitted a request to NOAA requesting an IHA for the possible harassment of small numbers of eight marine mammal species incidental to construction work associated with the Mukilteo Ferry Terminal replacement project in Mukilteo, Snohomish County, Washington. The new terminal will be located to the east of the existing location at the site of the former U.S. Department of Defense Fuel Supply Point facility, known as the Tank Farm property, which includes a large pier extending into Possession Sound (Figure 1–2 and 1–3 of the WSF IHA application which may be found at URL: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm*). Completion of the entire project will occur over 4 consecutive years. WSF plans to submit an IHA request for each consecutive year of construction. WSF previously received an IHA on July 25, 2014 (79 FR 43424) which was active from September 1, 2014 through August 31, 2015. However, the project was delayed for one year. The IHA application currently under review would cover work from September 1, 2015 through August 31, 2016. All existing pile work will be done under these two successive permits. Due to NMFS, U.S. Fish and Wildlife Service (USFWS), and Washington State Department of Fish and Wildlife (WDFW) in-water work timing restrictions to protect salmonids listed under the Endangered Species Act (ESA), planned WSF in-water construction is limited each year to August 1 through February 15. For removal of the Tank Farm Pier, in-water construction is planned to take place between August 1, 2015 and February 15, 2016; and continue in August 1, 2016 to February 15, 2017 if pier removal and dredging is not completed during the 2015/16 work window. A new MMPA IHA application will be submitted for subsequent construction years for this project.

The action discussed in this document is based on WSF's November 6, 2014 IHA application. NMFS is proposing to authorize the Level B harassment of the following marine mammal species: Pacific harbor seal (*Phoca vitulina richardsi*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), killer whale (*Orcinus orca*), gray whale (*Eschrichtius robustus*), and humpback whale (*Megaptera novaeangliae*)

*Specific Geographic Region*

The Mukilteo Tank Farm is located within the city limits of Mukilteo and Everett, Snohomish County, Washington. The property is located on the shore of Possession Sound, an embayment of the inland marine waters of Puget Sound (see Figures 1–1 and 1–2 in the Application).

**Description of the Specified Activity**

The Mukilteo Tank Farm Pier, which has not been used for fuel transfers since the late 1970s, covers approximately 138,080 $ft^2$ (3.17 acres) over-water and contains approximately 3,900 12-inch diameter creosote-treated piles. Demolition of the pier will remove approximately 7,300 tons of creosote-treated timber from the aquatic environment. Demolition will take approximately ten months over two in-water work windows. Removal of the pier will occur from land and from a barge containing a derrick, crane and other necessary equipment.

Piles will be removed with a vibratory hammer or by direct pull using a chain wrapped around the pile. The crane operator will take measures to reduce turbidity, such as vibrating the pile slightly to break the bond between the pile and surrounding soil, and removing the pile slowly; or if using direct pull, keep the rate at which piles are removed low enough to meet regulatory turbidity limit requirements. If piles are so deteriorated they cannot be removed using either the vibratory or direct pull method, the operator will use a clamshell to pull the piles from below the mudline, or cut at or just below the mudline (up to one foot) using a hydraulic saw.

Pile removal and demolition of creosote-treated timber elements of the Tank Farm Pier will take place between August 1 and February 15. All work will occur in water depths between 0 and −30 feet mean lower-low water.

The first year of construction activities for the Mukilteo Multimodal Project is limited to removing the Tank Farm Pier. The noise produced by the proposed vibratory pile extraction may impact marine mammals. Direct pull and clamshell removal are not expected to exceed noise levels that would injure or harass marine mammals. These extraction methods are described below.

*Vibratory Hammer Removal*

Vibratory hammer extraction is a common method for removing timber piling. A vibratory hammer is suspended by cable from a crane and derrick, and positioned on the top of a pile. The pile is then unseated from the sediments by engaging the hammer, creating a vibration that loosens the sediments binding the pile, and then slowly lifting up on the hammer with the aid of the crane. Once unseated, the crane continues to raise the hammer and pulls the pile from the sediment.

When the pile is released from the sediment, the vibratory hammer is disengaged and the pile is pulled from the water and placed on a barge for transfer upland. Vibratory removal will take approximately 10 to 15 minutes per pile, depending on sediment conditions.

*Direct Pull and Clamshell Removal*

Older timber pilings are particularly prone to breaking at the mudline because of damage from marine borers and vessel impacts. In some cases, removal with a vibratory hammer is not possible if the pile is too fragile to withstand the hammer force. Broken or damaged piles may be removed by wrapping the piles with a cable and pulling them directly from the sediment with a crane. If the piles break below the waterline, the pile stubs will be removed with a clamshell bucket, a hinged steel apparatus that operates like a set of steel jaws. The bucket will be lowered from a crane and the jaws will grasp the pile stub as the crane pulled up. The broken piling and stubs will be loaded onto the barge for off-site disposal. Clamshell removal will be used only if necessary, as it will produce temporary, localized turbidity impacts. Turbidity will be kept within required regulatory limits. Direct pull and clamshell removal do not produce noise that could impact marine mammals.

*Dates and Duration*

The subject IHA application addresses Year One and a first month of Year Two. The first month of the project is covered by the existing IHA permit (expiring in August 2015). The new IHA would be active from September 1, 2015 through August 31, 2016, which allows for one month of pier removal if necessary in Year Two. If the rate of pier removal in Year One is slow enough to suggest that pier removal will continue beyond the first month (August) of Year Two, an additional IHA request will be submitted to ensure that pier removal can be completed.

The daily construction window for pile removal will begin no sooner than 30 minutes after sunrise to allow for initial marine mammal monitoring, and will end at sunset (or soon after), when visibility decreases to the point that effective marine mammal monitoring is not possible.

Vibratory pile removal will take approximately 10 to 15 minutes per pile. Assuming the worst case of 15 minutes per pile (with no direct pull or clamshell removal), removal of 3,900 piles will take and estimated 675–975 hours over 140–180 days of pile removal (Table 2–2 in the Application). The estimate of 180 days provides for some shorter pile pulling days during winter, transition time to dig out broken piles, and removal of decking. The actual number of days may be closer to 140 for pile work.

It is likely that the actual hours of vibratory pile removal will be less, as the duration conservatively assumes that every pile will be removed with a vibratory hammer. It is likely that many will be require direct pull or clamshell removal if necessary, both of which are quicker than vibratory extraction.

**Description of Marine Mammals in the Area of the Specified Activity**

The marine mammal species under NMFS jurisdiction most likely to occur in the proposed construction area include Pacific harbor seal (*Phoca vitulina richardsi*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*P. dalli*), killer whale (*Orcinus orca*), gray whale (*Eschrichtius robustus*), and humpback whale (*Megaptera novaeangliae*).

General information on the marine mammal species found in California waters can be found in Carretta *et al.* (2013), which is available at the following URL: *http://www.nmfs.noaa.gov/pr/sars/pdf/pacific2013_final.pdf* and in Table 1 below. Refer to that document for information on these species. Specific information concerning these species in the vicinity of the proposed action area is provided below.

TABLE 1—LIST OF MARINE SPECIES UNDER NMFS JURISDICTION THAT OCCUR IN THE VICINITY OF THE MUKILTEO TANK FARM PIER PROJECT

| Species | ESA Status | MMPA Status | Timing of occurrence | Frequency of occurrence |
|---|---|---|---|---|
| Harbor Seal | Unlisted | Non-depleted | Year-round | Common. |
| California Sea Lion | Unlisted | Non-depleted | August–April | Common. |
| Steller Sea Lion | Delisted | Strategic/Depleted | October–May | Rare. |
| Harbor Porpoise | Unlisted | Non-depleted | Year-round | Occasional. |
| Dall's Porpoise | Unlisted | Non-depleted | Year-round (more common in winter). | Occasional. |
| Killer Whale (Southern Resident) | Endangered | Strategic/Depleted | October–March | Occasional. |
| Killer Whale (Transient) | Unlisted | Strategic/Depleted | March–May (intermittently year-round). | Occasional. |
| Gray Whale | Delisted | Non-depleted | January–May | Occasional. |
| Humpback Whale | Endangered | Strategic/Depleted | April–June | Occasional. |

*Harbor Seal*

Harbor seals are members of the true seal family (Phocidae). For management purposes, differences in mean pupping date (Temte 1986), movement patterns (Brown 1988), pollutant loads (Calambokidis *et al.* 1985), and fishery interactions have led to the recognition of three separate harbor seal stocks along the west coast of the continental U.S. (Boveng 1988). The three distinct stocks are: (1) Inland waters of Washington State (including Hood Canal, Puget Sound, Georgia Basin and the Strait of Juan de Fuca out to Cape Flattery), (2) outer coast of Oregon and Washington, and (3) California (Carretta *et al.* 2011).

The Washington Inland Waters stock (which includes Hood Canal, Puget Sound, Georgia Basin and the Strait of Juan de Fuca out to Cape Flattery) may be present near the project site. Pupping seasons vary by geographic region. For the northern Puget Sound region, pups are born from late June through August (WDFW 2012a). After October 1 all pups in the inland waters of Washington are weaned. Of the three pinniped species that commonly occur within the region of activity, harbor seals are the most numerous and the only one that breeds in the inland marine waters of Washington (Calambokidis and Baird, 1994).

In 1999, Jeffries *et al.* (2003) recorded a mean count of 9,550 harbor seals in Washington's inland marine waters, and estimated the total population to be approximately 14,612 animals (including the Strait of Juan de Fuca).

According to the 2014 Stock Assessment Report (SAR), the most recent estimate for the Washington Northern Inland Waters Stock is 11,036 (Carretta et al. 2014). No minimum population estimate is available. However, there are an estimated 32,000 harbor seals in Washington today, and their population appears to have stabilized (Jeffries 2013), so the estimate of 11,036 may be low.

Harbor seals are the most numerous marine mammal species in Puget Sound. Harbor seals are non-migratory; their local movements are associated with such factors as tides, weather, season, food availability and reproduction (Scheffer and Slipp 1944; Fisher 1952; Bigg 1969, 1981). They are not known to make extensive pelagic migrations, although some long-distance movements of tagged animals in Alaska (174 km) and along the U.S. west coast (up to 550 km) have been recorded (Pitcher and McAllister 1981; Brown and Mate 1983; Herder 1983).

Harbor seals haul out on rocks, reefs and beaches, and feed in marine, estuarine and occasionally fresh waters. Harbor seals display strong fidelity for haul-out sites (Pitcher and Calkins 1979; Pitcher and McAllister 1981). The closest documented harbor seal haul-out sites to the Tank Farm Pier are the Naval Station Everett floating security fence, and the Port Gardner log booms, both approximately 4.5 miles northeast of the project site. Harbor seals may also haul-out on undocumented sites in the area, such as beaches.

Since June 2012, Naval Station Everett personnel have been conducting counts of the number of harbor seals that use the in-water security fence floats as haul-outs. As of April 18, 2013, the highest count was 343 seals observed during one day in October 2012 (U.S. Navy 2013). The average number of seals hauled out for the 8 days of monitoring falling within the Tank Farm Pier removal work window (July 15–February 15) was 117 (U.S. Navy 2013). However, given the distance from the haul-out to the Tank Farm Pier, the number of affected seals would be less.

Since 2007, the Everett Community College Ocean Research College Academy (ORCA) has conducted quarterly cruises that include monitoring stations within the ZOI. Marine mammal sightings data were collected during these cruises. During 24 cruises within the ZOI falling within the Tank Farm Pier removal window (July 15–February 15), the highest count was 13 seals observed during one day in November of 2012. The average number of seals observed during these cruises was 2.4 (ORCA 2013).

According to the NMFS National Stranding Database (2007–2013), there were 7 confirmed harbor seal strandings within 0.5 miles of Tank Farm Pier (NMFS 2013b).

*California Sea Lion*

Washington California sea lions are part of the U.S. stock, which begins at the U.S./Mexico border and extends northward into Canada. The U.S. stock was estimated at 296,750 in the 2012 Stock Assessment Report (SAR) and may be at carrying capacity, although more data are needed to verify that determination (Carretta *et al.* 2013). Some 3,000 to 5,000 animals are estimated to move into northwest waters (both Washington and British Columbia) during the fall (September) and remain until the late spring (May) when most return to breeding rookeries in California and Mexico (Jeffries *et al.* 2000). Peak counts of over 1,000 animals have been made in Puget Sound (Jeffries *et al.* 2000).

California sea lions breed on islands off Baja Mexico and southern California with primarily males migrating to feed in the northern waters (Everitt *et al.* 1980). Females remain in the waters near their breeding rookeries off California and Mexico. All age classes of males are seasonally present in Washington waters (WDFW 2000).

California sea lions do not avoid areas with heavy or frequent human activity, but rather may approach certain areas to investigate. This species typically does not flush from a buoy or haulout if approached.

California sea lions were unknown in Puget Sound until approximately 1979 (Steiger and Calambokidis 1986). Everitt *et al.* (1980) reported the initial occurrence of large numbers at Port Gardner, Everett (northern Puget Sound) in the spring of 1979. The number of California sea lions using the Everett haul-out at that time numbered around 1,000. Similar sightings and increases in numbers were documented throughout the region after the initial sighting in 1979 (Steiger and Calambokidis 1986), including urbanized areas such as Elliot Bay near Seattle and heavily used areas of central Puget Sound (Gearin *et al.* 1986). In Washington, California sea lions use haul-out sites within all inland water regions (WDFW 2000). The movement of California sea lions into Puget Sound could be an expansion in range of a growing population (Steiger and Calambokidis 1986).

The closest documented California sea lion haul-out sites to the Tank Farm Pier are the Everett Harbor navigation buoys (3.0/3.5 miles NE), and the Naval Station Everett floating security fence and Port Gardner log booms (both 4.5 miles NE).

Since June 2012, Naval Station Everett personnel have been conducting counts of the number of sea lions that use the in-water security fence floats as haul-outs. As of April 18, 2013, the highest count has been 123 California sea lions observed during one day in November 2012. The average number of California sea lions hauled out for the 8 days of monitoring falling within the Tank Farm Pier removal work window (July 15–February 15) is 61 (U.S. Navy 2013). However, given the distance from the haul-out to the Tank Farm Pier, it is not expected that the same numbers would be present in the ZOI.

Since 2007, the Everett Community College ORCA has conducted quarterly cruises that include monitoring stations within the ZOI. Marine mammal sightings data were collected during these cruises. During 10 cruises within the ZOI falling within the Tank Farm Pier removal window (July 15–February 15), the highest count was 6 California sea lions observed during one day in October of 2008. The average number of sea lions observed during these cruises was 2.8 (ORCA 2013).

According to the NMFS National Stranding Database (2007–2013), there was one confirmed California sea lion stranding within 0.5 miles of the Tank Farm Pier (NMFS 2013b).

*Steller Sea Lion*

The Eastern stock of Steller sea lion may be present near the project site. The eastern stock of Steller sea lions is estimated at 63,160 with a Washington minimum population estimate of 1,749 (Carretta *et al.,* 2013). For Washington inland waters, Steller sea lion abundances vary seasonally with a minimum estimate of 1,000 to 2000 individuals present or passing through the Strait of Juan de Fuca in fall and winter months.

Steller sea lion numbers in Washington State decline during the summer months, which correspond to the breeding season at Oregon and British Columbia rookeries (approximately late May to early June) and peak during the fall and winter months (WDFW 2000). A few Steller sea lions can be observed year-round in Puget Sound although most of the breeding age animals return to rookeries in the spring and summer.

The eastern stock of Steller sea lions are ''depleted/strategic'' under the MMPA and were ''delisted'' as a distinct population segment under the ESA on November 4, 2013 (78 FR 66140). On August 27, 1993, NMFS published a final rule designating critical habitat for

the Steller sea lion associated with breeding and haul-out areas in Alaska, California, and Oregon (58 FR 45269). That critical habitat remains in effect for the western DPS of Steller sea lions, which remain listed under the ESA. No critical habitat has been designated in Washington.

Breeding rookeries for the eastern stock are located along the California, Oregon, British Columbia, and southeast Alaska coasts, but not along the Washington coast or in inland Washington waters (Angliss and Outlaw 2007). Adult Steller sea lions congregate at rookeries in Oregon, California, and British Columbia for pupping and breeding from late May to early June (Gisiner 1985).

Steller sea lions primarily use haul-out sites on the outer coast of Washington and in the Strait of Juan de Fuca along Vancouver Island in British Columbia. Only sub-adults or non-breeding adults may be found in the inland waters of Washington (Pitcher *et al.* 2007). However, the number of inland waters haul-out sites has increased in recent years.

Since June 2012, Naval Station Everett personnel have been conducting counts of the number of sea lions that use the in-water security fence floats as haul-outs. No Steller sea lions have been observed using the security barrier floats haul-out to date (U.S Navy. 2013).

Since 2007, the Everett Community College ORCA has conducted quarterly cruises that include monitoring stations within the ZOI. No Steller sea lions have been observed in the ZOI during these cruises (ORCA 2013).

The closest documented Steller Sea lion haul-outs to the Tank Farm Pier are the Orchard Rocks and Rich Passage buoys near S. Bainbridge Island (19 miles SW), and Craven Rock near Marrowstone Island (23 miles NW). Haul-outs are generally occupied from October through May, which overlaps with the in-water work window. Any Steller sea lions near the Tank Farm Pier would be transiting through the area.

There is no data available on the number of Steller sea lions that use the Orchard Rocks. Up to 12 Steller sea lions have been observed using the Craven Rock haul-out off of Marrowstone Island in northern Puget Sound (WSF 2010). However, given the distance from this haul-out to the Tank Farm Pier, it is not expected that the same numbers would be present in the ZOI.

*Harbor Porpoise*

The Washington Inland Waters Stock of harbor porpoise may be found near the project site. The Washington Inland Waters Stock occurs in waters east of Cape Flattery (Strait of Juan de Fuca, San Juan Island Region, and Puget Sound).

The Washington Inland Waters Stock mean abundance estimate based on 2002 and 2003 aerial surveys conducted in the Strait of Juan de Fuca, San Juan Islands, Gulf Islands, and Strait of Georgia is 10,682 harbor porpoises (Carretta *et al.* 2011). No minimum population estimate is available.

No harbor porpoise were observed within Puget Sound proper during comprehensive harbor porpoise surveys (Osmek *et al.* 1994) or Puget Sound Ambient Monitoring Program (PSAMP) surveys conducted in the 1990s (WDFW 2008). Declines were attributed to gill-net fishing, increased vessel activity, contaminants, and competition with Dall's porpoise.

However, populations appear to be rebounding with increased sightings in central Puget Sound (Carretta *et al.* 2007b) and southern Puget Sound (D. Nysewander pers. comm. 2008; WDFW 2008). Recent systematic boat surveys of the main basin indicate that at least several hundred and possibly as many as low thousands of harbor porpoise are now present. While the reasons for this recolonization are unclear, it is possible that changing conditions outside of Puget Sound, as evidenced by a tripling of the population in the adjacent waters of the Strait of Juan de Fuca and San Juan Islands since the early 1990s, and the recent higher number of harbor porpoise mortalities in coastal waters of Oregon and Washington, may have played a role in encouraging harbor porpoise to explore and shift into areas like Puget Sound (Hanson, *et. al.* 2011).

The Washington Inland Waters Stock of harbor porpoise is ''non-depleted'' under MMPA, and ''unlisted'' under the ESA.

Harbor porpoises are common in the Strait of Juan de Fuca and south into Admiralty Inlet, especially during the winter, and are becoming more common south of Admiralty Inlet. Little information exists on harbor porpoise movements and stock structure near the Mukilteo area, although it is suspected that in some areas harbor porpoises migrate (based on seasonal shifts in distribution). For instance Hall (2004; pers. comm. 2008) found harbor porpoises off Canada's southern Vancouver Island to peak during late summer, while the Washington State Department of Fish and Wildlife's (WDFW) Puget Sound Ambient Monitoring Program (PSAMP) data show peaks in Washington waters to occur during the winter.

Hall (2004) found that the frequency of sighting of harbor porpoises decreased with increasing depth beyond 150 m with the highest numbers observed at water depths ranging from 61 to 100 m. Although harbor porpoises have been spotted in deep water, they tend to remain in shallower shelf waters (<150 m) where they are most often observed in small groups of one to eight animals (Baird 2003). Water depths within the Tank Farm Pier ZOI range from 0 to 192 m.

Since 2007, the Everett Community College Ocean Research College Academy (ORCA) has conducted quarterly cruises that include monitoring stations within the ZOI. No harbor porpoise have been observed within the ZOI during these cruises (ORCA 2013). According to the NMFS National Stranding Database, there was one confirmed harbor porpoise stranding within 0.5 miles of the Tank Farm Pier from 2007 to 2013 (NMFS 2013b).

*Dall's Porpoise*

The California, Oregon, and Washington Stock of Dall's porpoise may be found near the project site. Dall's porpoise are high-frequency hearing range cetaceans (Southall *et al.* 2007).

The most recent estimate of Dall's porpoise stock abundance is 42,000, based on 2005 and 2008 summer/autumn vessel-based line transect surveys of California, Oregon, and Washington waters (Carretta *et al.* 2011). Within the inland waters of Washington and British Columbia, this species is most abundant in the Strait of Juan de Fuca east to the San Juan Islands. The most recent Washington's inland waters estimate is 900 animals (Calambokidis *et al.* 1997). Prior to the 1940s, Dall's porpoises were not reported in Puget Sound.

The California, Oregon, and Washington Stock of Dall's porpoise is ''non-depleted'' under the MMPA, and ''unlisted'' under the ESA. Dall's porpoises are migratory and appear to have predictable seasonal movements driven by changes in oceanographic conditions (Green *et al.* 1992, 1993), and are most abundant in Puget Sound during the winter (Nysewander *et al.* 2005; WDFW 2008). Despite their migrations, Dall's porpoises occur in all areas of inland Washington at all times of year (Calambokidis pers. comm. 2006), but with different distributions throughout Puget Sound from winter to summer. The average winter group size is three animals (WDFW 2008).

Since 2007, the Everett Community College Ocean Research College

Academy (ORCA) has conducted quarterly cruises that include monitoring stations within the ZOI. No Dall's porpoise have been observed within the ZOI during these cruises (ORCA 2013). According to the NMFS National Stranding Database (2007–2013), there were no Dall's porpoise strandings in the area of the Tank Farm Pier (NMFS 2013b).

*Killer Whale*

The Eastern North Pacific Southern Resident and West Coast Transient stocks of killer whale may be found near the project site.

A. Southern Resident Stock

The Southern Residents live in three family groups known as the J, K and L pods. As of July 15, 2014, the stock collectively numbers 82 individuals (Carretta *et al.* 2014).

Southern Residents are documented in coastal waters ranging from central California to the Queen Charlotte Islands, British Columbia (NMFS 2008). They occur in all inland marine waters. SR killer whales generally spend more time in deeper water and only occasionally enter water less than 15 feet deep (Baird 2000). Distribution is strongly associated with areas of greatest salmon abundance, with heaviest foraging activity occurring over deep open water and in areas characterized by high-relief underwater topography, such as subsurface canyons, seamounts, ridges, and steep slopes (Wiles 2004).

Sightings compiled by the Orca Network from 1990–2013 show that SR killer whale occurs most frequently in the general area of the Tank Farm Pier in the fall and winter, and are far less common from April through September (Osborne 2008; Orca Network 2013). Since 2007, the Everett Community College ORCA has conducted quarterly cruises that include monitoring stations within the ZOI. No killer whales have been observed within the ZOI during these cruises (ORCA 2013).

Records from 1976 through 2013 document Southern Residents in the inland waters of Washington during the months of March through June and October through December, with the primary area of occurrence in inland waters north of Admiralty Inlet, located in north Puget Sound (Osborne 2008; Orca Network 2013).

Beginning in May or June and through the summer months, all three pods (J, K, and L) of Southern Residents are most often located in the protected inshore waters of Haro Strait (west of San Juan Island), in the Strait of Juan de Fuca, and Georgia Strait near the Fraser River.

Historically, the J pod also occurred intermittently during this time in Puget Sound; however, records from 1997–2007 show that J pod did not enter Puget Sound south of the Strait of Juan de Fuca from approximately June through August (Osborne 2008).

In fall, all three pods occur in areas where migrating salmon are concentrated such as the mouth of the Fraser River. They may also enter areas in Puget Sound where migrating chum and Chinook salmon are concentrated (Osborne 1999). In the winter months, the K and L pods spend progressively less time in inland marine waters and depart for coastal waters in January or February. The J pod is most likely to appear year-round near the San Juan Islands, and in the fall/winter, in the lower Puget Sound and in Georgia Strait at the mouth of the Fraser River.

According to the NMFS National Stranding Database (2007–2013), there were no killer whale strandings in the area of the Tank Farm Pier (NMFS 2013b).

The SR killer whale stock was declared ''depleted/strategic'' under the MMPA in May 2003 (68 FR 31980). On November 18, 2005, the SR stock was listed as ''endangered'' under the ESA (70 FR 69903). On November 29, 2006, NMFS published a final rule designating critical habitat for the SR killer whale DPS. Both Puget Sound and the San Juan Islands are designated as core areas of critical habitat under the ESA, excluding areas less than 20 feet deep relative to extreme high water are not designated as critical habitat (71 FR 69054). A final recovery plan for Southern Residents was published in January of 2008 (NMFS 2008).

B. West Coast Transient Stock

Transient killer whales generally occur in smaller (1–5 individuals), less structured pods (Allen and Angliss. 2013). According to the Center for Whale Research (CWR 2014), they tend to travel in small groups of one to five individuals, staying close to shorelines, often near seal rookeries when pups are being weaned.

The West Coast Transient stock, which includes individuals from California to southeastern Alaska, is estimated to have a minimum number of 243 (Allen and Angliss, 2013).

The West Coast Transient stock occurs in California, Oregon, Washington, British Columbia, and southeastern Alaskan waters. Within the inland waters, they may frequent areas near seal rookeries when pups are weaned (Baird and Dill 1995).

Sightings compiled by the Orca Network from 1990–2013 show that transient killer whale occurs most frequently in the general area of the Mukilteo Tank Farm Pier in the spring and summer, and are far less common from September through February (Orca Network 2013). However, transient killer whale occurrence is less predictable than SR killer whale occurrence, and they may be present at any time of the year. Since 2007, the Everett Community College ORCA has conducted quarterly cruises that include monitoring stations within the ZOI. No killer whales have been observed within the ZOI during these cruises (ORCA 2013).

*Gray Whale*

Gray whales are recorded in Washington waters during feeding migrations between late spring and autumn with occasional sightings during winter months (Calambokidis *et al.* 1994, 2002; Orca Network 2013). The Eastern North Pacific stock of gray whale may be found near the project site. Gray whales are low-frequency hearing range cetaceans (Southall *et al.* 2007).

The Eastern North Pacific stock of gray whales is ''non-depleted'' under the MMPA, and was ''delisted'' under the ESA in 1994 after a 5-year review by NOAA Fisheries. In 2001 NOAA Fisheries received a petition to relist the stock under the ESA, but it was determined that there was not sufficient information to warrant the petition (Angliss and Outlaw 2007).

Although typically seen during their annual migrations on the outer coast, a regular group of gray whales annually comes into the inland waters at Saratoga Passage and Port Susan (7.5 miles north) from March through May to feed on ghost shrimp (Weitkamp *et al.* 1992; Calambokidis pers. comm. 2006). During this time frame they are also seen in the Strait of Juan de Fuca, the San Juan Islands, and areas of Puget Sound, although the observations in Puget Sound are highly variable between years (Calambokidis *et al.* 1994). The average tenure within Washington inland waters is 47 days and the longest stay was 112 days (J. Calambokidis pers. comm. 2007).

Sightings compiled by the Orca Network from 1990–2013 show that gray whales are most frequently in the general area of the Mukilteo Tank Farm Pier from January through May, and are far less common from June through September (Orca Network 2013). Table 3–6 in the Application presents total gray whale sightings (individual) per month in the area between 1990 and 2013. Sightings in Puget Sound are usually of a single individual, so Table

3–6 sightings are likely of the same individual or low number of individuals over a number of days that month.

Since 2007, the Everett Community College Ocean Research College Academy (ORCA) has conducted quarterly cruises that include monitoring stations within the ZOI. No gray whales have been observed within the ZOI during these cruises (ORCA 2013).

*Humpback Whale*

The California-Oregon-Washington (CA-OR-WA) stock of humpback whale may be found near the project site. Humpback whales are low-frequency hearing range cetaceans (Southall *et al.* 2007). The SAR abundance estimate is 1,918 individuals. (Carretta *et al.* 2014).

The humpback whale was listed as ''endangered'' throughout its range under the Endangered Species Conservation Act of 1969. This protection was transferred to the ESA in 1973. A recovery plan was adopted in 1991 (NMFS 1991). The humpback whale is also listed as ''depleted/strategic'' under the MMPA.

Historically, humpback whales were common in inland waters of Puget Sound and the San Juan Islands (Calambokidis *et al.* 2004b). In the early part of this century, there was a productive commercial hunt for humpbacks in Georgia Strait that was probably responsible for their long disappearance from local waters (Osborne *et al.* 1988). Commercial hunts ended in the 1960's. Since the mid-1990s, sightings in Puget Sound have increased.

This stock calves and mates in coastal Central America and Mexico and migrates up the coast from California to southern British Columbia in the summer and fall to feed (NMFS 1991; Marine Mammal Commission 2003; Carretta et al. 2007b). Few humpback whales are seen in Puget Sound, but more frequent sightings occur in the Strait of Juan de Fuca and near the San Juan Islands. Most sightings are in spring and summer.

Sightings compiled by the Orca Network from 1990–2013 show that humpback whales are most frequently in the general area of the Tank Farm Pier from April through June, and are far less common from July to March (Orca Network 2013). Table 3–7 presents total humpback whale sightings (individual) per month in the area between 1990 and 2013. Sightings in Puget Sound are usually of a single individual.

Since 2007, the Everett Community College Ocean Research College Academy (ORCA) has conducted quarterly cruises that include monitoring stations within the ZOI. No humpback whales have been observed within the ZOI during these cruises (ORCA 2013).

**Potential Effects of the Specified Activity on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that stressors, (*e.g.* vibratory hammer pile extraction) and potential mitigation activities, associated with the Mukilteo Tank Farm Pier Removal project may impact marine mammals and their habitat. The ''Estimated Take by Incidental Harassment'' section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The ''Negligible Impact Analysis'' section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the ''Estimated Take by Incidental Harassment'' section, and the ''Proposed Mitigation'' section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks. In the following discussion, we provide general background information on sound and marine mammal hearing before considering potential effects to marine mammals from sound produced by vibratory pile driving.

*Description of Sound Sources*

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa and all airborne sound levels in this document are referenced to a pressure of 20 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.,* 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring

ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.

- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.
- *Biological:* Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.
- *Anthropogenic:* Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.,* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

TABLE 2—REPRESENTATIVE SOUND LEVELS OF ANTHROPOGENIC SOURCES

| Sound source | Frequency range (Hz) | Underwater sound level | References |
|---|---|---|---|
| Small vessels | 250–1,000 | 151 dB rms at 1 m | Richardson *et al.,* 1995. |
| Tug docking gravel barge | 200–1,000 | 149 dB rms at 100 m | Blackwell and Greene, 2002. |
| Vibratory driving of 72-in steel pipe pile | 10–1,500 | 180 dB rms at 10 m | Reyff, 2007. |
| Impact driving of 36-in steel pipe pile | 10–1,500 | 195 dB rms at 10 m | Laughlin, 2007. |
| Impact driving of 66-in cast-in-steel-shell (CISS) pile | 10–1,500 | 195 dB at rms 10 m | Reviewed in Hastings and Popper, 2005. |

In-water construction activities associated with the project would consist mainly of vibratory pile extraction and direct pull of piles using a chain wrapped around the pile. The latter activity is not expected to produce sound that would approach Level B harassment. There are two general categories of sound types: Impulse and non-pulse (defined in the following). Vibratory pile driving is considered to be continuous or non-pulsed while impact pile driving is considered to be an impulse or pulsed sound type. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts.

Pulsed sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; Harris, 1998; NIOSH, 1998; ISO, 2003; ANSI, 2005) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. Note that there is no impact driving planned as part of this project.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving and removal, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

The likely or possible impacts of the proposed vibratory hammer pile extraction at the MukilteoTank Farm Pier on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel. Any impacts to marine mammals, however, are expected to primarily be acoustic in nature.

*Marine Mammal Hearing*

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 30 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;
- Phocid pinnipeds in Water: Functional hearing is estimated to occur between approximately 75 Hz and 100 kHz; and
- Otariid pinnipeds in Water: Functional hearing is estimated to occur between approximately 100 Hz and 40 kHz.

As mentioned previously in this document, eight marine mammal species (seven cetacean and two pinniped) may occur in the Icy Strait project area. Of the five cetacean species likely to occur in the proposed project area and for which take is requested, two are classified as low-frequency cetaceans (*i.e.,* humpback and gray whales), one is classified as a mid-frequency cetacean (*i.e.,* killer whale), and two are classified as high-frequency cetaceans (*i.e.,* harbor and Dall's porpoises) (Southall *et al.,* 2007). Additionally, harbor seals are classified as members of the phocid pinnipeds in water functional hearing group while California and Stellar sea lions are grouped under the Otariid pinnipeds in water functional hearing group. A species' functional hearing group is a consideration when we analyze the effects of exposure to sound on marine mammals.

*Acoustic Impacts*

*Potential Effects of Pile Driving and Removal Sound*—The effects of sounds from pile driving might result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving and removal on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving and removal activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (*e.g.,* sand) would absorb or attenuate the sound more readily than hard substrates (*e.g.,* rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulse sounds on marine mammals. Potential effects from impulse sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973).

*Hearing Impairment and Other Physical Effects*—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions, (*e.g.,* orientation, communication, finding prey, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

*Temporary Threshold Shift*—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007). TTS is not currently classified as an injury (Southall *et al.,* 2007).

Given the available data, the received level of a single pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2$-s (*i.e.,* 186 dB sound exposure level [SEL] or approximately 221–226 dB p-p [peak]) in order to produce brief, mild TTS. Exposure to several strong pulses that each have received levels near 190 dB rms (175–180 dB SEL) might result in cumulative exposure of approximately 186 dB SEL and thus slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy.

The above TTS information for odontocetes is derived from studies on the bottlenose dolphin (*Tursiops truncatus*) and beluga whale (*Delphinapterus leucas*). There is no published TTS information for other species of cetaceans. However, preliminary evidence from a harbor porpoise exposed to pulsed sound suggests that its TTS threshold may have been lower (Lucke *et al.,* 2009). As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes are exposed to pile driving pulses stronger than 180 dB re 1 µPa rms.

*Permanent Threshold Shift*—When PTS occurs, there is physical damage (injury) to the sound receptors in the ear. In severe cases, there can be total or

partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to pulses of sound can cause PTS in any marine mammal. However, given the possibility that mammals close to a sound source can incur TTS, it is possible that some individuals might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals, based on anatomical similarities. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as pile driving pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.,* 2007). On an SEL basis, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans, Southall *et al.* (2007) estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of approximately 198 dB re 1 $\mu Pa^2$-s (15 dB higher than the TTS threshold for an impulse). Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Measured source levels from impact pile driving can be as high as 214 dB rms. Although no marine mammals have been shown to experience TTS or PTS as a result of being exposed to pile driving activities, captive bottlenose dolphins and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds (Finneran *et al.,* 2000, 2002, 2005). The animals tolerated high received levels of sound before exhibiting aversive behaviors. Experiments on a beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (30 psi) p-p, which is equivalent to 228 dB p-p, resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within four minutes of the exposure (Finneran *et al.,* 2002). Although the source level of pile driving from one hammer strike is expected to be much lower than the single watergun impulse cited here, animals being exposed for a prolonged period to repeated hammer strikes could receive more sound exposure in terms of SEL than from the single watergun impulse (estimated at 188 dB re 1 $\mu Pa^2$-s) in the aforementioned experiment (Finneran *et al.,* 2002). However, in order for marine mammals to experience TTS or PTS, the animals have to be close enough to be exposed to high intensity sound levels for a prolonged period of time. Based on the best scientific information available, these SPLs are far below the thresholds that could cause TTS or the onset of PTS.

*Non-auditory Physiological Effects*—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of pile driving, including some odontocetes and some pinnipeds, are especially unlikely to incur auditory impairment or non-auditory physical effects.

*Disturbance Reactions*

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007).

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic guns or acoustic harassment devices, but also including pile driving) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Thorson and Reyff, 2006; see also Gordon *et al.,* 2004; Wartzok *et al.,* 2003; Nowacek *et al.,* 2007). Responses to continuous sound, such as vibratory pile installation and removal, have not been documented as well as responses to pulsed sounds.

With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haul-outs or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could include effects on growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns;
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking—Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were anthropogenic, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs only during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

Masking occurs at the frequency band which the animals utilize so the frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water vibratory pile driving and removal is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds made by porpoises. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009).

Masking has the potential to impact species at the population or community levels as well as at individual levels. Masking affects both senders and receivers of the signals and can potentially have long-term chronic effects on marine mammal species and populations. Recent research suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, and that most of these increases are from distant shipping (Hildebrand, 2009). All anthropogenic sound sources, such as those from vessel traffic, pile driving, and dredging activities, contribute to the elevated ambient sound levels, thus intensifying masking.

Vibratory pile driving and removal is relatively short-term, with rapid oscillations occurring for 10 to 30 minutes per installed or removed pile. It is possible that vibratory driving and removal resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory pile driving, and which have already been taken into account in the exposure analysis.

Acoustic Effects, Airborne—Marine mammals that occur in the project area could be exposed to airborne sounds associated with pile removal that have the potential to cause harassment, depending on their distance from pile driving activities. Airborne pile removal sound would have less impact on cetaceans than pinnipeds because sound from atmospheric sources does not transmit well underwater (Richardson *et al.,* 1995); thus, airborne sound would only be an issue for pinnipeds either hauled-out or looking with heads above water in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2004) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB rm.

*Vessel Interaction*

Besides being susceptible to vessel strikes, cetacean and pinniped responses to vessels may result in behavioral changes, including greater variability in the dive, surfacing, and respiration patterns; changes in vocalizations; and changes in swimming speed or direction (NRC 2003). There will be a temporary and localized increase in vessel traffic during construction. At least one work barge will be present at any time during the in-water and over water work.

**Potential Effects on Marine Mammal Habitat**

The primary potential impacts to marine mammal habitat are associated with elevated sound levels produced by vibratory pile removal. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

*Potential Pile Driving and Removal Effects on Prey*—With regard to fish as a prey source for cetaceans and pinnipeds, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.,* 1981) and possibly avoid predators (Wilson and Dill, 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB; however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.,* 1996). In general, fish react more strongly to pulses of sound rather than non-pulse signals (such as noise from vessels) (Blaxter *et al.,* 1981), and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Further, during the coastal construction only a small fraction of the available habitat would be ensonified at any given time. Disturbance to fish species would be short-term and fish would return to their pre-disturbance behavior once the pile driving activity ceases. Thus, the proposed construction would have little, if any, impact on the

abilities of marine mammals to feed in the area where construction work is planned.

Finally, the time of the proposed construction activity would avoid the spawning season of the ESA-listed salmonid species.

*Effects to Foraging Habitat*—Short-term turbidity is a water quality effect of most in-water work, including pile removal. WSF must comply with state water quality standards during these operations by limiting the extent of turbidity to the immediate project area. Roni and Weitkamp (1996) monitored water quality parameters during a pier replacement project in Manchester, Washington. The study measured water quality before, during and after pile removal and driving. The study found that construction activity at the site had ''little or no effect on dissolved oxygen, water temperature and salinity'', and turbidity (measured in nephelometric turbidity units [NTU]) at all depths nearest the construction activity was typically less than 1 NTU higher than stations farther from the project area throughout construction.

Similar results were recorded during pile removal operations at two WSF ferry facilities. At the Friday Harbor terminal, localized turbidity levels within the regulatory compliance radius of 150 feet (from three timber pile removal events) were generally less than 0.5 NTU higher than background levels and never exceeded 1 NTU. At the Eagle Harbor maintenance facility, within 150 feet, local turbidity levels (from removal of timber and steel piles) did not exceed 0.2 NTU above background levels (WSF 2012). In general, turbidity associated with pile installation is localized to about a 25-foot radius around the pile (Everitt *et al.,* 1980).

Cetaceans are not expected to be close enough to the Tank Farm Pier to experience turbidity, and any pinnipeds will be transiting the area and could avoid localized turbidity. Therefore, the impact from increased turbidity levels is expected to be discountable to marine mammals.

Removal of the Tank Farm Pier will result in 3,900 creosote-treated piles (~7,300 tons) removed from the marine environment. This will result in temporary and localized sediment re-suspension of some of the contaminants associated with creosote, such as polycyclic aromatic hydrocarbons.

However, the removal of the creosote-treated wood piles from the marine environment will result in a long-term improvement in water and sediment quality, meeting the goals of WSF's Creosote Removal Initiative started in 2000. The net impact is a benefit to marine organisms, especially toothed whales and pinnipeds that are high on the food chain and bioaccumulate these toxins. This is especially a concern for long-lived species that spend much of their life in Puget Sound, such as Southern Resident killer whales (NMFS 2008).

**Proposed Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, ''and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking'' for certain subsistence uses. For the proposed project, WSF worked with NMFS and proposed the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity. The primary purposes of these mitigation measures are to minimize sound levels from the activities, and to monitor marine mammals within designated zones of influence corresponding to NMFS' current Level A and B harassment thresholds which are depicted in Table 3 found later in the Estimated Take by Incidental Harassment section.

*Monitoring and Shutdown for Pile Driving*

The following measures would apply to WSF's mitigation through shutdown and disturbance zones:

*Shutdown Zone*—For all pile driving activities, WSF will establish a shutdown zone. Shutdown zones are typically used to contain the area in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria for cetaceans and pinnipeds, respectively, with the purpose being to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury of marine mammals. For vibratory driving, WSF's activities are not expected to produce sound at or above the 180 dB rms injury criterion (see ''Estimated Take by Incidental Harassment''). WSF would, however, implement a minimum shutdown zone of 10 m radius for all marine mammals around all vibratory extraction activity. This precautionary measure is intended to further reduce the unlikely possibility of injury from direct physical interaction with construction operations.

*Disturbance Zone Monitoring*—WSF will establish disturbance zones corresponding to the areas in which SPLs equal or exceed 122 dB rms (Level B harassment threshold for continuous sound) for pile driving installation and removal. The disturbance zones will provide utility for monitoring conducted for mitigation purposes (*i.e.,* shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones will enable observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring will be to document incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see ''Proposed Monitoring and Reporting

*Ramp Up (Soft Start)*—Vibratory hammer use for pile removal and pile driving shall be initiated at reduced power for 15 seconds with a 1 minute interval, and be repeated with this procedure for an additional two times. This will allow marine mammals to move away from the sound source.

*Time Restrictions*—Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In addition, all in-water construction will be limited to the period between August 1, 2015 and February 15, 2016; and continue in August 1, 2016 until IHA expires on August 31, 2016.

*Southern Resident Killer Whale*—The following steps will be implemented for southern resident killer whales to avoid or minimize take (see Appendix B of the application—Monitoring Plan):

- If Southern Residents approach the zone of influence (ZOI) during vibratory pile removal, work will be paused until the Southern Residents exit the ZOI. The ZOI is the area co-extensive with the Level A and Level B harassment zones.
- If killer whales approach the ZOI during vibratory pile removal, and it is unknown whether they are Southern Resident killer whales or transients, it shall be assumed they are Southern Residents and work will be paused until the whales exit the ZOI.
- If Southern Residents enter the ZOI before they are detected, work will be paused until the Southern Residents exit the ZOI to avoid further Level B harassment take.

*Mitigation Conclusions*

NMFS has carefully evaluated the applicant's proposed mitigation in the context of ensuring that NMFS

prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals.
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned.
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of pile removal, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

*Proposed Monitoring Measures*

The monitoring plan proposed by WSF can be found in its IHA application. The plan may be modified or supplemented based on comments or new information received from the public during the public comment period. A summary of the primary components of the plan follows.

(1) Marine Mammal Monitoring Coordination

WSF would conduct briefings between the construction supervisors and the crew and protected species observers (PSOs) prior to the start of pile-driving activity, marine mammal monitoring protocol and operational procedures.

Prior to the start of pile driving, the Orca Network and/or Center for Whale Research would be contacted to find out the location of the nearest marine mammal sightings. The Orca Sightings Network consists of a list of over 600 (and growing) residents, scientists, and government agency personnel in the U.S. and Canada. Sightings are called or emailed into the Orca Network and immediately distributed to other sighting networks including: The NMFS Northwest Fisheries Science Center, the Center for Whale Research, Cascadia Research, the Whale Museum Hotline and the British Columbia Sightings Network.

Sighting information collected by the Orca Network includes detection by hydrophone. The SeaSound Remote Sensing Network is a system of interconnected hydrophones installed in the marine environment of Haro Strait (west side of San Juan Island) to study killer whale communication, in-water noise, bottom fish ecology and local climatic conditions. A hydrophone at the Port Townsend Marine Science Center measures average in-water sound levels and automatically detects unusual sounds. These passive acoustic devices allow researchers to hear when different marine mammals come into the region. This acoustic network, combined with the volunteer (incidental) visual sighting network allows researchers to document presence and location of various marine mammal species.

With this level of coordination in the region of activity, WSF will be able to get real-time information on the presence or absence of whales before starting any pile removal or driving.

(2) Protected Species Observers (PSOs)

WSF will employ qualified PSOs to monitor the 122 $dB_{rms}$ re 1 µPa for marine mammals. Qualifications for marine mammal observers include:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars will be necessary to correctly identify the target.
- Advanced education in biological science, wildlife management, mammalogy or related fields (Bachelor's degree or higher is preferred), but not required.
- Experience or training in the field identification of marine mammals (cetaceans and pinnipeds).
- Sufficient training, orientation or experience with the construction operation to provide for personal safety during observations.
- Ability to communicate orally, by radio or in person, with project personnel to provide real time information on marine mammals observed in the area as necessary.
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).
- Writing skills sufficient to prepare a report of observations that would include such information as the number and type of marine mammals observed; the behavior of marine mammals in the project area during construction, dates and times when observations were conducted; dates and times when in-

water construction activities were conducted; and dates and times when marine mammals were present at or within the defined ZOI.

(3) Monitoring Protocols

PSOs would be present on site at all times during pile removal and driving. Marine mammal behavior, overall numbers of individuals observed, frequency of observation, and the time corresponding to the daily tidal cycle would be recorded.

WSF proposes the following methodology to estimate marine mammals that were taken as a result of the proposed Mukilteo Multimodal Tank Farm Pier removal project:

- During vibratory pile removal, two land-based biologists will monitor the area from the best observation points available. If weather conditions prevent adequate land-based observations, boat-based monitoring may be implemented.
- To verify the required monitoring distance, the vibratory Level B behavioral harassment ZOI will be determined by using a range finder or hand-held global positioning system device.
- The vibratory Level B acoustical harassment ZOI will be monitored for the presence of marine mammals 30 minutes before, during, and 30 minutes after any pile removal activity.
- Monitoring will be continuous unless the contractor takes a significant break, in which case, monitoring will be required 30 minutes prior to restarting pile removal.
- If marine mammals are observed, their location within the ZOI, and their reaction (if any) to pile-driving activities will be documented.

NMFS has reviewed the WSF's proposed marine mammal monitoring protocol, and has preliminarily determined the applicant's monitoring program is adequate, particularly as it relates to assessing the level of taking or impacts to affected species. The land-based PSO is expected to be positioned in a location that will maximize his/her ability to detect marine mammals and will also utilize binoculars to improve detection rates. NMFS has reviewed the WSF's proposed marine mammal monitoring protocol, and has determined the applicant's monitoring program is adequate, particularly as it relates to assessing the level of taking or impacts to affected species. The land-based PSO is expected to be positioned in a location that will maximize his/her ability to detect marine mammals and will also utilize binoculars to improve detection rates.

*Proposed Reporting Measures*

WSF would provide NMFS with a draft monitoring report within 90 days of the conclusion of the proposed construction work. This report will detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed.

If comments are received from the NMFS Northwest Regional Administrator or NMFS Office of Protected Resources on the draft report, a final report will be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft report will be considered to be the final report.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: ''. . . any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

All anticipated takes would be by Level B harassment resulting from vibratory pile removal and are likely to involve temporary changes in behavior. Injurious or lethal takes are not expected due to the expected source levels and sound source characteristics associated with the activity, and the proposed mitigation and monitoring measures are expected to further minimize the possibility of such take.

If a marine mammal responds to a stimulus by changing its behavior (*e.g.,* through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound.

WSF has requested authorization for the incidental taking of small numbers of humpback whale, Steller sea lion, California sea lion, Dall's porpoise, gray whale, harbor porpoise and killer whale near the Mukilteo Tank Farm Pier that may result from vibratory pile extraction activities.

In order to estimate the potential incidents of take that may occur incidental to the specified activity, we must first estimate the extent of the sound field that may be produced by the activity and then consider in combination with information about marine mammal density or abundance in the project area. We first provide information on applicable sound thresholds for determining effects to marine mammals before describing the information used in estimating the sound fields, the available marine mammal density or abundance information, and the method of estimating potential incidences of take.

**Sound Thresholds**

We use generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. To date, no studies have been conducted that explicitly examine impacts to marine mammals from pile driving sounds or from which empirical sound thresholds have been established. These thresholds (Table 3) are used to estimate when harassment may occur (*i.e.,* when an animal is exposed to levels equal to or exceeding the relevant criterion) in specific contexts; however, useful contextual information that may inform our assessment of behavioral effects is typically lacking and we consider these thresholds as step functions. NMFS is working to revise these acoustic guidelines; for more information on that process, please visit *www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.*

TABLE 3—UNDERWATER INJURY AND DISTURBANCE THRESHOLD DECIBEL LEVELS FOR MARINE MAMMALS

| Criterion | Criterion definition | Threshold |
|---|---|---|
| Level A harassment ..... | PTS (injury) conservatively based on TTS ..... | 190 dB RMS for pinnipeds. 180 dB RMS for cetaceans. |
| Level B harassment ..... | Behavioral disruption for impulse noise (e.g., impact pile driving) ..... | 160 dB RMS. |
| Level B harassment ..... | Behavioral disruption for non-pulse noise (e.g., vibratory pile driving, drilling). | 120 dB RMS. |

*Distance to Sound Thresholds*

WSF and NMFS have determined that open-water vibratory pile extraction during the Mukilteo Tank Farm Pier Removal project has the potential to result in behavioral harassment of marine mammal species and stocks in the vicinity of the proposed activity.

As Table 3 shows, under current NMFS guidelines, the received exposure level for Level A harassment is defined at ≥180 dB (rms) re 1 μPa for cetaceans and ≥190 dB (rms) re 1 μPa for pinnipeds. The measured source levels from vibratory removal of 12-inch timber piles are between 149 and 152 dB (rms) re 1 μPa at 16 m from the hammer (Laughlin 2011a). Therefore, the proposed Mukilteo Tank Farm Pier Removal construction project is not expected to cause Level A harassment or TTS to marine mammals.

Masking affects both senders and receivers of the signals and therefore can have consequences at the population level. Recent science suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than 3 times in terms of SPL) in the world's ocean from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand 2009). All anthropogenic noise sources, such as those from vessel traffic, pile driving, dredging, and dismantling existing bridge by mechanic means, contribute to the elevated ambient noise levels, thus intensify masking.

Nevertheless, the levels of noise from the proposed WSF construction activities are relatively low and are blocked by landmass southward. Therefore, the noise generated is not expected to contribute to increased ocean ambient noise in a manner that will notably increase the ability of marine mammals in the vicinity to detect critical acoustic cues. Due to shallow water depths near the ferry terminals, underwater sound propagation for low-frequency sound (which is the major noise source from pile driving) is expected to be poor.

Currently NMFS uses 120 $dB_{rms}$ re 1 μPa received level for non-impulse noises (such as vibratory pile driving, saw cutting, drilling, and dredging) for the onset of marine mammal Level B behavioral harassment. However, since the ambient noise level at the vicinity of the proposed project area is between 122 to 124 dB re 1 μPa, depending on marine mammal functional hearing groups (Laughlin 2011b), the received level of 120 dB re 1 μPa would be below the ambient level. Therefore, for this proposed project, 122 dB re 1 μPa is used as the threshold for Level B behavioral harassment. The distance to the 122 dB contour Level B acoustical harassment threshold due to vibratory pile removal extends a maximum of 1.6 km as is shown in Figure 1–5 in the Application.

As far as airborne noise is concerned, the estimated in-air source level from vibratory pile driving a 30-in steel pile is estimated at 97.8 dB re 1 μPa at 15 m (50 feet) from the pile (Laughlin 2010b). Using the spreading loss of 6 dB per doubling of distance, it is estimated that the distances to the 90 dB and 100 dB thresholds were estimated at 37 m and 12 m, respectively.

The closest documented harbor seal haul-out is the Naval Station Everett floating security fence, and the Port Gardner log booms, both approximately 4.5 miles to the northeast of the project site). The closest documented California sea lion haul out site are the Everett Harbor navigation buoys, located approximately 3 miles to the northeast of the project site (Figure 3–1). In-air disturbance will be limited to those animals moving on the surface through the immediate pier area, within approximately 37 meters (123 feet) for harbor seals and within 12 meters (39 feet) for other pinnipeds of vibratory pile removal (Figure 1–6 in Application).

Incidental take is estimated for each species by estimating the likelihood of a marine mammal being present within a ZOI during active pile removal or driving. Expected marine mammal presence is determined by past observations and general abundance near the Tank Farm Pier during the construction window. Typically, potential take is estimated by multiplying the area of the ZOI by the local animal density. This provides an estimate of the number of animals that might occupy the ZOI at any given moment. However, in some cases take requests were estimated using local marine mammal data sets (*e.g.,* Orca Network, state and federal agencies), opinions from state and federal agencies, and observations from Navy biologists.

*Harbor Seal*

Based on the ORCA monitoring, NMFS' analysis uses a conservative estimate of 13 harbor seals per day potentially within the ZOI. For Year One pile removal, the duration estimate is 975 hours over 140 days. For the exposure estimate, it will be conservatively assumed that 13 harbor seals may be present within the ZOI and be exposed multiple times during the project. The calculation for marine mammal exposures is estimated by:

Exposure estimate = N * 140 days of vibratory pile removal activity,

where:
N = # of animals (13)
Exposure estimate = 13 * 140 days = 1,820

NMFS is proposing the authorization for Level B acoustical harassment of 1,820 harbor seals. However, many of these takes are likely to be repeated exposures of individual animals.

*California Sea Lion*

Based on the ORCA monitoring this analysis uses a conservative estimate of 6 California sea lions per day potentially within the ZOI.

Exposure estimate = 6 * 140 days = 840

NMFS is proposing the authorization for Level B acoustical harassment take of 840 California sea lions. Many of these takes are likely to be repeated exposures of individual animals.

*Steller Sea Lion*

Based on the observation data from Craven Rock, this analysis uses a conservative estimate of 12 Steller sea lions per day potentially near the ZOI. However, given the distance from this haul-out to the Tank Farm Pier, it is not expected that the same numbers would be present in the ZOI. For the exposure estimate, it will be conservatively assumed that ⅙th of the Steller sea lions observed at Craven Rock (2

animals) may be present within the ZOI and be exposed multiple times during the project for total of 2 animals

Exposure estimate = 2 * 140 days = 280

NMFS is proposing the authorization for Level B acoustical harassment take of 280 Steller sea lions. It is likely that many of these takes are likely to be repeated exposures of individual animals..

*Harbor Porpoise*

Based on the water depth within the ZOI and group size, this analysis uses a conservative estimate of 8 harbor porpoises per day potentially near the ZOI.

Exposure estimate = 8 * 140 days = 1,120

WSF is requesting authorization for Level B acoustical harassment take of 1,120 Harbor porpoise. Note that many of these takes are likely to be repeated exposures of individual animals.

*Dall's Porpoise*

Based on the average winter group size, as described in Section 3.0 of the Application, this analysis uses a conservative estimate of 3 Dall's porpoises per day potentially near the ZOI.

Exposure estimate = 3 * 140 days = 420

NMFS is proposing authorization for Level B acoustical harassment take of 420 Dall's porpoise. A number of these anticipated takes are likely to be repeated exposures of individual animals.

*Killer Whale*

*Southern Resident Killer Whale*—In order to estimate anticipated take, NMFS used Southern Resident killer whale density data from the Pacific Marine Species Density Database (US Navy 2014) that measured density per $km^2$ per season in the waters in the vicinity of the Mukilteo Tank Farm Pier. Data was provided as a range by the Navy. NMFS took the high end of the range for the summer, fall, and winter seasons to estimate density and multiplied that figure by the ensonified area (~5 $km^2$.)

Exposure estimate = (0.00090 [summer] + 0.000482 [fall] + 0.000250 [winter]) * 5 $km^2$ = 0.0258 Southern Resident killer whales.

Note that pod size of Southern Resident killer whales can range from 3–50. NMFS will assume that one pod of 15 whales will be sighted during this authorization period and proposes to authorize that amount. However, it is possible that a larger group may be observed. In order to limit the take of southern resident killer whales NMFS proposes to require additional steps applicable to killer whales. These steps are described below and in Appendix B of the Application.

*Transient Killer Whale*—NMFS estimated the take of transient killer whales by applying the same methodology used to estimate Southern Resident killer whale.

Exposure estimate = (0.001582 [summer] + 0.002373 [fall] + 0.002373 [winter]) * 5 $km^2$ = 0.03163 transient killer whales.

Note that pod size of transients can range from 1–5. NMFS will assume that two pods of 5 whales will be sighted during this authorization period. Therefore, NMFS is proposing 10 takes of transient killer whales.

*Gray Whale*

Based on the frequency of sightings during the in-water work window, this analysis uses a conservative estimate of 3 gray whales per day potentially near the ZOI.

It is assumed that Gray whales will not enter the ZOI each day of the project, but may be present in the ZOI for 5 days per month as they forage in the area, for a total of 30 days. For the exposure estimate, it will be conservatively assumed that up to 3 animals may be present within the ZOI and be exposed multiple times during the project.

Exposure estimate = 3 * 30 days = 90

NMFS is proposing authorization for Level B acoustical harassment take of 90 Gray whales. It is assumed that this number will include multiple harassments of a single individual animal.

*Humpback Whale*

Based on the frequency of sightings during the in-water work window, this analysis uses a conservative estimate of 2 humpback whales potentially near the ZOI.

It is assumed that humpback whales will not enter the ZOI each day of the project, but may be present in the ZOI for 3 days per month as they forage in the area, for a total of 18 days. For the exposure estimate, it will be conservatively assumed that up to 2 animals may be present within the ZOI and be exposed multiple times during the project.

Exposure estimate = 2 * 18 days = 36

NMFS is proposing authorization for Level B acoustical harassment take of 36 humpback whales. It is assumed that this number will include multiple harassments of the same individuals.

Based on the estimates, approximately 1,820 Pacific harbor seals, 840 California sea lions, 280 Steller sea lions, 1,120 Harbor porpoise, 420 Dall's porpoise, 94 killer whales (10 transient, 15 Southern Resident killer whales), 90 gray whales, and 36 humpback whales could be exposed to received sound levels above 122 dB re 1 µPa (rms) from the proposed Mukilteo Tank Farm Pier Removal project. A summary of the estimated takes is presented in Table 4.

TABLE 4—ESTIMATED NUMBERS OF MARINE MAMMALS THAT MAY BE EXPOSED TO VIBRATORY HAMMER SOUND LEVELS ABOVE 122 dB re 1 µPa

[rms]

| Species | Estimated marine mammal akes * | Percentage of species or stock (%) |
|---|---|---|
| Pacific harbor seal | 1,820 | 16.5 |
| California sea lion | 840 | 0.3 |
| Steller sea lion ..... | 280 | 0.4 |
| Harbor porpoise .... | 1,120 | 10.5 |
| Dall's porpoise ..... | 420 | 1.0 |
| Killer whale, transient ..... | 10 | 4.1 |
| Killer whale, Southern Resident ..... | 15 | 18.2 |
| Gray whale ..... | 90 | 0.5 |
| Humpback whale .. | 36 | 2.0 |

* Represents maximum estimate of animals due to likelihood that some individuals will be taken more than once

**Analysis and Preliminary Determinations**

*Negligible Impact Analysis*

Negligible impact is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival'' (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of

estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, the following discussion applies to the affected stocks of harbor seals, California sea lions, Steller sea lions, harbor porpoises, Dall's porpoises, gray whales and humpback whales, except where a separate discussion is provided for killer whales, as the best available information indicates that effects of the specified activity on individuals of those stocks will be similar, and there is no information about the population size, status, structure, or habitat use of the areas to warrant separate discussion.

Pile removal activities associated with the Mukilteo Tank Farm removal project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated from pile extraction. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving is happening.

No injury, serious injury, or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically, vibratory hammers will be the primary method of extraction and no impact driving will occurs. Vibratory driving and removal does not have significant potential to cause injury to marine mammals due to the relatively low source levels produced (site-specific acoustic monitoring data show no source level measurements above 180 dB rms) and the lack of potentially injurious source characteristics. Given sufficient ''notice'' through use of soft start, marine mammals are expected to move away from a sound source. The likelihood that marine mammal detection ability by trained observers is high under the environmental conditions described for waters around the Mukilteo Tank Farm further enables the implementation of shutdowns if animals come within 10 meters of operational activity to avoid injury, serious injury, or mortality.

WSF proposed activities are localized and of relatively short duration. The entire project area is limited to water in close proximity to the tank farm. The project will require the extraction of 3,900 piles and will require 675–975 hours over 140–180 days. These localized and short-term noise exposures may cause brief startle reactions or short-term behavioral modification by the animals. These reactions and behavioral changes are expected to subside quickly when the exposures cease. Moreover, the proposed mitigation and monitoring measures are expected to reduce potential exposures and behavioral modifications even further.

*Southern Resident Killer Whale*

Critical habitat for Southern Resident killer whales has been identified in the area and may be impacted. The proposed action will have short-term adverse effects on Chinook salmon, the primary prey of Southern Resident killer whales. However, the Puget Sound Chinook salmon ESU comprises a small percentage of the Southern Resident killer whale diet. Hanson et al. (2010) found only six to 14 percent of Chinook salmon eaten in the summer were from Puget Sound. Therefore, NMFS concludes that both the short-term adverse effects and the long-term beneficial effects on Southern Resident killer whale prey quantity and quality will be insignificant. Also, the sound from vibratory pile driving and removal may interfere with whale passage. For example, exposed killer whales are likely to redirect around the sound instead of passing through the area. However, the effect of the additional distance traveled is unlikely to cause a measureable increase in an individual's energy budget, and the effects would therefore be temporary and insignificant. Additionally, WSF will employ additional mitigation measures to avoid or minimize impacts to Southern Residents. These measures were described previously in the section *Monitoring and Shutdown for Pile Driving.*

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the ''Anticipated Effects on Marine Mammal Habitat'' section. The project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences. Furthermore, no important feeding and/or reproductive areas for other marine mammals are known to be near the proposed action area.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. In response to vibratory driving and removal, pinnipeds (which may become somewhat habituated to human activity in industrial or urban waterways) have been observed to orient towards and sometimes move towards the sound. The pile removal activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in fitness for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the project area while the activity is occurring.

In summary, we considered the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior; (3) the absence of any significant habitat, other than identified critical habitat for Southern Resident killer whales within the project area, including rookeries, significant haul-outs, or known areas or features of special significance for foraging or reproduction; (4) the expected efficacy of the proposed mitigation measures in minimizing the effects of the specified activity on the affected species or stocks and their

habitat to the level of least practicable impact. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activity will have only short-term effects on individuals. The take resulting from the proposed WSF Mukilteo Multimodal Project Tank Farm Pier Removal project is not reasonably expected to and is not reasonably likely to adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival.

Therefore, based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from WSF's Mukilteo Multimodal Project Tank Farm Pier Removal project will have a negligible impact on the affected marine mammal species or stocks.

*Small Numbers Analysis*

Based on long-term marine mammal monitoring and studies in the vicinity of the proposed construction areas, it is estimated that approximately 1,820 Pacific harbor seals, 840 California sea lions, 280 Steller sea lions, 1,120 harbor porpoises, 420 Dall's porpoises, 10 transient killer whales, 15 Southern Resident killer whales, 90 gray whales, and 36 humpback whales could be exposed to received noise levels above 122 dBrms re 1 μPa from the proposed construction work at the Mukilteo Multimodal Ferry Terminal. These numbers represent approximately 0.3%–18.2% of the stocks and populations of these species that could be affected by Level B behavioral harassment.

The numbers of animals authorized to be taken for all species would be considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, we find that small numbers of marine mammals will be taken relative to the population sizes of the affected species or stocks.

**Impact on Availability of Affected Species for Taking for Subsistence Uses**

There are no subsistence uses of marine mammals in Puget Sound or the San Juan Islands relevant to section 101(a)(5)(D).

**Endangered Species Act (ESA)**

The humpback whale and Southern Resident stock of killer whale are the only marine mammal species currently listed under the ESA that could occur in the vicinity of WSF's proposed construction projects. NMFS issued a Biological Opinion that covers the proposed action on July 31, 2013, and concluded that the proposed action is not likely to jeopardize the continued existence of Southern Resident killer whales or humpback whales, and is not likely to destroy or adversely modify Southern Resident killer whales critical habitat.

**National Environmental Policy Act (NEPA)**

NMFS re-affirms the document titled *Final Environmental Assessment Issuance of Marine Mammal Incidental Take Authorizations to the Washington State Department of Transportation to Take Marine Mammals* which was issued in February 2014. A Finding of No Significant Impact (FONSI) was signed on February 28, 2014. In the FONSI NMFS determined that the issuance of IHAs for the take, by harassment, of small numbers of marine mammals incidental to the WSF's Mukilteo Ferry Terminal replacement project in Washington State, will not significantly impact the quality of the human environment, as described in this document and in the Mukilteo EA. These documents are found at *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.*

**Proposed Authorization**

For the reasons discussed in this document, NMFS has preliminarily determined that the vibratory pile removal associated with the Mukilteo Tank Farm Pier Removal Project would result, at worst, in the Level B harassment of small numbers of eight marine mammal species that inhabit or visit the area. While behavioral modifications, including temporarily vacating the area around the project site, may be made by these species to avoid the resultant visual and acoustic disturbance, the availability of alternate areas within Washington coastal waters and haul-out sites has led NMFS to preliminarily determine that this action will have a negligible impact on these species in the vicinity of the proposed project area.

In addition, no take by TTS, Level A harassment (injury) or death is anticipated and harassment takes should be at the lowest level practicable due to incorporation of the mitigation and monitoring measures mentioned previously in this document.

As a result of these preliminary determinations, NMFS proposes to issue an IHA to WSF for conducting the Mukilteo Tank Farm removal project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided next.

This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

1. This Authorization is valid from September 1, 2015, through August 31, 2016.

2. This Authorization is valid only for activities associated with in-water construction work at the Mukilteo Multimodal Ferry Terminals in the State of Washington.

3. (a) The species authorized for incidental harassment takings, Level B harassment only, are: Pacific harbor seal (*Phoca vitulina richardsi*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), transient and Southern Resident killer whales (*Orcinus orca*), gray whale (*Eschrichtius robustus*), and humpback whale (*Megaptera novaeangliae*).

(b) The authorization for taking by harassment is limited to the following acoustic sources and from the following activities:

(i) Vibratory pile removal; and

(ii) Work associated with pile removal activities.

(c) The taking of any marine mammal in a manner prohibited under this Authorization must be reported within 24 hours of the taking to the Northwest Regional Administrator (206–526–6150), National Marine Fisheries Service (NMFS) and the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401.

4. The holder of this Authorization must notify Monica DeAngelis of the West Coast Regional Office (phone: (562) 980–3232) at least 24 hours prior to starting activities.

5. Prohibitions:

(a) The taking, by incidental harassment only, is limited to the species listed under condition 3(a) above and by the numbers listed in Table 3 of this **Federal Register** notice. The taking by Level A harassment,

injury or death of these species or the taking by harassment, injury or death of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this Authorization.

(b) The taking of any marine mammal is prohibited whenever the required protected species observers (PSOs), required by condition 7(a), are not present in conformance with condition 7(a) of this Authorization.

6. Mitigation:

(a) *Ramp Up (Soft Start):* Vibratory hammer for pile removal and pile driving shall be initiated at reduced power for 15 seconds with a 1 minute interval, and be repeated with this procedure for an additional two times.

(b) *Marine Mammal Monitoring:* Monitoring for marine mammal presence shall take place 30 minutes before, during and 30 minutes after pile driving.

(c) Power Down and Shutdown Measures:

(i) A shutdown zone of 10 m radius for all marine mammals will be established around all vibratory extraction activity.

(ii) WSF shall implement shutdown measures if Southern Resident killer whales (SRKWs) are sighted within the vicinity of the project area and are approaching the Level B harassment zone (zone of influence, or ZOI) during in-water construction activities.

(iii) If a killer whale approaches the ZOI during pile driving or removal, and it is unknown whether it is a SRKW or a transient killer whale, it shall be assumed to be a SRKW and WSF shall implement the shutdown measure identified in 6(c)(i).

(iv) If a SRKW enters the ZOI undetected, in-water pile driving or pile removal shall be suspended until the SRKW exits the ZOI to avoid further level B harassment.

(d) *Time Restrictions*—Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In addition, all in-water construction will be limited to the period between August 1, 2015 and February 15, 2016; and August 1, 2016 until IHA expires on August 31, 2016.

7. Monitoring:

(a) *Protected Species Observers:* WSF shall employ qualified protected species observers (PSOs) to monitor the 122 dBrms re 1 μPa (nominal ambient level) zone of influence (ZOI) for marine mammals. Qualifications for marine mammal observers include:

(i) Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars will be required to correctly identify the target.

(ii) Experience or training in the field identification of marine mammals (cetaceans and pinnipeds).

(iii) Sufficient training, orientation or experience with the construction operation to provide for personal safety during observations.

(iv) Ability to communicate orally, by radio or in person, with project personnel to provide real time information on marine mammals observed in the area as necessary.

(v) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).

(vi) Writing skills sufficient to prepare a report of observations that would include such information as the number and type of marine mammals observed; the behavior of marine mammals in the project area during construction, dates and times when observations were conducted; dates and times when in-water construction activities were conducted; and dates and times when marine mammals were present at or within the defined ZOI.

(b) *Monitoring Protocols:* PSOs shall be present on site at all times during pile removal.

(i) During vibratory pile removal, two land-based biologists will monitor the area from the best observation points available. If weather conditions prevent adequate land-based observations, boat-based monitoring shall be implemented.

(ii) The vibratory Level B acoustical harassment ZOI shall be monitored for the presence of marine mammals 30 minutes before, during, and 30 minutes after any pile removal activity.

(iii) Monitoring shall be continuous unless the contractor takes a significant break, in which case, monitoring shall be required 30 minutes prior to restarting pile removal.

(iv) A range finder or hand-held global positioning system device shall be used to ensure that the 122 dBrms re 1 μPa Level B behavioral harassment ZOI is monitored.

(v) If marine mammals are observed, the following information will be documented:

(A) Species of observed marine mammals;

(B) Number of observed marine mammal individuals;

(C) Behavioral of observed marine mammals;

(D) Location within the ZOI; and

(E) Animals' reaction (if any) to pile-driving activities

8. Reporting:

(a) WSDOT shall provide NMFS with a draft monitoring report within 90 days of the conclusion of the construction work. This report shall detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed.

(b) If comments are received from the NMFS Northwest Regional Administrator or NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft report will be considered to be the final report.

(c) In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by this Authorization (if issued), such as an injury, serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), WSF shall immediately cease all operations and immediately report the incident to the Chief Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401and/or be email to *Jolie.Harrison@noaa.gov* and *Robert.pauline@noaa.gov* and the West Coast Regional Stranding Coordinator Brent Norberg (*Brent.Norbert@noaa.gov*). The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) Description of the incident;

(iii) Status of all sound source use in the 24 hours preceding the incident;

(iv) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility, and water depth);

(v) Description of marine mammal observations in the 24 hours preceding the incident;

(vi) Species identification or description of the animal(s) involved;

(vii) The fate of the animal(s); and

(viii) Photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with WSF to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. WSF may not resume their activities until notified by NMFS via letter, email, or telephone.

(d) In the event that WSF discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), WSF will immediately report the

incident to the Chief Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or be email to *Jolie.Harrison@noaa.gov* and *Robert.pauline@noaa.gov* and the West Coast Regional Stranding Coordinator Brent Norberg (*Brent.Norbert@noaa.gov*).

The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with WSF to determine whether modifications in the activities are appropriate.

(e) In the event that WSF discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), WSF shall report the incident to the Chief, Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401and/or be email to *Jolie.Harrison@noaa.gov* and *Robert.pauline@noaa.gov* and the West Coast Regional Stranding Coordinator Brent Norberg (*Brent.Norbert@noaa.gov*) within 24 hours of the discovery. WSF shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. WSF can continue its operations under such a case.

9. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein or if the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals, or if there is an unmitigable adverse impact on the availability of such species or stocks for subsistence uses.

10. A copy of this Authorization and the Incidental Take Statement must be in the possession of each contractor who performs the construction work at Mukilteo Multimodal Ferry Terminals.

11. WSF is required to comply with the Terms and Conditions of the Incidental Take Statement corresponding to NMFS' Biological Opinion.

**Request for Public Comments**

NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for WSF's Mukilteo Tank Farm removal project. Please include with your comments any supporting data or literature citations to help inform our final decision on WSF's request for an MMPA authorization.

Dated: July 16, 2015.

**Perry Gayaldo,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XD978**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Rehabilitation of Jetty A at the Mouth of the Columbia River

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments.

**SUMMARY:** NMFS has received a request from the U.S. Army Corps of Engineers, Portland District (Corps) for authorization to take marine mammals incidental to the rehabilitation of jetty system at the mouth of the Columbia River (MCR): North Jetty, South Jetty, and Jetty A. The Corps is requesting an Incidental Harassment Authorization (IHA) for the first season of pile installation and removal at Jetty A only.

**DATES:** Comments and information must be received no later than August 24, 2015.

**ADDRESSES:** Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent *to ITP.Pauline@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted to the Internet at *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

**Availability**

An electronic copy of the Corps' application and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* In case of problems accessing these documents, please call the contact listed above.

**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the

wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

**Summary of Request**

On February 13, 2015, NMFS received an application from the Corps for the taking of marine mammals incidental to the rehabilitation of Jetty A at the mouth of the Columbia River (MCR). On June 9, 2015 NMFS received a revised application. NMFS determined that the application was adequate and complete on June 12, 2015. The Corps proposes to conduct in-water work that may incidentally harass marine mammals (*i.e.,* pile driving and removal). This IHA would be valid from May 1, 2016 through April 30, 2017.

The use of vibratory pile driving is expected to produce underwater sound at levels that have the potential to result in behavioral harassment of marine mammals. Species with the expected potential to be present during the project timeframe include killer whale (*Orcinus orca*), Steller sea lion (*Eumatopius jubatus*), gray whale (*Eschrichtius robustus*), harbor porpoise (*Phocoena phocoena*), California sea lion (*Zalophus californianus),* and harbor seal (*Phoca vitulina richardii*).

**Description of the Specified Activity**

*Overview*

The Corps is seeking an IHA for the first year of pile installation and, possibly, removal work at Jetty A related to construction and maintenance of a barge offloading facility. The barge facility will be used for activities associated with the rehabilitation of Jetty A. The Corps is seeking this authorization by the end of August 2015 for contract bid schedule reasons. Because the work may extend beyond two seasons the Corps will request an LOA for any additional years of pile maintenance and removal at Jetty A. Jetty A is not a haul-out site for pinnipeds so pile installation and removal were the only activities identified as having the potential to adversely affect marine mammals at Jetty A.

*Dates and Duration*

Work on the first year of pile installation may begin as early as May 2016 and would extend through September 2017. Work is anticipated for two seasons stone placement for head stabilization and trunk repairs starting in 2016. Because the work may extend to two seasons the Corps will be requesting an LOA for the second year of pile maintenance and removal at Jetty A.

The scheduled program of repair and rehabilitation priorities are described in detail in Section 1 of the Corps' IHA application. The sequence and overall timing for remaining work requiring an IHA and future LOA at the three MCR jetties include:

1. Jetty A Scheduled Repairs and Head Stabilization will require an IHA and future LOA for pile installation of an offloading facilities. Construction and stone placement will likely occur in 2016 and 2017. The Corps will request an LOA after the IHA expires to cover additional years of pile maintenance and removal.

2. North Jetty Scheduled Repair and Head Stabilization will require an LOA in the future for pile installation and removal at offloading facility. Construction/placement is planned for 2016–2019.

3. South Jetty Interim Repair and Head Determination will require an LOA for pile installation and removal at two barge offloading facilities. This work would be covered under a future LOA.

The work season generally extends from April through October, with extensions, contractions, and additional work windows outside of the summer season varying by weather patterns. To avoid the presence of Southern resident killer whales, the Corps will prohibit pile installation for offloading facilities from October 1 until on or after May 1 since that is their primary feeding season when they may be present at the MCR plume. Installation would occur from May 1 to September 30 each year.

*Specified Geographic Region*

This activity will take place at the three MCR jetties in Pacific County, Washington, and Clatsop County, Oregon. The scheduled program of repair and rehabilitation priorities are described and illustrated in Section 1 of the application.

*Detailed Description of Activities*

Jetty A Scheduled Repair would occur as part of the Corps' Major Rehabilitation program for the jetties. Scheduled repairs would address the loss of cross-section, reduce future cross-section instability, and stabilize the head (terminus). Scheduled cross-section repairs are primarily above mean lower low water (MLLW), with a majority of stone placement not likely to extend below −5 feet MLLW. The jetty head (Southern-most end section) would be stabilized at approximately station (STA) 89+00 with large armoring stone placed on relic jetty stone that is mostly above MLLW. Stations (STA) indicate lineal distance along the jetty relative to a fixed reference point (0+00) located at the landward-most point on the jetty root (See Application Figure 2).

Construction of an offloading facility will be necessary to transport materials to the Jetty A project site. This construction would require dredging and pile installation. There is a small chance that delivery and placement could occur exclusively via overland methods. If such were the case, the Corps would not have a need an IHA.

Four offloading facilities will eventually be required for completion of entire project. However, only construction of the first facility would be covered under the proposed Authorization. Construction of all four offloading facilities combined will require up to 96 wood or steel piles and up to 373 sections of Z-piles, H-piles, and sheet pile to retain rock fill. A vibratory hammer will be used for pile installation due to the soft sediments (sand) in the project area and only untreated wood will be used, where applicable. No impact driving will be necessary under this Authorization. The piles will be located within 200 feet of the jetty structure. The presence of relic stone may require locating the piling further from the jetty so that use of this method is not precluded by the existing stone. The dolphins/Z- and H-piles would be composed of either untreated timber or steel piles installed to a depth of approximately 15 to 25 feet below grade in order to withstand the needs of off-loading barges and heavy construction equipment. Because vibratory hammers will be used in areas with velocities greater than 1.6 feet per second, the need for hydroacoustic attenuation is not an anticipated issue. Piling will be fitted with pointed caps to prevent perching by piscivorous birds to minimize opportunities for avian predation on listed species. Some of the pilings and offloading facilities will be removed at the end of the construction period.

Pile installation is assumed to occur for about 10 hours a day, with a total of approximately 15 piles installed per day. Each offloading facility would have about ¼ of the total piles mentioned. As noted above, up to 96 piles could be installed, and up to 373 sections of sheet pile to retain rock fill. This is a total of 469 initial installation and 469 removal events, over the span of about 67 days. In order to round the math, the NMFS has assumed 68 days, so that each of the four offloading facilities takes about 17 days total for installation and removal. This is likely to be the maximum number of days for pile

installation at Jetty A. The Corps is still determining whether or not to remove some or all of these offloading facilities once jetty rehabilitation work is completed. It is possible that portions of these facilities may not survive ocean conditions. Longer-term offloading facilities at South and North Jetties may need to be repaired if used more than one season. The Corps will also be conducting post-construction pedestrian surveys along the jetties, and will have construction activities for about four seasons on the South Jetty.

Note that only a portion of the activities described above will be covered under the IHA. Actions covered under the authorization would include installing a maximum of 24 piles for use as dolphins and a maximum of 93 sections of Z or H piles for retention of rock fill over 17 days. The piles would be a maximum diameter of 24 inches and would only be installed by vibratory driving method. The possibility exists that smaller diameter piles may be used but for this analysis it is assumed that 24 inch piles will be driven.

**Description of Marine Mammals in the Area of the Specified Activity**

Marine mammals known to occur in the Pacific Ocean offshore at the MCR include whales, orcas, dolphins, porpoises, sea lions, and harbor seals. Most cetacean species observed by Green and others (1992) occurred in Pacific slope or offshore waters (600 to 6,000 feet in depth). Harbor porpoises (*Phocoena phocoena)* and gray whales (*Eschrichtius robustus)* were prevalent in shelf waters less than 600 feet in depth. Orcas are known to feed on Chinook salmon at the MCR, and humpback whales (*Megaptera novaeangliae*) may transit through the area offshore of the jetties. While humpbacks have been observed offshore they are unlikely to be found inside of the jetty system. The marine mammal species potentially present in the activity area are shown in Table 1.

Pinniped species that occur in the vicinity of the jetties include Pacific harbor seals (*Phoca vitulina richardsi*), California sea lions (*Zalophus californianus*), and Steller sea lions (*Eumetopias jubatus*). Their use is primarily confined to the South Jetty. According to the Washington Department of Fish and Wildlife (WDFW) aerial survey counts from 2000–2014, there are no records for harbor seals, Steller sea lions or California sea lions using Jetty A (WDFW 2014).

In the species accounts provided here, we offer a brief introduction to the species and relevant stock as well as available information regarding population trends and threats, and describe any information regarding local occurrence.

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN THE PROJECT AREA

| Species | Stock(s) abundance estimate [1] | ESA Status | MMPA* Status | Frequency of occurrence [3] |
|---|---|---|---|---|
| Killer Whale (*Orcinus orca*), *Eastern N. Pacific, Southern Resident Stock*. | 85 | Endangered | Depleted and Strategic. | Infrequent/Rare. |
| Killer Whale (*Orcinus orca*), *Eastern N. Pacific, West Coast Transient Stock*. | 243 | | Non-depleted | Rare. |
| Gray Whale (*Eschrichtius robustus*), *Eastern North Pacific Stock, (Pacific Coast Feed Group)*. | 18,017 (173) | Delisted/Recovered (1994) | Non-depleted | Rare. |
| Harbor Porpoise (*Phocoena phocoena*), *Northern Oregon/Washington Coast Stock*. | 21,487 | | Non-depleted | Likely. |
| Steller Sea Lion (*Eumetopias jubatus*), *Eastern U.S. Stock/DPS***. | 63,160-78,198 | Delisted/Recovered (2013) | Depleted and Strategic [2]. | Likely. |
| California Sea Lion (*Zalophus californianus*), *U.S. Stock* | 296,750 | | Non-depleted | Likely. |
| Harbor Seal (*Phoca vitulina richardii*), *Oregon and Washington Stock*. | 24,732 [4] | | Non-depleted | Seasonal. |

[1] NOAA/NMFS 2014 marine mammal stock assessment reports at *http://www.nmfs.noaa.gov/pr/sars/species.htm.*
[2] May be updated based on the recent delisting status.
[3] Frequency defined here in the range of:
- Rare—Few confirmed sightings, or the distribution of the species is near enough to the area that the species could occur there.
- Infrequent—Confirmed, but irregular sightings.
- Likely—Confirmed and regular sightings of the species in the area year-round.
- Seasonal—Confirmed and regular sightings of the species in the area on a seasonal basis.

[4] Data is 8 years old. No current abundance estimates exist.
*MMPA = Marine Mammal Protection Act.
**DPS = Distinct population segment.

*Cetaceans*

Killer Whale

During construction of the project, it is possible that two killer whale stocks, the Eastern North Pacific Southern resident and Eastern North Pacific West Coast transient stocks could be in the nearshore vicinity of the MCR. However, based on the restrictions to the work window for pile installation, it is unlikely that either West Coast transient or Southern resident killer whales will be present in the area during the period of possible acoustic effects.

Since the first complete census of this stock in 1974 when 71 animals were identified, the number of Southern resident killer whales has fluctuated annually. Between 1974 and 1993 the Southern Resident stock increased approximately 35%, from 71 to 96 individuals (Ford *et al.* 1994), representing a net annual growth rate of 1.8% during those years. Following the peak census count of 99 animals in 1995, the population size has fluctuated and currently stands at 85 animals as of the 2013 census (Carretta *et al.* 2014).

The Southern resident killer whale population consists of three pods, designated J, K, and L pods, that reside from late spring to fall in the inland waterways of Washington State and British Columbia (NMFS 2008a). During winter, pods have moved into Pacific coastal waters and are known to travel as far south as central California. Winter and early spring movements and distribution are largely unknown for the population. Sightings of members of K and L pods in Oregon (L pod at Depoe

Bay in April 1999 and Yaquina Bay in March 2000, unidentified Southern residents at Depoe Bay in April 2000, and members of K and L pods off of the Columbia River) and in California (17 members of L pod and four members of K pod at Monterey Bay in 2000; L pod members at Monterey Bay in March 2003; L pod members near the Farallon Islands in February 2005 and again off Pt. Reyes in January 2006) have considerably extended the Southern limit of their known range (NMFS 2008a). Sightings of Southern resident killer whales off the coast of Washington, Oregon, and California indicate that they are utilizing resources in the California Current ecosystem in contrast to other North Pacific resident pods that exclusively use resources in the Alaskan Gyre system (NMFS 2008a).

During the 2011 Section 7 Endangered Species Act (ESA) consultation, NMFS indicated Southern resident killer whales are known to feed on migrating Chinook salmon in the Columbia River plume during the peak salmon runs in March through April. Anecdotal evidence indicates that orcas historically were somewhat frequent visitors in the vicinity of the estuary, but have been less common in current times (Wilson 2015). However, there is low likelihood of them being in close proximity to any of the pile installation locations, and there would be minimal overlap of their presence during the peak summer construction season. To further avoid any overlap with Southern resident killer whales use during pile installation, the Corps would limit the pile installation window to start on or after May 1 and end after September 30 of each year to avoid peak adult salmon runs.

Southern Resident killer whales were listed as endangered under the ESA in 2005 and consequently the stock is automatically considered as a ''strategic'' stock under the MMPA. This stock was considered ''depleted'' prior to its 2005 listing under the ESA.

The West Coast transient stock ranges from Southeast Alaska to California. Preliminary analysis of photographic data resulted in the following minimum counts for 'transient' killer whales belonging to the West Coast Transient Stock (NOAA 2013b). Over the time series from 1975 to 2012, 521 individual transient killer whales have been identified. Of these, 217 are considered part of the poorly known ''outer coast'' subpopulation and 304 belong to the well-known ''inner coast'' population. However, of the 304, the number of whales currently alive is not certain. A recent mark-recapture estimate that does not include the ''outer coast'' subpopulation or whales from California for the west coast transient population resulted in an estimate of 243 in 2006. This estimate applies to the population of West Coast transient whales that occur in the inside waters of southeastern Alaska, British Columbia, and northern Washington. Given that the California transient numbers have not been updated since the publication of the catalogue in 1997 the total number of transient killer whales reported above should be considered as a minimum count for the West Coast transient stock (NOAA 2014a)

For this project, it is possible only the inner-coast species would be considered for potential exposure to acoustic effects. However, they are even less likely to be in the project area than Southern resident killer whales, especially outside of the peak salmon runs. The Corps is avoiding pile installation work during potential peak feeding timeframes in order to further reduce the potential for acoustic exposure. It is possible, however, that West Coast transients come in to feed on the pinniped population hauled out on the South Jetty.

This stock of killer whales is not designated as ''depleted'' under the MMPA nor are they listed as ''threatened'' or ''endangered'' under the ESA. Furthermore, the West Coast transient stock of killer whales is also not classified as a strategic stock

Gray Whale

During summer and fall, most gray whales in the Eastern North Pacific stock feed in the Chukchi, Beaufort and northwestern Bering Seas. An exception is the relatively small number of whales (approximately 200) that summer and feed along the Pacific coast between Kodiak Island, Alaska and northern California (Carretta *et al.* 2014), also known as the ''Pacific Coast Feeding Group.'' The minimum population estimate for the Eastern North Pacific stock using the 2006/2007 abundance estimate of 19,126 and its associated coefficient of variation (CV) of 0.071 is 18,017 animals. The minimum population estimate for Pacific Coast Feeding Group gray whales is calculated as the lower 20th percentile of the log-normal distribution of the 2010 mark-recapture estimate, or 173 animals (Carretta *et al.* 2014). If gray whales were in the vicinity of MCR, the Pacific Coast Feeding Group would be the most likely visitor. Anecdotal evidence indicates they have been seen at MCR, but are not a common visitor, as they mostly remain in the vicinity of the offshore shelf-break (Griffith 2015).

In 1994, the Eastern North Pacific stock of gray whales was removed from the Endangered Species List as it was no longer considered ''endangered'' or ''threatened'' under the ESA. NMFS has not designated gray whales as ''depleted'' under the MMPA. The Eastern North Pacific gray whale stock is not classified as ''strategic.''

Harbor Porpoise

The harbor porpoise inhabits temporal, subarctic, and arctic waters. In the eastern North Pacific, harbor porpoises range from Point Barrow, Alaska, to Point Conception, California. Harbor porpoise primarily frequent coastal waters and occur most frequently in waters less than 100 m deep (Hobbs and Waite 2010). They may occasionally be found in deeper offshore waters.

Harbor porpoise are known to occur year-round in the inland transboundary waters of Washington and British Columbia, Canada and along the Oregon/Washington coast. Aerial survey data from coastal Oregon and Washington, collected during all seasons, suggest that harbor porpoise distribution varies by depth. Although distinct seasonal changes in abundance along the west coast have been noted, and attributed to possible shifts in distribution to deeper offshore waters during late winter seasonal movement patterns are not fully understood. Harbor porpoises are sighted regularly at the MCR (Griffith 2015, Carretta *et al.* 2014).

According to the online database, Ocean Biogeographic Information System, Spatial Ecological Analysis of Megavertebrate Populations (Halpin 2009 at OBIS–SEAMAP 2015), West Coast populations have more restricted movements and do not migrate as much as East Coast populations. Most harbor porpoise groups are small, generally consisting of less than five or six individuals, though for feeding or migration they may aggregate into large, loose groups of 50 to several hundred animals. Behavior tends to be inconspicuous, compared to most dolphins, and they feed by seizing prey which consists of wide variety of fish and cephalopods ranging from benthic or demersal.

The Northern Oregon/Washington coast stock of harbor porpoise inhabits the waters near the proposed project area. The population estimate for this stock is calculated at 21,847 with a minimum population estimate of 15,123. (Carretta *et al.,* 2014)

Harbor porpoise are not listed as ''depleted'' under the MMPA, listed as ''threatened'' or ''endangered'' under the

Endangered Species Act, or classified as ''strategic.''

*Pinnipeds*

Steller Sea Lion

The Steller sea lion is a pinniped and the largest of the eared seals. Steller sea lion populations that primarily occur east of 144° W (Cape Suckling, Alaska) comprise the Eastern Distinct Population Segment (DPS), which was de-listed and removed from the list of Endangered Species List on November 4, 2013 (78 FR 66140). This stock is found in the vicinity of MCR. The population west of 144° W longitude comprises the Western DPS, which is listed as endangered, based largely on over-fishing of the seal's food supply.

The range of the Steller sea lion includes the North Pacific Ocean rim from California to northern Japan. Steller sea lions forage in nearshore and pelagic waters where they are opportunistic predators. They feed primarily on a wide variety of fishes and cephalopods. Steller sea lions use terrestrial haulout sites to rest and take refuge. They also gather on well-defined, traditionally used rookeries to pup and breed. These habitats are typically gravel, rocky, or sand beaches; ledges; or rocky reefs (Allen and Angliss, 2013).

The MCR South Jetty is used by Steller sea lions for hauling out and is not designated critical habitat. Use occurs chiefly at the concrete block structure at the terminus, or head of the jetty, and at the emergent rubble mound comprised of the eroding jetty trunk near the terminus.

Previous monthly averages between 1995 and 2004 for Steller sea lions hauled-out at the South Jetty head ranged from about 168 to 1,106 animals. More recent data from ODFW from 2000–2014 reflects a lower frequency of surveys, and numbers ranged from zero animals to 606 Steller sea lions (ODFW 2014). More frequent surveys by WDFW for the same time frame (2000–2014) put the monthly range at 177 to 1,663 animals throughout the year. According to ODFW (2014), most counts of animals remain at or near the jetty tip.

Steller sea lions are present, in varying abundances, all year as is shown in the Corps application. Abundance is typically lower as the summer progresses when adults are at the breeding rookeries. Steller sea lions are most abundant in the vicinity during the winter months and tend to disperse elsewhere to rookeries during breeding season between May and July. Abundance increases following the breeding season. However, this is not always true as evidenced by a flyover count of the South Jetty on May 23, 2007 where 1,146 Steller sea lions were observed on the concrete block structure and none on the rubble mound (ODFW 2007). Those counts represent a high-use day on the South Jetty. According to ODFW (2014), during the summer months it is not uncommon to have between 500–1,000 Steller sea lions present, the majority of which are immature males and females (no pups or pregnant females). All population age classes, and both males and females, use the South Jetty to haul out. Only non-breeding individuals are typically found on the jetty during May–July, and a greater percentage of juveniles are present. There is probably a lot of turnover in sea lion numbers using the jetty. That is, the 100 or so sea lions hauled out one week might not be the same individuals hauled out the following week. Recent ODFW and WDFW survey data continue to support these findings. The most recent estimate from 2007 put the populations between 63,160 and 78,198.(Allen and Angliss, 2013). The best available information indicates the eastern stock of Steller sea lion increased at a rate of 4.18% per year between 1979 and 2010 based on an analysis of pup counts in California, Oregon, British Columbia and Southeast Alaska (Allen and Angliss, 2013).

California Sea Lion

California sea lions are found from the Southern tip of Baja California to southeast Alaska. They breed mainly on offshore islands from Southern California's Channel Islands south to Mexico. Non-breeding males often roam north in spring foraging for food. Since the mid-1980s, increasing numbers of California sea lions have been documented feeding on fish along the Washington coast and—more recently—in the Columbia River as far upstream as Bonneville Dam, 145 miles from the river mouth. The population size of the U.S. stock of California sea lions is estimated at 296,750 animals (Carretta *et al.* 2014). As with Steller sea lions, according to ODFW (2014) most counts of California sea lions are also concentrated near the tip of the jetty, although sometimes haul out about halfway down the jetty. Survey information (2007 and 2014) from ODFW indicates that California sea lions are relatively less prevalent in the Pacific Northwest during June and July, though in the months just before and after their absence there can be several hundred using the South Jetty. More frequent WDFW surveys (2014) indicate greater numbers in the summer, and use remains concentrated to fall and winter months. Nearly all California sea lions in the Pacific Northwest are sub-adult and adult males (females and young generally stay in California). Again, there is probably a lot of turnover in sea lion numbers using the jetty. (ODFW 2014).

California sea lions in the U.S. are not listed as ''endangered'' or ''threatened'' under the Endangered Species Act, listed as ''depleted'' under the MMPA, or classified as ''strategic'' under the MMPA.

Harbor Seal

Harbor seals range from Baja California, north along the western coasts of the U.S., British Columbia and southeast Alaska, west through the Gulf of Alaska, Prince William Sound, and the Aleutian Islands, and north in the Bering Sea to Cape Newenham and the Pribilof Islands. They haul out on rocks, reefs, beaches, and drifting glacial ice and feed in marine, estuarine, and occasionally fresh waters. Harbor seals generally are non-migratory, with local movements associated with tides, weather, season, food availability, and reproduction. Harbor seals do not make extensive pelagic migrations, though some long distance movement of tagged animals in Alaska (900 km) and along the U.S. west coast (up to 550 km) have been recorded. Harbor seals have also displayed strong fidelity to haulout sites (Carretta *et al.* 2014).

The 1999 harbor seal population estimate for the Oregon/Washington Coast stock was about 24,732 animals. However, the data used was over 8 years old and, therefore, there are no current abundance estimates. Harbor seals are not considered to be ''depleted'' under the MMPA or listed as ''threatened'' or ''endangered'' under the ESA. The Oregon/Washington Coast stock of harbor seals is not classified as a ''strategic'' stock (Carretta *et al.* 20140).

Further information on the biology and local distribution of these species can be found in the Corps application available online at: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm* and the NMFS Marine Mammal Stock Assessment Reports, which may be found at: *http://www.nmfs.noaa.gov/pr/species/.*

**Potential Effects of the Specified Activity on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that stressors, (*e.g.* pile driving,) and potential mitigation activities, associated with the rehabilitation of Jetty A at MCR may impact marine mammals and their

habitat. The *Estimated Take by Incidental Harassment* section later in this document will include an analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis* section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the *Estimated Take by Incidental Harassment* section, and the *Proposed Mitigation* section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks. In the following discussion, we provide general background information on sound and marine mammal hearing before considering potential effects to marine mammals from sound produced by vibratory pile driving.

*Description of Sound Sources*

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the 'loudness' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa and all airborne sound levels in this document are referenced to a pressure of 20 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.,* 1995):

- Wind and waves*:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.

- Precipitation: Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.

- Biological: Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.

- Anthropogenic: Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.,* 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.,* a passing vessel) is sometimes termed background sound, as opposed to ambient sound. Representative levels of anthropogenic sound are displayed in Table 2.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

TABLE 2—REPRESENTATIVE SOUND LEVELS OF ANTHROPOGENIC SOURCES

| Sound source | Frequency range (Hz) | Underwater sound level | Reference |
|---|---|---|---|
| Small vessels | 250–1,000 | 151 dB rms at 1 m | Richardson *et al.,* 1995. |
| Tug docking gravel barge | 200–1,000 | 149 dB rms at 100 m | Blackwell and Greene, 2002. |
| Vibratory driving of 72-in steel pipe pile | 10–1,500 | 180 dB rms at 10 m | Reyff, 2007. |
| Impact driving of 36-in steel pipe pile | 10–1,500 | 195 dB rms at 10 m | Laughlin, 2007. |
| Impact driving of 66-in cast-in- steel-shell (CISS) pile | 10–1,500 | 195 dB rms at 10 m | Reviewed in Hastings and Popper, 2005. |

In-water construction activities associated with the project include vibratory pile driving and removal. There are two general categories of sound types: Impulse and non-pulse (defined in the following). Vibratory pile driving is considered to be continuous or non-pulsed while impact pile driving is considered to be an impulse or pulsed sound type. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts. Note that information related to impact hammers is included here for comparison. The Corps does not intend to employ the use of impact hammers as part of this proposed project. Pulsed sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; Harris, 1998; NIOSH, 1998; ISO, 2003; ANSI, 2005) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

The likely or possible impacts of the proposed pile driving program in the MCR area on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel. Any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors could include effects of heavy equipment operation, dredging and disposal actions, and pile installation at Jetty A.

*Marine Mammal Hearing*

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 30 kHz;
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;
- Phocid pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz; and
- Otariid pinnipeds in Water: functional hearing is estimated to occur between approximately 100 Hz and 40 kHz.

As mentioned previously in this document, nine marine mammal species (seven cetacean and two pinniped) may occur in the project area. Of the three cetacean species likely to occur in the proposed project area, one is classified as low-frequency cetaceans (*i.e.,* minke), one is classified as a mid-frequency cetacean (*i.e.,* killer whale), and one is classified as a high-frequency cetaceans (*i.e.,* harbor porpoise) (Southall *et al.,* 2007). Additionally, harbor seals are classified as members of the phocid pinnipeds in water functional hearing group while Stellar sea lions and California sea lions are grouped under the Otariid pinnipeds in water functional hearing group. A species' functional hearing group is a consideration when we analyze the effects of exposure to sound on marine mammals.

*Acoustic Impacts*

Potential Effects of Pile Driving Sound—The effects of sounds from pile driving might result in one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically

related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (*e.g.,* sand) would absorb or attenuate the sound more readily than hard substrates (*e.g.,* rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulse sounds on marine mammals. Potential effects from impulse sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973).

Hearing Impairment and Other Physical Effects—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions, (*e.g.,* orientation, communication, finding prey, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS constitutes injury, but TTS does not (Southall *et al.,* 2007). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

Given the available data, the received level of a single pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2-s$ (*i.e.,* 186 dB sound exposure level [SEL] or approximately 221–226 dB p-p [peak]) in order to produce brief, mild TTS. Exposure to several strong pulses that each have received levels near 190 dB rms (175–180 dB SEL) might result in cumulative exposure of approximately 186 dB SEL and thus slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy.

The above TTS information for odontocetes is derived from studies on the bottlenose dolphin (*Tursiops truncatus*) and beluga whale (*Delphinapterus leucas*). There is no published TTS information for other species of cetaceans. However, preliminary evidence from a harbor porpoise exposed to pulsed sound suggests that its TTS threshold may have been lower (Lucke *et al.,* 2009). As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes are exposed to pile driving pulses stronger than 180 dB re 1 µPa rms.

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to pulses of sound can cause PTS in any marine mammal. However, given the possibility that mammals close to a sound source can incur TTS, it is possible that some individuals might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals, based on anatomical similarities. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as pile driving pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.,* 2007). On an SEL basis, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans, Southall *et al.* (2007) estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of approximately 198 dB re 1 $\mu Pa^2-s$ (15 dB higher than the TTS threshold for an impulse). Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Measured source levels from impact pile driving can be as high as 214 dB rms. Although no marine mammals have been shown to experience TTS or PTS as a result of being exposed to pile driving activities, captive bottlenose dolphins and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds (Finneran *et al.,* 2000, 2002, 2005). The animals tolerated high received levels of sound before exhibiting aversive behaviors. Experiments on a beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (30 psi) p-p, which is equivalent to 228 dB p-p, resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within four minutes of the exposure (Finneran *et al.,* 2002). Although the source level of pile driving from one hammer strike is expected to be much lower than the single watergun impulse cited here, animals being exposed for a prolonged period to repeated hammer strikes could receive more sound exposure in terms of SEL than from the

single watergun impulse (estimated at 188 dB re 1 $\mu Pa^2 - s$) in the aforementioned experiment (Finneran *et al.,* 2002). However, in order for marine mammals to experience TTS or PTS, the animals have to be close enough to be exposed to high intensity sound levels for a prolonged period of time. Based on the best scientific information available, these SPLs are far below the thresholds that could cause TTS or the onset of PTS.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of pile driving, including some odontocetes and some pinnipeds, are especially unlikely to incur auditory impairment or non-auditory physical effects.

*Disturbance Reactions*

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007).

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic guns or acoustic harassment devices, but also including pile driving) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Thorson and Reyff, 2006; see also Gordon *et al.,* 2004; Wartzok *et al.,* 2003; Nowacek *et al.,* 2007). Responses to continuous sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds.

With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haul-outs or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to cause beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking—Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were anthropogenic, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs only during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

Masking occurs at the frequency band which the animals utilize so the frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water vibratory pile driving is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds made by porpoises. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009).

Masking has the potential to impact species at the population or community levels as well as at individual levels. Masking affects both senders and receivers of the signals and can potentially have long-term chronic effects on marine mammal species and populations. Recent research suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, and that most of these increases are from distant shipping (Hildebrand, 2009). All anthropogenic sound sources, such as those from vessel traffic, pile driving, and dredging activities, contribute to the elevated ambient sound levels, thus intensifying masking.

Vibratory pile driving is relatively short-term, with rapid oscillations occurring for 10 to 30 minutes per installed pile. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory pile driving, and which have already been taken into account in the exposure analysis.

Acoustic Effects, Airborne—Marine mammals that occur in the project area could be exposed to airborne sounds associated with pile driving that have the potential to cause harassment, depending on their distance from pile driving activities. Airborne pile driving sound would have less impact on cetaceans than pinnipeds because sound from atmospheric sources does not transmit well underwater (Richardson *et al.,* 1995); thus, airborne sound would only be an issue for pinnipeds either hauled-out or looking with heads above water in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2004) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB rms. However, since there are no haulout areas in the immediate vicinity of Jetty A, pinnipeds are unlikely to be disturbed by airborne acoustics associated with pile driving activities. Therefore, such impacts to will not be considered as part of the analysis

*Vessel Interaction*

Besides being susceptible to vessel strikes, cetacean and pinniped responses to vessels may result in behavioral changes, including greater variability in the dive, surfacing, and respiration patterns; changes in vocalizations; and changes in swimming speed or direction (NRC 2003). There will be a temporary and localized increase in vessel traffic during construction. A maximum of three work barges will be present at any time during the in-water and over water work. The barges will be located near each other where construction is occurring

**Potential Effects on Marine Mammal Habitat**

The primary potential impacts to marine mammal habitat are associated with elevated sound levels produced by vibratory and impact pile driving and removal in the area. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

*Potential Pile Driving Effects on Prey*—Construction activities would produce continuous (*i.e.,* vibratory pile driving) sounds. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.,* 1992; Skalski *et al.,* 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality. The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Additionally, NMFS 2011 Biological Opinion indicated that no adverse effects were anticipated for critical habitat of prey species for marine mammals. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe for the project.

*Effects to Foraging Habitat*—Pile installation may temporarily increase turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. The Corps must comply with state water quality standards during these operations by limiting the extent of turbidity to the immediate project area. In general, turbidity associated with pile installation is localized to about a 25-foot radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the project pile driving areas to experience effects of turbidity, and any pinnipeds will be transiting the terminal area and could avoid localized areas of turbidity. Therefore, the impact from increased turbidity levels is expected to be discountable to marine mammals. Furthermore, pile driving and removal at the project site will not obstruct movements or migration of marine mammals.

Natural tidal currents and flow patterns in MCR waters routinely disturb sediments. High volume tidal events can result in hydraulic forces that re-suspend benthic sediments, temporarily elevating turbidity locally. Any temporary increase in turbidity as a result of the proposed action is not anticipated to measurably exceed levels caused by these normal, natural periods.

**Proposed Mitigation**

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, ''and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking'' for certain subsistence uses.

For the proposed project, the Corps worked with NMFS and proposed the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity. The primary purposes of these mitigation measures are to minimize sound levels from the activities, and to monitor marine mammals within designated zones of influence corresponding to NMFS' current Level A and B harassment thresholds which are depicted in Table 3 found later in the *Estimated Take by Incidental Harassment* section.

The Corps committed to the use of vibratory hammers for pile installation and will implement a soft-start procedure. In order to avoid exposure of Southern resident killer whales (*Orcinus orca*) the Corps also is limiting the installation window to on or after May 1 and will avoid installation or removal after September 30

*Monitoring Protocols*—Monitoring would be conducted before, during, and after pile driving and removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Monitoring will take place from 15 minutes prior to initiation through thirty minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than thirty minutes. Please see Section 13 of the Application for details on the marine mammal monitoring plan developed by the Corps with NMFS' cooperation.

The following additional measures apply to visual monitoring:

(1) Monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. These vantage points include Jett A or the barge. Qualified observers are trained biologists, with the following minimum qualifications:

(a) Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

(b) Advanced education in biological science or related field (undergraduate degree or higher required);

(c) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);

(d) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(e) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(f) Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

(g) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(2) Prior to the start of pile driving activity, the shutdown zone will be monitored for 15 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the entire shutdown zone is visible (*i.e.,* when not obscured by dark, rain, fog, etc.). In addition, if such conditions should arise during impact pile driving that is already underway, the activity would be halted.

If a marine mammal approaches or enters the shutdown zone during the course of pile driving operations, activity will be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal. Monitoring will be conducted throughout the time required to drive a pile.

*Soft Start*—The use of a soft start procedure is believed to provide additional protection to marine mammals by warning or providing a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from the hammer at reduced energy followed by a waiting period. This procedure is repeated two additional times. It is difficult to specify the reduction in energy for any given hammer because of variation across drivers. The project will utilize soft start techniques for all vibratory pile driving. We require the Corps to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a thirty-second waiting period, with the procedure repeated two additional times. Soft start will be required at the beginning of each day's pile driving work and at any time following a cessation of pile driving of 20 minutes or longer.

In addition to the measures described later in this section, the Corps would employ the following standard mitigation measures:

(a) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, and Corps staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(b) For in-water heavy machinery work other than pile driving (using, *e.g.,* standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile).

*Monitoring and Shutdown for Pile Driving*

The following measures would apply to the Corps' mitigation through shutdown and disturbance zones:

*Shutdown Zone*—For all pile driving activities, the Corps will establish a shutdown zone. Shutdown zones are intended to contain the area in which SPLs equal or exceed the 180/190 dB rms acoustic injury criteria, with the purpose being to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area), thus preventing injury of marine mammals. The estimated shutdown zone for Level A injury to cetaceans would be 1 meter. The Corps, however, would implement a minimum shutdown zone of 10 m radius for all marine mammals around all vibratory pile driving and removal activities. These precautionary measures are intended to further reduce the unlikely possibility of injury from direct physical interaction with construction operations.

*Disturbance Zone*—Disturbance zones are the areas in which sound pressure levels (SPLs) equal or exceed 120 dB rms (for continuous sound) for pile

driving installation and removal. Disturbance zones provide utility for monitoring conducted for mitigation purposes (*i.e.,* shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of disturbance zones enables observers to be aware of and communicate the presence of marine mammals in the project area but outside the shutdown zone and thus prepare for potential shutdowns of activity. However, the primary purpose of disturbance zone monitoring is for documenting incidents of Level B harassment; disturbance zone monitoring is discussed in greater detail later (see ''Proposed Monitoring and Reporting''). Nominal radial distances for disturbance zones are shown in Table 4 later in this notice. The shutdown zone for Level B injury wound extend 7,356 meters from the sound source. Given the size of the disturbance zone for vibratory pile driving, it is impossible to guarantee that all animals would be observed or to make comprehensive observations of fine-scale behavioral reactions to sound. We discuss monitoring objectives and protocols in greater depth in ''Proposed Monitoring and Reporting.''

In order to document observed incidents of harassment, monitors record all marine mammal observations, regardless of location. The observer's location, as well as the location of the pile being driven, is known from a GPS. The location of the animal is estimated as a distance from the observer, which is then compared to the location from the pile and the estimated zone of influence (ZOI) for relevant activities (*i.e.,* pile installation and removal). This information may then be used to extrapolate observed takes to reach an approximate understanding of actual total takes.

*Time Restrictions*—Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In order minimize impact to Southern resident killer whales, in-water work will not be conducted during their primary feeding season extending from October 1 until on or after May 1. Installation could occur from May 1 through September 30 each year.

*Mitigation Conclusions*

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of affecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned
- The practicability of the measure for applicant implementation,

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations (ITAs) must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

1. An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;

2. An increase in our understanding of how many marine mammals are likely to be exposed to levels of pile driving that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;

3. An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

4. An increased knowledge of the affected species; and

5. An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

The Corps submitted a marine mammal monitoring plan as part of the IHA application for this project, which can be found at *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* The plan may be modified or supplemented based on comments or new information received from the public during the public comment period.

*Visual Marine Mammal Observation*

The Corps will collect sighting data and behavioral responses to construction for marine mammal species observed in the region of activity during the period of activity. All observers will be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. The Corps will monitor the shutdown zone and disturbance zone before, during, and after pile driving, with at least one located at a best practicable vantage point, such as on the Jetty A or the barge. Based on our requirements, the Marine Mammal Monitoring Plan would implement the following procedures for pile driving:

- Individuals meeting the minimum qualifications identified in the applicant's monitoring plan, Section 13 of the application, Level A and Level B harassment zones during impact during vibratory pile driving.
- The area within the Level B harassment threshold for impact driving (shown in Figure 19 of the application) will be monitored by the field monitor stationed either on Jetty A or a pile driving rig. Any marine mammal documented within the Level B harassment zone during impact driving would constitute a Level B take (harassment), and will be recorded and reported as such.
- During vibratory pile driving, a shutdown zone will be established to include all areas where the underwater SPLs are anticipated to equal or exceed the Level A (injury) criteria for marine mammals (180 dB isopleth for cetaceans; 190 dB isopleth for pinnipeds). Pile installation will not commence or will be suspended temporarily if any marine mammals are observed within or approaching the area. The shutdown zone will always be a minimum of 10 meters (33 feet) to prevent injury from physical interaction of marine mammals with construction equipment
- The individuals will scan the waters within each monitoring zone activity using binoculars (Vector 10X42 or equivalent), spotting scopes (Swarovski 20–60 zoom or equivalent), and visual observation.
- Use a hand-held or boat-mounted GPS device or rangefinder to verify the required monitoring distance from the project site.
- If waters exceed a sea-state which restricts the observers' ability to make observations within the marine mammal shutdown zone (*e.g.* excessive wind or fog), pile installation will cease. Pile driving will not be initiated until the entire shutdown zone is visible.
- Conduct pile driving only during daylight hours from sunrise to sunset when it is possible to visually monitor marine mammals.
- The waters will be scanned 15 minutes prior to commencing pile driving at the beginning of each day, and prior to commencing pile driving after any stoppage of 15 minutes or greater. If marine mammals enter or are observed within the designated marine mammal shutdown zone during or 15 minutes prior to pile driving, the monitors will notify the on-site construction manager to not begin until the animal has moved outside the designated radius.
- The waters will continue to be scanned for at least 30 minutes after pile driving has completed each day, and after each stoppage of 20 minutes or greater.

*Data Collection*

We require that observers use approved data forms. Among other pieces of information, the Corps will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, the Corps will attempt to distinguish between the number of individual animals taken and the number of incidents of take. We require that, at a minimum, the following information be collected on the sighting forms:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (*e.g.,* percent cover, visibility);
- Water conditions (*e.g.,* sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;
- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Locations of all marine mammal observations; and
- Other human activity in the area.

*Proposed Reporting Measures*

The Corps would provide NMFS with a draft monitoring report within 90 days of the conclusion of the proposed construction work. This report will detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report must be submitted within 30 days after receipt of comments.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), the Corps would immediately cease the specified activities and immediately report the incident to Jolie Harrison (*Jolie.Harrison@NOAA.gov*), Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and Brent Norberg *(Brent.Norberg@noaa.gov*), the West Coast Regional Stranding Coordinator. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with the Corps to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA

compliance. The Corps would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), the Corps would immediately report the incident to Jolie Harrison (*Jolie.Harrison@NOAA.gov*), Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and Brent Norberg *(Brent.Norberg@noaa.gov*), the West Coast Regional Stranding Coordinator .

The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with the Corps to determine whether modifications in the activities are appropriate.

In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Corps would report the incident to Jolie Harrison (*Jolie.Harrison@NOAA.gov*), Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS West Coast Stranding Hotline and/or by email to Brent Norberg *(Brent.Norberg@noaa.gov*), the West Coast Regional Stranding Coordinator, within 24 hours of the discovery. The Corps would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: ''. . . any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

All anticipated takes would be by Level B harassment resulting from vibratory pile driving and removal and may result in temporary changes in behavior. Injurious or lethal takes are not expected due to the expected source levels and sound source characteristics associated with the activity, and the proposed mitigation and monitoring measures are expected to further minimize the possibility of such take.

If a marine mammal responds to a stimulus by changing its behavior (*e.g.,* through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound.

Upland work can generate airborne sound and create visual disturbance that could potentially result in disturbance to marine mammals (specifically, pinnipeds) that are hauled out or at the water's surface with heads above the water. However, because there are no regular haul-outs in the vicinity of Jetty A, we believe that incidents of incidental take resulting from airborne sound or visual disturbance are unlikely.

The Corps requested authorization for the incidental taking of small numbers of killer whale, Gray whale, harbor porpoise, Steller sea lion, California sea lion, and harbor seal near the MCR project area that may result from vibratory pile driving and removal during construction activities associated with the rehabilitation of Jetty A at the MCR.

In order to estimate the potential incidents of take that may occur incidental to the specified activity, we must first estimate the extent of the sound field that may be produced by the activity and then consider in combination with information about marine mammal density or abundance in the project area. We first provide information on applicable sound thresholds for determining effects to marine mammals before describing the information used in estimating the sound fields, the available marine mammal density or abundance information, and the method of estimating potential incidences of take.

*Sound Thresholds*

We use generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. To date, no studies have been conducted that explicitly examine impacts to marine mammals from pile driving sounds or from which empirical sound thresholds have been established. These thresholds (Table 3) are used to estimate when harassment may occur (*i.e.,* when an animal is exposed to levels equal to or exceeding the relevant criterion) in specific contexts; however, useful contextual information that may inform our assessment of effects is typically lacking and we consider these thresholds as step functions. NMFS is working to revise these acoustic guidelines; for more information on that process, please visit *www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.*

TABLE 3—UNDERWATER INJURY AND DISTURBANCE THRESHOLD DECIBEL LEVELS FOR MARINE MAMMALS

| Criterion | Criterion definition | Threshold * |
|---|---|---|
| Level A harassment | PTS (injury) conservatively based on TTS ** | 190 dB RMS for pinnipeds<br>180 dB RMS for cetaceans |
| Level B harassment | Behavioral disruption for impulse noise (e.g., impact pile driving) | 160 dB RMS |
| Level B harassment | Behavioral disruption for non-pulse noise (e.g., vibratory pile driving, drilling) | 120 dB RMS |

* All decibel levels referenced to 1 micropascal (re: 1 μPa). Note all thresholds are based off root mean square (RMS) levels

** PTS=Permanent Threshold Shift; TTS=Temporary Threshold Shift.

*Distance to Sound Thresholds*

Underwater Sound Propagation Formula—Pile driving generates underwater noise that can potentially result in disturbance to marine mammals in the project area. Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$TL = B * \log_{10} (R_1/R_2)$, where
TL = transmission loss in dB
$R_1$ = the distance of the modeled SPL from the driven pile, and
$R_2$ = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log[range]). A practical spreading value of fifteen is often used under conditions where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions. Practical spreading loss (4.5 dB reduction in sound level for each doubling of distance) is assumed here.

The Corps does not have information or modeling results related to pile installation activities. However, some features of the proposed action are similar to those recently proposed by the Navy, WSDOT, and other entities which were issued IHA/LOAs. For these reasons, NMFS considered some of the results from previous, representative monitoring efforts. Though the MCR navigation channel is a major commercial thoroughfare, there are no ports or piers in the immediate proximity of the jetties, as the seas are too dangerous. The location and setting of the MCR jetties is far more dynamic than a naval pier setting in the Puget Sound, the substrate is mostly sand, and the natural background noise is likely to be much higher with the large, breaking wave sets, dynamic currents, and high winds. The Corps project is also in the immediate proximity of the open ocean, with less opportunity for sound attenuation by land.

NMFS considered representative results from underwater monitoring for concrete, steel, and wood piles that were installed via both impact and vibratory hammers in water depths from 5 to 15 meters (Illingworth and Rodkin 2007, WSDOT 2011 cited in Naval Base Kitsap 2014, Navy 2014, and NMFS 2011b). Transmission loss and propagation estimates are affected by the size and depth of the piles, the type of hammer and installation method, frequency, temperature, sea conditions, currents, source and receiver depth, water depth, water chemistry, and bottom composition and topography. NMFS reviewed several documents that included relevant monitoring results for radial distances and proxy sound levels encompassed by underwater pile driving noise. These distances for impact driving and vibratory driving for 24-in steel piles were summarized previously in Table 15 and Table 16 in the Application.

Since no site-specific, in-water noise attenuation data is available, the practical spreading model described and used by NMFS was used to determine transmission loss and the distances at which impact and vibratory pile driving or removal source levels are expected to attenuate down to the pertinent acoustic thresholds. The underwater practical spreading model is provided below:

$R_2 = R_1 * 10^{-((dB_{at\ R1} - dB_{acoustic\ threshold})/15)}$
where:
$R_1$ = distance of a known or measured sound level.
$R_2$ = estimated distance required for sound to attenuate to a prescribed acoustic threshold.

NMFS used representative sound levels from different studies to determine appropriate proxy sound levels and to model estimated distances until pertinent thresholds ($R_1$ and dB at $R_1$). Studies which met the following parameters were considered: Pile materials comprised of wood, concrete, and steel pipe piles; pile sizes 24- up to 30-inches diameter, and pile driver type of either vibratory and impact hammers. These types and sizes of piles were considered in order to evaluate a representative range of sound levels that may result from the Proposed Action. In some cases since there was little or no data specific to 24-inch piles, NMFS analyzed 30-inch piles as the next larger pile size with available data. The Corps will include a maximum pile size of 24-inches as a constraint in its construction contracts, though it will consult with NMFS regarding the originally proposed size.

Results of the practical spreading model provided the distance of the radii that were used to establish a ZOI or area affected by the noise criteria. At the MCR, the channel is about 3 miles across between the South and North Jetty. These jetties, as well as Jetty A, could attenuate noise, but the flanking sides on two of the jetties are open ocean, and Jetty A is slightly further interior in the estuary. Clatsop Spit, Cape Disappointment, Hammond Point, as well as the Sand Islands, are also land features that would attenuate noise. Therefore, as a conservative estimate, the NMFS is using (and showing on ZOI maps) the maximum distance and area but has indicated jetty attenuation in the ZOI area maps (See Figure 19 in the Application).

NMFS selected proxy values for impact installation methods and calculated distances to acoustic thresholds for comparison and contextual purposes. As note previously, the Corps is not proposing impact installation. NMFS ultimately relied most heavily on the proxy values developed by the Navy (2014).

For impact installation, NMFS used *193 rms dB re 1* µ*Pa rms* at a distance of 10 meters, which is comprised of the range of average rms of n-weighted piles used to determine the recommended proxy source SPLs at 10m as determined by Navy (2014). The Tongue Point data (182 db re 1 µPa rms at a distance of 10 meters for 24-in steel piles (Navy 2014) is likely applicable to this MCR jetty project because it is of similar sandy rather than gravely substrate; and it is within the same geographical and hydraulic context, though it is likely more sheltered than conditions at the jetties. Therefore, 193 rms dB re 1 µPa rms is an extremely conservative proxy estimate for impact installation, as sandy substrate and the hydraulic context at the MCR project area would further reduce spreading distance. Note that impact driving is not being proposed by the Corps.

For vibratory installation, NMFS proposes *163 dB re 1* µ*Pa rms.* The proxy value of 163 dB re 1 µPa rms is greater than the 24-inch pipe pile proxy and equal to the sheet pile values proposed by Navy (2014) at 161 dB re 1 µPa rms and 163 dB re 1 µPa rms, respectively, and is also higher than the Friday Harbor Ferry sample (162 dB re

1 µPa rms) (Navy 2014 and Laughlin 2010a cited in Washington State Ferries 2013, respectively). NMFS also proposes 163 dB re 1 µPa rms to reflect sheet pile installation, which registered higher than the pipe pile levels in the proxy study. Given the comparative differences between the substrate and context used in the Navy study relative to the MCR, 163 dB re 1 µPa rms is a very conservative evaluation level. Results are listed in Table 4.

TABLE 4. CALCULATED AREA ENCOMPASSED WITHIN ZONE OF INFLUENCE AT MCR JETTIES FOR UNDERWATER MARINE MAMMAL SOUND THRESHOLDS AT JETTY A

| Jetty | Underwater threshold | Distance—m (ft) | Area excluding land & jetty masses—km$^2$ (mi$^2$) |
|---|---|---|---|
| Jetty A: ~ Station 78+50, River Side. | Impact driving, pinniped injury (190 dB)* | 16 (52.5) | <0.001 (0.0003) |
| | Impact driving, cetacean injury (180 dB)* | 74 (242.8) | 0.01 (0.004) |
| | Impact driving, disturbance (160 dB)* | 1,585 (5,200.1, or ~1 mile) | 3.38 (1.31) |
| | Vibratory driving, pinniped injury (190 dB) | 0 | 0 |
| | Vibratory driving, cetacean injury (180 dB) | 1 (3.3) | <0.000003 (0.000001) |
| | Vibratory driving, disturbance (120 dB) | 7,356 (4.6 miles) | 23.63 (9.12) |

Note that the actual area insonified by pile driving activities is significantly constrained by local topography relative to the total threshold radius. The actual insonified area was determined using a straight line-of-sight projection from the anticipated pile driving locations. This area is depicted in Table 4 and represented in the Application submitted by the Corps in Figure 19 of the Application.

The method used for calculating potential exposures to impact and vibratory pile driving noise for each threshold was estimated using local marine mammal data sets, the Biological Opinion, best professional judgment from state and federal agencies, and data from IHA estimates on similar projects with similar actions. All estimates are conservative and include the following assumptions:

- During construction, each species could be present in the project area each day. The potential for a take is based on a 24-hour period. The model assumes that there can be one potential take (Level B harassment exposure) per individual per 24-hours.
- All pilings installed at each site would have an underwater noise disturbance equal to the piling that causes the greatest noise disturbance (*i.e.,* the piling furthest from shore) installed with the method that has the largest ZOI. The largest underwater disturbance ZOI would be produced by vibratory driving steel piles. The ZOIs for each threshold are not spherical and are truncated by land masses which would dissipate sound pressure waves.
- Exposures were based on estimated work days. Numbers of days were based on an average production rate of 15 pilings per day for a total of 68 pile installation days. This means construction at each jetty offloading facility would occur over an approximate span of ~ 17 days.
- In absence of site specific underwater acoustic propagation modeling, the practical spreading loss model was used to determine the ZOI.

*Killer Whale*

Southern resident killer whales have been observed offshore near the study area and ZOI, but the Corps does not have fine-scale details on frequency of use. However, as noted in Section 3, members of K and L pods were sighted off the Oregon Coast in 1999 and 2000 and whales move as far north as Canada down to California, passing the MCR. While killer whales do occur in the Columbia River plume, where fresh water from the river intermixes with salt water from the ocean, they are rarely seen in the interior of the Columbia River Jetty system. The insonified area associated with the proposed action at Jetty A does not extend out into the open ocean where killer whales are likely to be found. Furthermore, the Corps has limited its pile installation window in order to avoid peak salmon runs and any overlap with the presence of Southern residents. To ensure no Level B acoustical harassment occurs, the Corps will restrict pile installation from October 1 until on or after May 1 of each season. However, this restriction was enacted primarily for construction work at the North and South jetties, where the insonified zone will radiate out towards the open ocean. As such NMFS is not anticipating any acoustic exposure to Southern residents. Also note that in the 2011 Biological Opinion, NMFS issued a not likely to adversely affect determination. Therefore, NMFS has determined that authorization of take for Southern residents is not warranted.

Western Transient killer whales may be traversing offshore over a greater duration of time than the feeding resident. They are rarely observed inside of the jetty system. The Southwest Fisheries Science Center (SWFSC) stratum model under the Marine Animal Monitor Model provides an estimated density of 0.00070853 animals per km$^2$ for summer killer whales for areas near MCR, which may provide a surrogate proxy value for assuming possible densities near the jetties (Barlow *et al.* 2009, Halpin *et al.* 2009 at OBIS–SEAMAP). Given anecdotal evidence (Griffith 2015) and sightings recorded on the OBIS network from surveys done in 2005 (Halpin *et al.* 2009, OBIS–SEAMAP 2015), this density may be appropriate for the MCR vicinity.

The following formula was used to calculate exposure using

Exposure Estimate = ($0.000708_{\text{DensityEstimate}}$ * $23.63_{\text{ZOI Jetty A}}$ * $17_{\text{days}}$) = 0.28 killer whale exposures

Where:

$N_{\text{DensityEstimate}}$ = Represents estimated density of species within the 4.6-mile radius encompassing the ZOI at Jetty A; using the density model suggested by NOAA (2015), this equates to 0.000708 animals per km$^2$ (Barlow *et al.* 2009).

Days = Total days of pile installation or removal activity (~17 days)

Given the low density and rare occurrence of transient killer whales in the ZOI, exposure of feeding or transient killer whales to Level B acoustical harassment from pile driving is unlikely to occur. However, NMFS proposes to authorize take of small number due to the remote chance that transient orcas remain in the vicinity to feed on pinnipeds that frequent the haulouts at the South Jetty.

NMFS proposes to authorize the take of 8 transients because solitary killer whales are rarely observed, and transient whales travel in pods of 2–15 members. NMFS has assumed a pod size of 8.

*Gray Whale*

Based on anecdotal information and sightings between 2006 and 2011 (Halpin *et al.* 2009 at OBIS SEAMAP 2015), gray whales may be in the proximity of the proposed action area and exposed to underwater acoustic disturbances. However, no data exists that is specific to presence and numbers in the MCR vicinity and gray whale density estimates were not available on the SERDP or OBIS–SEAMAP web model sites. Anecdotal evidence also indicates gray whales have been seen at MCR, but are not a common visitor, as they mostly remain in the vicinity of the further offshore shelf-break (Griffith 2015). According to NOAA's Cetacean Mapping classification of the MCR vicinity pertaining to gray whale use, its Biologically Important Area categorization is indicated as a migration corridor (*http://cetsound.noaa.gov/biologically-important-area-map).* As primarily bottom feeders, gray whales are the most coastal of all great whales; they primarily feed in shallow continental shelf waters and live much of their lives within a few tens of kilometers of shore (Barlow et. al. 2009 on OBIS–SEAMAP 2015).

A relatively small number of whales (approximately 200) summer and feed along the Pacific coast between Kodiak Island, Alaska and northern California (Darling 1984, Gosho *et al.* 2011, Calambokidis *et al.* 2012 cited in NOAA 2014c).

The Pacific Coast Feeding Group or northbound summer migrants would be the most likely gray whales to be in the vicinity of MCR. Since no information pertaining to gray whale densities could be identified, NMFS elected to apply proxy data for estimating densities. As a proxy, data pertinent to humpback whales (0.0039 animals per km$^2$) was selected because both are baleen species found near the MCR vicinity for the same purposes (as a migration route or temporary feeding zone). However, the number of estimated exposures at Jetty A was increased to account for the fact that gray whales are more likely to be in the nearshore environment than humpback whales. This increase was proposed strictly as a conservative assumption to acknowledge the distinct preference gray whales may have over humpbacks for nearshore feeding.

The following formula was used to calculate exposure:

$$\text{Exposure Estimate} = (0.0039_{\text{DensityEstimate}} * 23.63_{\text{ZOI Jetty A}} * 17_{\text{days}}) + 1 = 1.56 \text{ gray whale exposures}$$

Migrating gray whales often travel in groups of 2, although larger pods do occur. For gray whales, NMFS is proposing 4 Level B authorized takes.

*Harbor Porpoise*

Harbor porpoises are known to occupy shallow, coastal waters and, therefore, are likely to be found in the vicinity of the MCR. They are known to occur within the proposed project area, however, density data for this region is unavailable (Griffith 2015).

The SWFSC stratum model under the Marine Animal Monitor Model provides an estimated density per km$^2$ of year-round porpoises for areas near northern California, which may provide a surrogate proxy value for assuming possible densities near the jetties. Though not in the project vicinity, the range of 3.642 animals/km$^2$ (Barlow *et al.* 2009, Halpin *et al.* 2009) is a relatively high density compared to values moving even further south along the model boundaries, for which the northern-most extent ends in California. Given anecdotal evidence (Griffith 2015) and sightings recorded on the OBIS network from surveys done between 1989 and 2005, (Halpin *et al.* 2009, OBIS–SEAMAP 2015), this higher density may be appropriate for the MCR vicinity, or may be conservative.

The formula previously described was used to arrive at a take estimate for harbor porpoise.

$$\text{Exposure Estimate} = (3.642_{\text{DensityEstimate}} * 23.63_{\text{ZOI Jetty A}} * 17_{\text{days}}) = 1{,}464.$$

Based on the density model suggested by NOAA (2015), the Corps has provided a very conservative maximum estimate of 1,4640 harbor porpoise disturbance exposures over the 17 days of operation. However, this number of potential exposures does not accurately reflect the actual number of animals that would potentially be taken for the MCR jetty project. Rather, it is more likely that the same pod may be exposed more than once during the 17-day operating window. The highest estimated number of animals exposed on any single day based on the modeled proxy density (Barlow *et al.* 2009 at SERDP) and the jetty with the greatest ZOI is 193 animals (from South Jetty Channel). While the number of pods in the vicinity of the MCR is unknown, the size of the pods is usually assumed to be significantly smaller than 193 animals. According to OBIS–SEAMAP (2015 and Halpin *et al.* 2009), the normal range of group size generally consists of less than five or six individuals, though aggregations into large, loose groups of 50 to several hundred animals could occur for feeding or migration. Because the ZOI only extends for a maximum of 4.6 miles, it may also be assumed that due to competition and territorial circumstances only a limited number of pods would be feeding in the ZOI at any particular time. If the modeled density calculations are assumed, then this means anywhere from 32 small pods to 2 large, 100-animal pods might be feeding during every day of pile installation. Given these values seem an unrealistic representation of use and pod densities within any one of the ZOIs, NMFS is proposing an alternative calculation.

NMFS conservatively assumed that a single, large feeding pod of 50 animals forms within the ZOI for Jetty A on each day of pile installation. Though this is likely much higher than actual use by multiple pods in the vicinity, it more realistically represents a worst-case scenario for the number of animals that could potentially be affected by the proposed work. This calculation also assumes that it is a new pod of individuals would be affected on each installation day, which is also unlikely given pod residency. NMFS is proposing this higher number in acknowledgement of the SERDP density estimates originally proposed by NOAA (2015). Therefore, Corps has provided an extreme estimate of disturbance exposures over the duration of the entire project, and is requesting Level B take for 850 animals.

*Pinnipeds—Stellar Sea Lion, California Sea Lion and Harbor Seal*

There are haulout sites on the South Jetty used by pinnipeds, especially Steller sea lions. It is likely that pinnipeds that use the haulout area in would be exposed to 120 dB threshold acoustic threshold during pile driving activities. The number of exposures would vary based on weather conditions, season, and daily fluctuations in abundance. Based on a survey by the Washington Department of Fish & Wildlife (WDFW) the number of affected Steller sea lions could be between 200–800 animals per month; California sea lion numbers could range from 1 to 500 per month and the number of harbor seals could be as low as 1 to as high as 57 per month. Exposure and take estimates below are based on past pinniped data from WDFW (2000–2014 data), which had a more robust monthly sampling frequency relative to ODFW counts. The

exception to this was for harbor seal counts, for which ODFW (also 2000–2014 data) had more sampling data in certain months. Therefore, ODFW harbor seal data was used for the months of May and July. Exposure estimates are much higher than take estimates. This is because unlike the exposure estimate which assumes all new individuals, the take estimate request assumes that some of the same individuals will remain in the area and be exposed multiple times during the short 17-day installation period to complete and remove each offloading facility (for a total of about 68 days). NMFS examined the estimated monthly average number of animals from 2000–2014 hauled on South Jetty during May and June, which are the most likely months for pile installation as is shown in Table 5. NMFS assumed that 50% of the three species may be in the water at any given time during pile installation. This is based on the best professional judgment of a ODFW biologist, who stated: ''Assuming another 50% in the water above what is hauled out is probably on the high end, but it's probably best to be conservative (*i.e.,* have more takes authorized than actually incurred). It's probably more like 10–20% but it's highly variable and dependent on a lot of unpredictable factors like weather conditions, recent disturbance events, etc.'' (ODFW 2015). There are no anticipated airborne exposures since the main haul out sites are not in close proximity to Jetty A. Note that the formula used by NMFS is different than that employed by the Corps in their application as NMFS is only analyzing potential impacts associated with Jetty A.

To reiterate, these exposure estimates assume a new individual is exposed every day throughout each acoustic disturbance, for the entire duration of the project.

Exposure Estimate$_{Stellar}$ = ($N_{est(May+June)}$ * 50% * $17_{underwater/piles\ days}$) = 12,750 Steller sea lions

Exposure Estimate$_{California}$ = ($N_{est(May+June)}$ * 50% * $17_{underwater/piles\ days}$) = 2,788 CA sea lions

Exposure Estimate$_{Harbor}$ = ($N_{est(May+June)}$ * 50% * $17_{underwater/piles\ days}$)= 493 Harbor porpoises

*where:*

$N_{est}$ = Estimated monthly average number of species hauled out at South Jetty based on WDFW data.

Duration = total days of pile installation or removal activity for underwater thresholds (68);

Density = the estimated percentage of individuals in the respective ZOI: underwater assumed to be 50% of WDFW haul-out average during 2 most likely months of pile installation (May or June);

TABLE 5—ESTIMATED SOUND EXPOSURES EVENTS EXPERIENCED BY PINNIPEDS DURING PILE INSTALLATION AT ALL MCR JETTIES AND CONSTRUCTION/SURVEY SEASONS AT THE SOUTH JETTY

| Month | Steller sea lion | | California sea lion | | Harbor seal | |
|---|---|---|---|---|---|---|
| | Avg [1] # | Underwater (# at 50% Density) | Avg [1] # | Underwater (# at 50% Density) | Avg [1 2] # | Underwater (# at 50% Density) |
| April | 587 | ..... | 99 | ..... | ..... | ..... |
| May | 824 | 412 | 125 | 63 | 0 | 0 |
| June | 676 | 338 | 202 | 101 | 57 | 29 |
| July | 358 | ..... | 1 | ..... | 10 | ..... |
| August | 324 | ..... | 115 | ..... | 1 | ..... |
| September | 209 | ..... | 249 | ..... | ..... | ..... |
| October | 384 | ..... | 508 | ..... | ..... | ..... |
| Preliminary Number of Individuals [3] | ..... | 750 | ..... | 164 | ..... | 29 |
| Total Exposures (over Duration [4]: 17 days | ..... | 12,750 | ..... | 2,788 | ..... | 493 |

[1] WDFW monthly average from 2000–2014.
[2] ODFW monthly averages for May and July 2000–2014 data due to additional available sampling data.
[3] Conservatively assumes each exposure is to new individual, all individuals are new arrivals each month, and no individual is exposed more than one time.
[4] Assumed 17 pile installation/removal days.

Note that NMFS is using data from the South Jetty since data exists for this pinniped population data exists for haulouts near this location. This represents a worst-case scenario since Jetty A is likely to have fewer pinniped exposures. Therefore, South Jetty will serve as a proxy for Jetty A as part of this analysis.

However, requesting take based on exposure calculations using the above density/duration would inaccurately suggest that the proposed action would take a disproportionally large number of pinnipeds on the West Coast. It also assumes that each exposure is affecting a new animal, when the reality is a single animal is likely to be exposed to underwater disturbance more than one time.

NMFS is proposing the following take estimate and assumptions which should provide more realistic take estimates. NMFS will assume pile installation occurs only in *either* May *or* June, which is the most likely construction scenario. Further, it is assumed that the number of animals taken by underwater acoustic disturbance is represented by the highest average number of animals present during the installation month (May or June), and that all animals are exposed to the underwater disturbance. Therefore, for Steller sea lions, 824 animals will represent the seasonal take; for California sea lions, seasonal take will be 202 animals; and for harbor seals seasonal take will be 57 animals. NMFS will assume one installation season of 17 days and that in-water work on Jetty A take would take only a single season. It is also assumed that every animal observed during a season would count as a take. Using these assumptions, the take calculations are estimated in Table 6 and result in 824 Stellar sea lion, 202 California sea lion and 57 harbor seal takes.

TABLE 6—ESTIMATED SOUND EXPOSURES EVENTS EXPERIENCED BY PINNIPEDS DURING PILE INSTALLATION AT THE SOUTH JETTY DURING AND CONSTRUCTION/SURVEY SEASONS

| Month | Steller sea lion | | California sea lion | | Harbor seal | |
|---|---|---|---|---|---|---|
| | Avg [1] # | Underwater [3] (# at 100% exposure) | Avg [1] # | Underwater (# at 100% exposure) | Avg [1 2] # | Underwater (# at 100% exposure) |
| April | 587 | | 99 | | | |
| May | 824 | 824 | 125 | 125 | 0 | 0 |
| June | 676 | 676 | 202 | 202 | 57 | 57 |
| July | 358 | | 1 | | 10 | |
| August | 324 | | 115 | | 1 | |
| September | 209 | | 249 | | | |
| October | 384 | | 508 | | | |
| Preliminary Number of Individuals per season (~17 days) [4] | | 824 | | 202 | | 57 |

[1] WDFW monthly average for daily populations counts from 2000–2014.
[2] ODFW monthly averages for May and July 2000–2014 data) for daily population count due to additional available sampling data.
[3] Conservatively assumes each exposure is to new individual, all individuals are new arrivals each month, and no individual is exposed more than one time.
[4] Assumed 17 pile installation/removal days.

**Analysis and Preliminary Determinations**

*Negligible Impact*

Negligible impact is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival'' (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, the discussion of our analyses applies to all the species listed in Table 6, given that the anticipated effects of this pile driving project on marine mammals are expected to be relatively similar in nature. There is no information about the size, status, or structure of any species or stock that would lead to a different analysis for this activity, else species-specific factors would be identified and analyzed.

Pile driving activities associated with the rehabilitation of Jetty A at the mouth of the Columbia River, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated from pile driving. Potential takes could occur if individuals of these species are present in the insonified zone when pile driving is happening.

No injury, serious injury, or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically, vibratory hammers will be the only method of installation utilized. No impact driving is planned. Vibratory driving does not have significant potential to cause injury to marine mammals due to the relatively low source levels produced (site-specific acoustic monitoring data show no source level measurements above 180 dB rms) and the lack of potentially injurious source characteristics. The likelihood that marine mammal detection ability by trained observers is high under the environmental conditions described for the rehabilitation of Jetty A at MCR further enables the implementation of shutdowns to avoid injury, serious injury, or mortality.

The Corps' proposed activities are localized and of short duration. The entire project area is limited to the Jetty A area and its immediate surroundings. Actions covered under the Authorization would include installing a maximum of 24 piles for use as dolphins and a maximum of 93 sections of Z or H piles for retention of rock fill over 17 days. The piles would be a maximum diameter of 24 inches and would only be installed by vibratory driving method. The possibility exists that smaller diameter piles may be used but for this analysis it is assumed that 24 inch piles will be driven.

These localized and short-term noise exposures may cause brief startle reactions or short-term behavioral modification by the animals. These reactions and behavioral changes are expected to subside quickly when the exposures cease. Moreover, the proposed mitigation and monitoring measures are expected to reduce potential exposures and behavioral modifications even further. Additionally, no important feeding and/or reproductive areas for marine mammals are known to be near the proposed action area. Therefore, the take resulting from the proposed project is not reasonably expected to and is not reasonably likely to adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the ''Anticipated Effects on Marine Mammal Habitat'' section. The project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. In response to vibratory driving, pinnipeds (which may become somewhat habituated to human activity in industrial or urban waterways) have been observed to orient towards and sometimes move towards the sound. The pile driving activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in fitness for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the project area while the activity is occurring.

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior and; (3) the presumed efficacy of the proposed mitigation measures in reducing the effects of the specified activity to the level of least practicable impact. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activity will have only short-term effects on individuals. The specified activity is not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the Corps' rehabilitation of Jetty A at MCR will have a negligible impact on the affected marine mammal species or stocks.

*Small Numbers Analysis*

Table 7 demonstrates the number of animals that could be exposed to received noise levels that could cause Level B behavioral harassment for the proposed work associated with the rehabilitation of Jetty A at MCR. The analyses provided above represents between <0.01%—3.9% of the populations of these stocks that could be affected by Level B behavioral harassment. The numbers of animals authorized to be taken for all species would be considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. For pinnipeds occurring in the vicinity of Jetty A, there will almost certainly be some overlap in individuals present day-to-day, and these takes are likely to occur only within some small portion of the overall regional stock.

TABLE 7—ESTIMATED NUMBERS OF MARINE MAMMALS THAT MAY BE EXPOSED TO LEVEL B HARASSMENT

| Species | Total proposed authorized takes | Abundance | Percentage of total stock |
|---|---|---|---|
| Killer whale (Western transient stock) | 8 | 243 | 3.2 |
| Gray whale (Eastern North Pacific Stock) | 4 | 18,017 | <0.01 |
| Harbor porpoise | 850 | 21,487 | 3.9 |
| Steller sea lion | 824 | 63,160–78,198 | 1.3–1.0 |
| California sea lion | 202 | 296,750 | 0.01 |
| Harbor seal | 57 | 24,732 | 0.2 |

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the proposed action, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

**Impact on Availability of Affected Species for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Endangered Species Act (ESA)**

There are two marine mammal species that are listed as endangered under the ESA with confirmed or possible occurrence in the study area: humpback whale and Southern resident killer whale. For the purposes of this IHA, NMFS determined that take of Southern resident killer whales was highly unlikely given the rare occurrence of these animals in the project area. A similar conclusion was reached for humpback whales. On March 18, 2011, NMFS signed a Biological Opinion concluding that the proposed action is not likely to jeopardize the continued existence of humpback whales and may affect, but is not likely to adversely affect Southern resident killer whales.

**National Environmental Policy Act (NEPA)**

The Corps issued the *Final Environmental Assessment Columbia River at the Mouth, Oregon and Washington Rehabilitation of the Jetty System at the Mouth of the Columbia River* and *Finding of No Significant Impact* in 2011. The environmental assessment (EA) and finding of no significant interest (FONSI) were

revised in 2012 with a FONSI being signed on July 26, 2012. NMFS will seek to re-affirm the findings of the 2012 FONSI.

**Proposed Incidental Harassment Authorization**

As a result of these preliminary determinations, we propose to issue an IHA to the USACE the rehabilitation of Jetty A of the Columbia River Jetty System provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided next.

1. This Incidental Harassment Authorization (IHA) is valid from May 1, 2016 through April 30, 2017.

2. This Authorization is valid only for in-water construction work associated with the rehabilitation of Jetty A at MCR.

3. General Conditions

(a) A copy of this IHA must be in the possession of the Corps, its designees, and work crew personnel operating under the authority of this IHA.

(b) The species authorized for taking include killer whale (*Orcinus orca*), Steller sea lion (*Eumatopius jubatus*), gray whale (*Eschrichtius robustus*), harbor porpoise (*Phocoena phocoena*), California sea lion (*Zalophus californianus),* and harbor seal (*Phoca vitulina richardii*)

(c) The taking, by Level B harassment only, is limited to the species listed in condition 3(b).

(d) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in condition 3(b) of the Authorization or any taking of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(e) The Corps shall conduct briefings between construction supervisors and crews, marine mammal monitoring team, and staff prior to the start of all in-water pile driving, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

4. Mitigation Measures

The holder of this Authorization is required to implement the following mitigation measures:

(a) Time Restriction: For all in-water pile driving activities, the Corps shall operate only during daylight hours when visual monitoring of marine mammals can be conducted.

(b) Establishment of Level B Harassment (ZOI)

(i) Before the commencement of in-water pile driving activities, The Corps shall establish Level B behavioral harassment ZOI where received underwater sound pressure levels (SPLs) are higher then 120 dB (rms) re 1 μPa for and non-pulse sources (vibratory hammer). The ZOI delineates where Level B harassment would occur. For vibratory driving, the level B harassment area is between 10 m and 7.3 km.

(c) The Corps is authorized to utilize only vibratory driving under this IHA.

(d) Establishment of shutdown zone

(i) Implement a minimum shutdown zone of 10 m during vibratory driving activities. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(e) Use of Soft-start

(i) The project will utilize soft start techniques for vibratory pile driving. We require the Corps to initiate sound from vibratory hammers for fifteen seconds at reduced energy followed by a thirty-second waiting period, with the procedure repeated two additional times. Soft start will be required at the beginning of each day's pile driving work and at any time following a cessation of pile driving of thirty minutes or longer.

(ii) Whenever there has been downtime of 20 minutes or more without vibratory driving, the contractor will initiate the driving with soft-start procedures described above.

(f) Standard mitigation measures

(i) Conduct briefings between construction supervisors and crews, marine mammal monitoring team, and Corps staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(ii) For in-water heavy machinery work other than pile driving (*e.g.,* standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 10 meters, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) movement of the barge to the pile location or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile).

(g) The Corps shall establish monitoring locations as described below.

5. Monitoring and Reporting

The holder of this Authorization is required to report all monitoring conducted under the IHA within 90 calendar days of the completion of the marine mammal monitoring

(a) Visual Marine Mammal Monitoring and Observation

(i) At least one individual meeting the minimum qualifications identified in Section 13 of the application by the Corps will monitor the exclusion and Level B harassment zones during vibratory pile driving.

(ii) During pile driving, the area within 10 meters of pile driving activity will be monitored and maintained as marine mammal buffer area in which pile installation will not commence or will be suspended temporarily if any marine mammals are observed within or approaching the area of potential disturbance. This area will be monitored by one qualified field monitor stationed either on the jetty pile or pile driving rig.

(iii) The area within the Level B harassment threshold for pile driving will be monitored by one observer stationed to provide adequate view of the harassment zone, such as Jetty A or the barge. Marine mammal presence within this Level B harassment zone, if any, will be monitored. Pile driving activity will not be stopped if marine mammals are found to be present. Any marine mammal documented within the Level B harassment zone during impact driving would constitute a Level B take (harassment), and will be recorded and reported as such.

(iv) The individuals will scan the waters within each monitoring zone activity using binoculars (Vector 10X42 or equivalent), spotting scopes (Swarovski 20–60 zoom or equivalent), and visual observation .

(v) If waters exceed a sea-state which restricts the observers' ability to make observations within the marine mammal buffer zone (the 100 meter radius) (*e.g.* excessive wind or fog), impact pile installation will cease until conditions allow the resumption of monitoring.

(vi) The waters will be scanned 15 minutes prior to commencing pile driving at the beginning of each day, and prior to commencing pile driving after any stoppage of 20 minutes or greater. If marine mammals enter or are observed within the designated marine mammal buffer zone (the 10m radius) during or 15 minutes prior to impact pile driving, the monitors will notify the on-site construction manager to not begin until the animal has moved outside the designated radius.

(vii) The waters will continue to be scanned for at least 30 minutes after pile driving has completed each day, and after each stoppage of 20 minutes or greater.

(b) Data Collection

(i) Observers are required to use approved data forms. Among other pieces of information, the Corps will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, the Corps will attempt to distinguish between the number of individual animals taken and the number of incidents of take. At a minimum, the following information be collected on the sighting forms:

1. Date and time that monitored activity begins or ends;
2. Construction activities occurring during each observation period;
3. Weather parameters (*e.g.,* percent cover, visibility);
4. Water conditions (*e.g.,* sea state, tide state);
5. Species, numbers, and, if possible, sex and age class of marine mammals;
6. Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;
7. Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
8. Locations of all marine mammal observations; and
9. Other human activity in the area.

(c) Reporting Measures

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), the Corps would immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators. The report would include the following information:

1. Time, date, and location (latitude/longitude) of the incident;
2. Name and type of vessel involved;
3. Vessel's speed during and leading up to the incident;
4. Description of the incident;
5. Status of all sound source use in the 24 hours preceding the incident;
6. Water depth;
7. Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
8. Description of all marine mammal observations in the 24 hours preceding the incident;
9. Species identification or description of the animal(s) involved;
10. Fate of the animal(s); and
11. Photographs or video footage of the animal(s) (if equipment is available).

(ii) Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with the Corps to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Corps would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

(iii) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), the Corps would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS West Coast Stranding Hotline and/or by email to the West Coast Regional Stranding Coordinators. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with the Corps to determine whether modifications in the activities are appropriate.

(iv) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Corps would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS West Coast Stranding Hotline and/or by email to the West Coast Regional Stranding Coordinators, within 24 hours of the discovery. The Corps would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

6. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

**Request for Public Comments**

NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for the Corps' rehabilitation of Jetty A at MCR. Please include with your comments any supporting data or literature citations to help inform our final decision on the Corps' request for an MMPA authorization.

Dated: July 17, 2015.

**Perry Gayaldo,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2015–18022 Filed 7–22–15; 8:45 am]

**BILLING CODE 3510–22–P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No: CFPB–2015–0033]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is proposing to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Consumer Leasing Act (Regulation M) 12 CFR 1013.''

**DATES:** Written comments are encouraged and must be received on or before August 24, 2015 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OMB*: Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395–5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of

this information collection request is available at *www.reginfo.gov* (this link active on the day following publication of this notice). Select ''information Collection Review,'' under ''Currently under review, use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *PRA@cfpb.gov. Please do not submit comments to this email box.*

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Consumer Leasing Act (Regulation M) 12 CFR 1013.

*OMB Control Number:* 3170–0006.

*Type of Review:* Extension without change of a currently approved collection.

*Affected Public:* Businesses and other for-profit institutions.

*Estimated Number of Respondents:* 13,718.

*Estimated Total Annual Burden Hours:* 5,018.

*Abstract:* Consumers rely upon the disclosures required by the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* (CLA) and Regulation M, 12 CFR 1013, for information to comparison shop among leases, as well as to ascertain the true costs and terms of lease offers. Federal and state enforcement and private litigants use the records to ascertain whether accurate and complete disclosures of the cost of leases have been provided to consumers prior to consummation of the lease. This information provides the primary evidence of law violations in CLA enforcement actions brought by federal agencies. Without Regulation M's recordkeeping requirement, the agencies' ability to enforce the CLA would be significantly impaired.

*Request for Comments:* The Bureau issued a 60-day **Federal Register** notice on May 4, 2015 (80 FR 25281). Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: July 17, 2015.

**Linda F. Powell,**

*Chief Data Officer, Bureau of Consumer Financial Protection.*

[FR Doc. 2015–18014 Filed 7–22–15; 8:45 am]

**BILLING CODE 4810–AM–P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No: CFPB–2015–0032]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is proposing to renew the Office of Management and Budget (OMB) approval for an existing information collection, to revise an existing information collection, titled, ''Gramm-Leach-Bliley Act (Regulation P) 12 CFR 1016.''

**DATES:** Written comments are encouraged and must be received on or before August 24, 2015 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OMB:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395–5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link active on the day following publication of this notice). Select ''information Collection Review,'' under ''Currently under review, use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov*. Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *PRA@cfpb.gov. Please do not submit comments to this email box.*

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Gramm-Leach-Bliley Act (Regulation P) 12 CFR 1016.

*OMB Control Number:* 3170–0010.

*Type of Review:* Extension without change of an existing approved information collection.

*Affected Public:* Businesses and other for-profit institutions.

*Estimated Number of Respondents:* 29,544.

*Estimated Total Annual Burden Hours:* 366,134.

*Abstract:* Section 502 of the Gramm-Leach-Bliley Act (GLBA) (Pub. L. 106–102) generally prohibits a financial institution from sharing nonpublic personal information about a consumer with nonaffiliated third parties unless the institution satisfies various disclosure requirements (including provision of initial privacy notices, annual notices, notices of revisions to the institution's privacy policy, and opt-out notices) and the consumer has not elected to opt out of the information sharing. The Bureau promulgated regulation P 12 CFR 1016 to implement the GLBA's notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties.

*Request For Comments:* The Bureau issued a 60-day **Federal Register** notice on May 7th, 2015, 80 FR 26234. Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the

validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: July 17, 2015.

**Linda F. Powel,**

*Chief Data Officer, Bureau of Consumer Financial Protection.*

[FR Doc. 2015–18016 Filed 7–22–15; 8:45 am]

**BILLING CODE 4810–AM–P**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No: CFPB–2015–0034]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is proposing to renew the Office of Management and Budget (OMB) approval for an existing information collection titled,'' Mortgage Assistance Relief Services (Regulation O) 12 CFR part 1015.''

**DATES:** Written comments are encouraged and must be received on or before August 24, 2015 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OMB:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395–5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link active on the day following publication of this notice). Select ''information Collection Review,'' under ''Currently under review, use the dropdown menu ''Select Agency'' and select ''Consumer Financial Protection Bureau'' (recent submissions to OMB will be at the top of the list). The same documentation is also available at *http://www.regulations.gov.* Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *PRA@cfpb.gov. Please do not submit comments to this email box.*

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Mortgage Assistance Relief Services (Regulation O) 12 CFR part 1015.

*OMB Control Number:* 3170–0007.

*Type of Review:* Extension without change of a currently approved collection.

*Affected Public:* Businesses and other for-profit institutions.

*Estimated Number of Respondents:* 107.

*Estimated Total Annual Burden Hours:* 322.

*Abstract:* The required disclosures under Regulation O (12 CFR 101) assist prospective purchasers of mortgage assistance relief services (MARS) in making well-informed decisions and avoiding deceptive and unfair acts and practices. The information that must be kept under Regulation O's recordkeeping requirements is used by the CFPB and the Federal Trade Commission for enforcement purposes and to ensure compliance by MARS providers with Regulation O. The information is requested only on a case-by-case basis.

*Request for Comments:* The Bureau issued a 60-day **Federal Register** notice on May 4, 2015 (80 FR 25282). Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: July 17, 2015.

**Linda F. Powell,**

*Chief Data Officer, Bureau of Consumer Financial Protection.*

[FR Doc. 2015–18015 Filed 7–22–15; 8:45 am]

**BILLING CODE 4810–AM–P**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DoD–2014–OS–0157]**

### 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 August 24, 2015.

**FOR FURTHER INFORMATION CONTACT:** Fred Licari, 571–372–0493.

**SUPPLEMENTARY INFORMATION:**

*Title, Associated Form and OMB Number:* AFNConnect (AFNC); OMB Control Number 0704–TBD.

*Type of Request:* New.

*Number of Respondents:* 700.

*Responses per Respondent:* 1.

*Annual Responses:* 60.

*Average Burden per Response:* 10 minutes.

*Annual Burden Hours:* 116.67.

*Needs and Uses:* The information collection requirement is necessary to obtain and audit the eligibility of DoD Employees, DoD contractors, Department of State (DoS) employees, military personnel (including retirees and active reservists) and their family members OCONUS to receive restricted American Forces Radio and Television Service (AFRTS) programming services (*i.e.,* radio, television, and web streaming services). Demographic data will also be collected to ensure DMA provides its services in the most efficient and cost effective manner.

*Affected Public:* Individuals or Households.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra at the Office of Management and Budget, 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 02G09, Alexandria, VA 22350–3100.

Dated: July 17, 2015.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2015–18017 Filed 7–22–15; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

## Applications for New Awards; Rehabilitation Services Administration, Disability Innovation Fund—Automated Personalization Computing Project

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice.

**Overview Information**

*Rehabilitation Services Administration (RSA), Disability Innovation Fund—Automated Personalization Computing Project*

Notice inviting applications for new awards for fiscal year (FY) 2015.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.421A.

**DATES:**

*Applications Available:* July 23, 2015.

*Date of Pre-Application Webinar:* August 5, 2015.

*Deadline for Transmittal of Applications:* September 8, 2015.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The purpose of the Disability Innovation Fund, as provided by the Consolidated Appropriations Act, 2014 (Pub. L. 113–76), is to support innovative activities aimed at improving the outcomes of ''individuals with disabilities,'' as defined in section 7(20)(B) of the Rehabilitation Act of 1973, as amended.

*Priority:* We are establishing this priority for the FY 2015 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

*Absolute Priority:* For FY 2015 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

*Disability Innovation Fund—Automated Personalization Computing Project*

Background

In today's world, individuals with disabilities experience many barriers to accessing information and communication technologies (ICT) needed for education, training, and workforce participation, as well as for participation in the activities of daily living. For example, in order to meet the needs of a student with a disability, a school will often provide only a single computer, as customizing its software requires expert intervention and staff time. In this case, students cannot use any other information technology (IT) within the learning environment, nor can they use these accommodations on a home or public library computer. Similarly, software licenses for computers within an educational or employment setting cannot follow individual users from school to college or from school to work, or to other environments.

Therefore, as a student, jobseeker, employee, or other user of ICT, an individual with a disability may be very limited in his or her ability to access and use critical information.

For some individuals with or without a disability, the interaction with complex sites and computers (*e.g.,* email, social networking, and electronic voting) can be a source of anxiety and alienation, which may be compounded if there are also barriers to accessing computers and Web sites. Further, as more everyday services migrate online, from Web-enabled ticket kiosks to government services, college and job applications, and student loan services, individuals who need accommodations to use the Web are often left with few or no alternatives.

The Web itself also has barriers to access. Many Web sites and pages may be too complicated or visually busy for users to find the information they need; they may use complex language rather than language that is accessible to individuals with intellectual disabilities or low literacy skills; and they may not include text-to-speech functionality or video description options for people who are blind or visually impaired.

It is essential to develop mechanisms to reduce barriers to accessing technology in order to ensure that everyone who faces these barriers, regardless of economic resources, can use ICT to access information, communities, and services for education, employment, and daily living.

The Department of Education (Department) believes that developing an IT infrastructure that allows individuals with disabilities easier access to ICT will ultimately provide better educational opportunities, ease transitions between school and the workforce, and improve productivity in the workplace.

The Department is therefore seeking to implement a pilot demonstration of automated personalization computing for individuals with disabilities. The demonstration must help users identify the assistive technology (AT) solutions and settings that work best for them (their ''personalization'') without the intervention of an AT specialist. Personalization could include, but is not limited to, font size or color, text-to-speech functionality, site simplification or simple language, translation from one language to another language, and audio volume. After identification of the

optimal personalized features, the ''personalization''—the accommodations or accessibility features—would be available reliably to the user via the Web. Individuals with disabilities would then be able to access, on a secure basis, this computer information no matter where they are (at school, work, home, or in the community), and no matter the type of computer (*e.g.,* desktop, laptop, tablet, smartphone, kiosk) or software platform (*e.g.,* PC, Mac) they are using, as long as it is an APCP-enabled computer with Web access.

This project will require coordination among several different sectors: Cloud or other technology platform providers, AT researchers and manufacturers, mainstream technology manufacturers, Federal agencies, individuals with disabilities, educators, employers, and disability advocacy organizations. Therefore, the Department will require applicants to establish a partnership or use an existing partnership. The applicant may include entities in the partnership that are not otherwise eligible (*e.g.,* for profit entities)to apply, and we encourage cross-sector partnership with the potential to maximize the benefits both to individuals with disabilities and the participating partners.

The project has enormous potential to benefit all of these sectors, but care must be taken to ensure that the project benefits the intended market of individuals with disabilities. Federal involvement in developing this infrastructure will encourage continued innovation and investment by private sector entities, help ensure that all individuals with disabilities reap the benefits of this technology, and ensure that data and personally identifiable information (PII) are protected.

This priority is:

*Disability Innovation Fund—Automated Personalization Computing Project*

The purpose of this priority is to enter into a cooperative agreement to implement a pilot project that would improve outcomes for individuals with disabilities by increasing access to information and communication technologies (ICT) through automatic personalization of needed assistive technology (AT). Under the Automated Personalization Computing Project (APCP), an information technology (IT) infrastructure would be created to allow users of ICT to store preferences in the cloud or other technology, which then would allow supported Internet-capable devices they are using to automatically run their preferred AT solutions.

Using these stored preferences, along with information about the computer (*e.g.,* type, operating system) and available AT solutions, the APCP would identify AT to meet the user's preferences and then configure the computer accordingly. This may require automatically configuring AT built into the mainstream technology computer itself or configuring external AT solutions to operate on the computer.

The Department is seeking to implement a pilot demonstration of this concept which demonstrates how the automated personalization could follow a person across multiple sites and multiple devices. The project must also demonstrate the scalability and sustainability of the implemented model(s).

*Outcomes*

The project is designed to achieve the following outcomes:

(a) An APCP demonstration that is usable, complies with accessibility requirements (*i.e.,* WCAG [1] 2.0 Level AA), and effectively automates personalization;

(b) A reliable infrastructure that could be scaled well beyond the demonstration implemented under this project;

(c) Evidence that the personalization is transferrable in such a way that it can follow a person from one device to another and from one site to another (*e.g.,* from college to career);

(d) A set of metrics, along with the strategies and the computer programs needed to collect and analyze data, that can be used to improve, scale up, and sustain the APCP; and

(e) A detailed plan for sustainability of the implemented model(s).

*Project Requirements*

(a) *Target populations.* The pilot project must be designed to address the ICT and automated personalization needs of either or both of the following target populations: (1) Youth with disabilities transitioning from secondary to postsecondary education or employment, or (2) individuals with disabilities who are clients of American Job Centers or State vocational rehabilitation (VR) agencies.

(b) *Demonstration sites.* The personalization system must have access to the preferences of the user and to the computing environment of each specific device to be personalized so that it can determine how best to adapt that device to meet a user's preferences. The demonstration must include sites that show how the APCP could work in a variety of computing environments—from those that freely release information about the computing environment to those that keep such information secure. Sites across multiple organizations and settings must be involved in this project.

(c) *Computers to be personalized.* Personalization must be accomplished on mainstream hardware and operating systems that are currently in use at the selected sites. Multiple hardware platforms with multiple operating systems must be used in this demonstration.

(d) *AT included.* The personalization must use a variety of AT solutions, including those from traditional AT manufacturers, as well as free open-source solutions and solutions built into the operating systems of the computers involved.

(e) *Privacy and security of users and computers to be personalized.* Privacy must be guaranteed for the users of the personalization system (*e.g.,* the system must be compliant with the Health Insurance Portability and Accountability Act (HIPAA) [2] and Family Educational Rights and Privacy Act (FERPA) [3]), especially their stored preferences. Additionally, the security of the computers to be personalized must be maintained.

(f) *Appropriate security controls applied.* The implementation must ensure that the system: (1) Follows the risk assessment framework from the National Institute of Standards and Technology (NIST) described in NIST SP 800–37 to determine the risk posture; (2) applies the controls in NIST SP 800–53a (revision 4) correlated with the risk level; and (3) assures the application of other security controls, standards, and requirements appropriate for the security of information managed by the system.

(g) *Reliability.* The demonstration must be designed so that users will be assured of access at any time.

(h) *Involvement of stakeholders.* The applicant must involve all affected stakeholder groups (*e.g.,* cloud or other technology platform providers, AT researchers and manufacturers, mainstream technology manufacturers, Federal agencies, individuals with disabilities, and disability advocacy organizations) in all aspects of the project including, but not limited to, project development, design,

[1] See *www.w3.org/TR/WCAG20/* for WCAG 2.0 accessibility requirements.

[2] See *www.hhs.gov/ocr/privacy/hipaa/administrative/statute/* for more information on HIPAA requirements.

[3] See *www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html* for more information on FERPA requirements.

implementation, and development of sustainability plans.

(i) *Advisory committee.* The grantee must establish an advisory committee that meets at least semi-annually. The committee must include, but is not limited to, individuals with disabilities, local educational agencies or State educational agencies, and institutions of higher education (IHEs), State VR and workforce development agencies, businesses, and AT manufacturers. The committee will work on the project development, methods for engagement with international standards organizations and the Web and ICT community, and performance review.

(j) *Federal steering committee.* The grantee must work with a Federal steering committee, consisting of federal employees only, (to be constituted by RSA) that provides support, guidance, and oversight of the project to ensure delivery of project outputs and achievement of project outcomes. At a minimum, the committee will:

(1) Provide input to the development of the project, including input on refining the evaluation plan;

(2) Identify and monitor risks;

(3) Monitor timelines and the quality of the project;

(4) Provide technical assistance; and

(5) Leverage resources to support the project moving forward.

*Application Requirements*

In order to be considered under this priority, an applicant must meet the following requirements:

(a) Address the technical requirements for the deployment of the system in a large-scale demonstration of users and how the users will retrieve their stored preferences. To meet this requirement, the applicant must describe—

(1) The system architecture indicating necessary components and how they interact with the computing environment to be personalized;

(2) The technical requirements in terms of processing power, data storage and retrieval, networking and bandwidth capacity, and methods to procure the necessary services;

(3) The methods by which users will access their stored preferences and personalize the computer being used and the related security measures; and

(4) The methods to ensure data deletion after users permanently withdraw from the system.

(b) Describe how it will incorporate all of the project components.

(c) Describe how it will assure reliability, security, usability, and ethical administration in a large-scale demonstration. To meet this requirement the applicant must describe its plan for—

(1) Privacy and security measures to safeguard user data;

(2) Security measures to safeguard the computers to be personalized;

(3) The development of a board of ethics to determine privacy considerations related to the project for individuals with specialized needs and their caregivers (*e.g.,* access to the location data of cognitively disabled individuals);

(4) A policy regarding the appropriate use of metadata and derived data from the user's activity; and

(5) Metric-based solutions for reliability of the user data, including a description of how the user's data will be stored and copied to ensure a current and up-to-date profile.

(d) Describe how it will build business systems (*e.g.,* work with stakeholders to define requirements). To meet this requirement the applicant must describe how and when user and stakeholder requirements will be considered in the project plan and major milestones identified.

(e) Describe how it will build systems to align existing AT products and mainstream access features. To meet this requirement the applicant must describe—

(1) A project plan that identifies possible current products that can be used in a test bed environment to construct these systems;

(2) A plan that describes how to work with AT manufacturers to develop licensing models consistent with this project;

(3) A process for identification and incorporation of new products or innovative use of existing products; and

(4) A plan for involving all stakeholders in addressing issues that arise when multiple AT personalization solutions exist (*e.g.,* when a user prefers a particular screen reader but multiple screen readers with different features and price points are available).

(f) Describe methods for defining applicable metrics and reliable measurement techniques and tools that can be implemented by multiple stakeholders and independent assessment organizations.

(g) Describe an evaluation plan that addresses the methods for evaluating this project, including the metrics and instruments to be used in the evaluation and data to be collected.

(h) Describe a plan for addressing sustainability of the implemented model(s).

(i) Identify how it will establish a partnership or utilize an existing partnership. Documentation must include, at a minimum: (1) Evidence of an existing Memorandum of Understanding or a Letter of Intent to establish a partnership; (2) a description of each proposed partner's anticipated commitment of financial or in-kind resources (if any); (3) how each proposed partner's current and proposed activities align with those of the proposed project; (4) how each proposed partner will be held accountable under the proposed governance structure; and (5) how the applicant together with its proposed partners has a demonstrable record of working together with key stakeholders such as major ICT providers, agencies that serve people with disabilities, and organizations of people with disabilities.

*Waiver of Proposed Rulemaking:* Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under new or substantially revised program authority. This is the first grant competition for this program under the Consolidated Appropriations Act, 2014, and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priority under section 437(d)(1) of GEPA. This priority will apply to the FY 2015 grant competition and any subsequent year in which we make awards from the list of unfunded applicants from this competition.

**Program Authority:** Consolidated Appropriations Act, 2014 (Pub. L. 113–76).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474.

**Note:** The regulations in 34 CFR part 79 apply to all applications except federally recognized Indian tribes.

**Note:** The regulations in 34 CFR part 86 apply only to IHEs.

**II. Award Information**

*Type of Award:* Discretionary grant.

*Estimated Available Funds:* $20,000,000.

*Estimated Number of Awards:* 1.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months. Applicants under this competition are required to provide detailed budget information for each of the five years of this project and for the total grant.

**III. Eligibility Information**

1. *Eligible Applicants:* An application must be submitted by an eligible applicant serving as the lead entity on behalf of a proposed partnership that would involve public and private partners participating in project implementation and governance. The applicant must be a State or public or nonprofit agency or organization, including Indian tribes and IHEs. The applicant, together with its proposed partners, must also have a demonstrable record of working together with key stakeholders such as major ICT providers, agencies that serve people with disabilities, and organizations of people with disabilities.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

**IV. Application and Submission Information**

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.421A.

To obtain a copy from the program office, contact Douglas Zhu, U.S. Department of Education, Rehabilitation Services Administration, 550 12th Street SW., Room 5051, Potomac Center Plaza (PCP), Washington, DC 20202–2800. Telephone: (202) 245–6037 or by email: *douglas.zhu@ed.gov.*

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the person or team listed under Accessible Format in section VIII of this notice.

2.a. *Content and Form of Application Submission:*

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Because of the limited time available to review applications and make a recommendation for funding, we strongly encourage applicants to limit the application narrative to no more than 75 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

In addition to the page-limit guidance on the application narrative section, we recommend that you adhere to the following page limits, using the standards listed above: (1) The abstract should be no more than one page, (2) the resumes of key personnel should be no more than two pages per person, and (3) the bibliography should be no more than three pages. The only optional materials that will be accepted are letters of support. Please note that our reviewers are not required to read optional materials.

Please note that any funded applicant's application abstract will be made available to the public.

b. *Submission of Proprietary Information:*

Given the types of projects that may be proposed in applications for the Disability Innovation Fund—Automated Personalization Computing Project, an application may include business information that the applicant considers proprietary. The Department's regulations define ''business information'' in 34 CFR 5.11.

Because we plan to make the abstract of the successful application available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you feel is exempt from disclosure under Exemption 4 of the Freedom of Information Act. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Submission Dates and Times:*

*Applications Available:* July 23, 2015.

*Date of Pre-Application Webinar:* Interested parties are invited to participate in a pre-application Webinar. The pre-application Webinar with staff from the Department will be held on August 5, 2015. The Webinar will be recorded. For further information about the pre-application Webinar, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Deadline for Transmittal of Applications: September 8, 2015.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental

review in order to make an award by the end of FY 2015.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the Applicable Regulations section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry (CCR)), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data entered into the SAM database by an entity. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

**Note:** Once your SAM registration is active, you will need to allow 24 to 48 hours for the information to be available in Grants.gov and before you can submit an application through Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

*a. Electronic Submission of Applications*

Applications for grants under the Automated Personalization Computing Project, CFDA number 84.421A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Automated Personalization Computing Project competition at *www.Grants.gov*. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.421, not 84.421A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov*.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a

password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

*Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System:* If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

**Note:** The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

*and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Douglas Zhu, U.S. Department of Education, 550 12th Street SW., Room 5051, PCP, Washington, DC 20202–2800. FAX: (202) 245–7591.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

*b. Submission of Paper Applications by Mail*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.421A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

*c. Submission of Paper Applications by Hand Delivery*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.421A), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any

discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also. If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. You must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals.

The goal of the APCP is to develop an IT infrastructure on which Internet-capable computers automatically run AT solutions customized for individual users with disabilities according to their preferences. These preferences must be established with minimal effort on the part of the user. The result is a personalized interface automatically and transparently running on any APCP-enabled computer after log-in, wherever located.

Pursuant to GPRA, the Department is in the process of developing performance measures for this program to assess the success of the grantee in meeting the goals of this project. In general, these measures will assess the quality, relevance, and usefulness of the pilot implemented by this project, as well as the performance of this project in meeting the project requirements and achieving outcomes established in this notice and specified annually in the cooperative agreement. Those project requirements and outcomes will include, but not be limited to:

(a) Developing an APCP demonstration that is usable (*e.g.,* such that the percentage of individuals with disabilities who have access to the APCP who use the system and the percentage of such individuals who continue to use the system increase over a specific period of time), complies with accessibility requirements (*i.e.,* WCAG 2.0 Level AA), and effectively automates personalization;

(b) Establishing a reliable infrastructure that could be scaled well beyond the pilot implemented under this project;

(c) Collecting evidence that the personalization is transferrable in such a way that it can follow a person from one device to another and from one site to another (*e.g.,* by tracking the percentage of users who utilize the APCP on multiple devices or at multiple sites);

(d) Developing and implementing a set of metrics, along with the strategies and the computer programs needed to collect and analyze data, that can be used to improve, scale up, and sustain the APCP; and

(e) Developing a plan for sustainability of the implemented model(s).

Measures developed by the Federal steering committee (in consultation with the grantee) will also be included in the cooperative agreement to ensure the grantee's progress in deploying concepts that show promise of sustaining the deployment beyond this grant and scaling beyond this pilot project in the future.

The grantee will be required to collect and annually report data related to its performance on these measures in the project's annual and final performance reports to the Department. The Department may require more frequent reporting. The annual performance reports must include both quantitative and qualitative information sufficient to assess the quality, relevance, and usefulness of the implementation of the pilot project and the objectives and outcomes for that year. The data used must be valid and verifiable.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measure requirements, the performance targets in the grantee's approved application. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Douglas Zhu, U.S. Department of Education, Rehabilitation Services Administration, 550 12th Street SW., Room 5051, PCP, 20202–2800. Telephone: 202–245–6037 or by email: *Douglas.Zhu@ed.gov.*

If you use a TDD or a TYY, call the FRS, toll free, at 1–800–877–8339.

**VIII. Other Information**

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

*Electronic Access to This Document:* The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: July 20, 2015.

**Michael K. Yudin,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2015–18085 Filed 7–22–15; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2015–ICCD–0063]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Gainful Employment Recent Graduates Employment and Earning Survey Pilot Test

**AGENCY:** Federal Student Aid (FSA), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

**DATES:** Interested persons are invited to submit comments on or before August 24, 2015.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use *http://wwww.regulations.gov* by searching the Docket ID number ED–2015–ICCD–0063. 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 2E103, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Beth Grebeldinger, (202) 377–4018.

**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:* Gainful Employment Recent Graduates Employment and Earning Survey Pilot Test.

*OMB Control Number:* 1845—NEW.

*Type of Review:* A new information collection.

*Respondents/Affected Public:* Individuals or Households.

*Total Estimated Number of Annual Responses:* 2,040.

*Total Estimated Number of Annual Burden Hours:* 170.

*Abstract:* The National Center for Education Statistics (NCES) of the U.S. Department of Education (ED) is required by regulation to develop an earnings survey to support gainful employment program evaluations (see 34 CFR 668.406 as specified in final regulations published in the **Federal Register** in October 2014). NCES is responsible for developing the survey and the technical standards to which programs must adhere in its administration. The regulations specify that the Secretary of Education will publish in the **Federal Register** a pilot-tested earnings survey and the standards required for its administration. The draft standards are being published for public comment in a separate announcement. This request is to conduct a pilot test of the Recent Graduates Employment and Earnings Survey (RGEES). The RGEES pilot test will measure unit response rates and enable comparisons to earnings data collected through other surveys and in administrative records. The pilot study results will be used to compare median earnings collected through the survey to median earnings for graduates from comparable programs based on a match to the Social Security Administration as part of the 2012 gainful employment informational rates.

Dated: July 17, 2015.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.*

[FR Doc. 2015–18018 Filed 7–22–15; 8:45 am]

**BILLING CODE 4000–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2006–0407; FRL–9931–10–OAR]**

### Proposed Information Collection Request; Comment Request; EPA's ENERGY STAR Program in the Commercial and Industrial Sectors (Renewal)

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

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) is planning to submit a request to renew an existing approved information collection request (ICR), ''EPA's ENERGY STAR Program in the

Commercial and Industrial Sectors'' (EPA ICR No. 1772.07, OMB Control No. 2060–0347) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through March 31, 2016. 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.

**DATES:** Comments must be submitted on or before September 21, 2015.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2006–0407, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Klein, Climate Protection Partnerships Division, (6202A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9144; fax number: (202) 343–2204; email address: *klein.stephanie@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) 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; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

*Abstract:* EPA created ENERGY STAR as a voluntary program to help businesses and individuals protect the environment through superior energy efficiency. The program focuses on reducing utility-generated emissions by reducing the demand for energy. In 1991, EPA launched the Green Lights Program to encourage corporations, State and local governments, colleges and universities, and other organizations to adopt energy-efficient lighting as a profitable means of preventing pollution and improving lighting quality. Since then, EPA has rolled Green Lights into ENERGY STAR and expanded ENERGY STAR to encompass organization-wide energy performance improvement, such as building technology upgrades, product purchasing initiatives, and employee training. At the same time, EPA has streamlined the reporting requirements of ENERGY STAR and focused on providing incentives for improvements (*e.g.,* ENERGY STAR Awards Program). EPA also makes tools and other resources available on the web to help the public overcome the barriers to evaluating their energy performance and investing in profitable improvements.

To join ENERGY STAR, organizations are asked to complete a Partnership Letter or Agreement that establishes their commitment to energy efficiency. Partners agree to undertake efforts such as measuring, tracking, and benchmarking their organization's energy performance by using tools such as those offered by ENERGY STAR; developing and implementing a plan to improve energy performance in their facilities and operations by adopting a strategy provided by ENERGY STAR; and educating staff and the public about their Partnership with ENERGY STAR, and highlighting achievements with the ENERGY STAR, where available.

Partners also may be asked to periodically submit information to EPA as needed to assist in program implementation.

Partnership in ENERGY STAR is voluntary and can be terminated by Partners or EPA at any time. EPA does not expect organizations to join the program unless they expect participation to be cost-effective and otherwise beneficial for them.

In addition, Partners and any other interested party can seek recognition and help EPA promote energy-efficient technologies by evaluating the efficiency of their buildings using EPA's on-line tools (*e.g.,* Portfolio Manager) and applying for recognition. EPA does not expect to deem any information collected under ENERGY STAR to be Confidential Business Information (CBI).

*Form Numbers:* 5900–19, 5900–33, 5900–195, 5900–21, 5900–22, 590–198, 5900–16, 5900–89, 5900–263, 5900–262, 5900–264, and 5900–265.

*Respondents/affected entities:* Private sector.

*Respondent's obligation to respond:* Voluntary.

*Estimated number of respondents:* 15,000 (total).

*Frequency of response:* One-time, on occasion, monthly, annually, and/or periodically.

*Total estimated burden:* 194,509 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $24,408,276 (per year) includes $10,318,180 annualized capital or operation & maintenance costs.

*Changes in Estimates:* There is no change of hours in the total estimated respondent burden compared with the ICR currently approved by OMB. EPA is currently evaluating and updating these estimates as part of the ICR renewal process. EPA will discuss its updated estimates, as well as changes from the last approval, in the next **Federal Register** notice to be issued for this renewal.

Dated: July 15, 2015.

**Jacob Moss,**

*Acting Director, Climate Protection Partnerships Division.*

[FR Doc. 2015–18082 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–RCRA–2015–0219; FRL–9930–05–OEI]**

### Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Hazardous Waste Combustors (Renewal)

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

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection has submitted an information collection request (ICR), ''NESHAP for Hazardous Waste Combustors (40 CFR part 63, subpart EEE) (Renewal)'' (EPA ICR No. 1773.11, OMB Control No. 2050–0171) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through July 31, 2015. Public comments were previously requested via the **Federal Register** (80 FR 20223) on April 15, 2015 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** Additional comments may be submitted on or before August 24, 2015.

**ADDRESSES:** Submit your comments, referencing Docket ID Number EPA–HQ–RCRA–2015–0219, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** John Sager, Office of Resource Conservation and Recovery (mail code 5304P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 703–308–7256; fax number: 703–308–0514; email address: *sager.john@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

*Abstract:* The affected entities are subject to the General Provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAP) at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart EEE. Hazardous waste combustors include: Hazardous waste incinerators, hazardous waste cement kilns, hazardous waste lightweight aggregate kilns, hazardous waste solid fuel boilers, hazardous waste liquid fuel boilers, and hazardous waste hydrochloric acid production furnaces. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, notification of exceedances, notification of performance test and continuous monitoring system evaluation, notification of intent to comply, notification of compliance, notification if the owner or operator elects to comply with alternative requirements, initial performance tests, and periodic reports and results.

*Form numbers:* None.

*Respondents/affected entities:* Owners or operators of combustion units burning hazardous waste, States.

*Respondent's obligation to respond:* Mandatory (40 CFR part 63, subpart EEE).

*Estimated number of respondents:* 192.

*Frequency of response:* Occasionally.

*Total estimated burden:* 142,381 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $19,945,848 (per year), includes $4,052,444 annualized capital or operation & maintenance costs.

*Changes in the estimates:* There is decrease of 66 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This small decrease is due to the slight decrease in the number of incinerators from last time.

**Courtney Kerwin,**

*Acting Director, Collection Strategies Division.*

[FR Doc. 2015–18025 Filed 7–22–15; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

**[3064–0095, 3064–0117, 3064–0145, 3064–0152, 3064–0161]**

### Agency Information Collection Activities: Proposed Collection Renewals; Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the FDIC is soliciting comment on the renewal of the information collections described in the **SUPPLEMENTARY INFORMATION** section.

**DATES:** Comments must be submitted on or before September 21, 2015.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/.*
- *Email: comments@fdic.gov* Include the name and number of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202) 898–3877, Counsel, John W. Popeo (202) 898–6923, Counsel, MB–3007, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Gary A. Kuiper or John W. Popeo, at the FDIC address above.

**SUPPLEMENTARY INFORMATION:** Proposal to renew the following currently-approved collections of information:

1. *Title:* Procedures for Monitoring Bank Protection Act Compliance.

*OMB Number:* 3064–0095.

*Affected Public:* Insured state nonmember banks.

*Estimated Number of Respondents:* 4049.

*Estimated Burden per Respondent:* .5 hours.

*Estimated Total Annual Burden:* 2,025 hours.

*General Description:* The collection requires insured state nonmember banks to comply with the Bank Protection Act and to review bank security programs.

2. *Title:* Mutual-to-Stock Conversion of State Savings Banks.

*OMB Number:* 3064–0117.

*Affected Public:* Insured state nonmember banks.

*Estimated Number of Respondents:* 15.

*Estimated Time Burden per Respondent:* 250 hours.

*Estimated Total Annual Burden:* 3,750 hours.

*General Description:* State nonmember savings banks must file a notice of intent to convert to stock form, and provide the FDIC with copies of documents filed with state and federal banking and/or securities regulators in connection with any proposed mutual-to-stock conversion.

3. *Title:* Notice Regarding Unauthorized Access to Customer Information.

*OMB Number:* 3064–0145.

*Affected Public:* Insured state nonmember banks.

*Frequency of Response:* On occasion.

*Number of FDIC-Regulated Banks that will Notify Customers:* 93.

*Estimated Time per Response:* 29 hours.

*Annual Burden:* 2,697 hours.

*General Description:* This collection reflects the FDIC's expectations regarding a response program that financial institutions should have to address unauthorized access to or use of customer information that could result in substantial harm or inconvenience to a customer. The information collection requires financial institutions to: (1) Develop notices to customers; and (2) in certain circumstances, determine which customers should receive the notices, and send the notices to customers.

4. *Title:* ID Theft Red Flags.

*OMB Number:* 3064–0152.

*Number of Respondents:* 4,049.

*Total Estimated Time per Response:* 16 hours.

*Total Estimated Annual Burden:* 64,784 hours.

*General Description:* The FDIC is requesting OMB approval to extend for three years the expiration date of information collection 3064–0152, ''ID Theft red Flags.'' The regulation containing this information collection requirement is 12 CFR part 334, which implements sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Pub. L. 108–159 (2003).

*FACT Act Section 114:* Section 114 requires the Agencies to jointly propose guidelines for financial institutions and creditors identifying patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. In addition, each financial institution and creditor is required to establish reasonable policies and procedures to address the risk of identity theft that incorporate the guidelines. Credit card and debit card issuers must develop policies and procedures to assess the validity of a request for a change of address under certain circumstances.

The information collections pursuant to section 114 require each financial institution and creditor to create an Identify Theft Prevention Program and report to the board of directors, a committee thereof, or senior management at least annually on compliance with the proposed regulations. In addition, staff must be trained to carry out the program. Each credit and debit card issuer is required to establish policies and procedures to assess the validity of a change of address request. The card issuer must notify the cardholder or use another means to assess the validity of the change of address.

*FACT Act Section 315:* Section 315 requires the Agencies to issue regulations providing guidance regarding reasonable policies and procedures that a user of consumer reports must employ when such a user receives a notice of address discrepancy from a consumer reporting agencies. Part 334 provides such guidance. Each user of consumer reports must develop reasonable policies and procedures that it will follow when it receives a notice of address discrepancy from a consumer reporting agency. A user of consumer reports must furnish an address that the user has reasonably confirmed to be accurate to the consumer reporting agency from which it receives a notice of address discrepancy.

The Agencies believe that the entities covered by the proposed regulation are already furnishing addresses that they have reasonably confirmed to be accurate to consumer reporting agencies from which they receive a notice of address discrepancy as a usual and customary business practice. Therefore, this requirement is not included in the burden estimates set out above.

5. *Title:* Furnisher Information Accuracy and Integrity (FACTA 312).

*OMB Number:* 3064–0161.

*Affected Public:* State nonmember banks.

*Policies and Procedures:*

*Estimated Number of Respondents:* 4,049.

*Estimated Burden per Respondent:*

24 hours to implement written policies and procedures and training associated with the written policies and procedures;

8 hours to amend procedures for handling complaints received directly from consumers; and,

8 hours to implement the new dispute notice requirements.

*Estimated Annual Burden:* 4049 × 40 hours = 161,960 hours.

*Frivolous or Irrelevant Dispute Notices:*

*Number of Frivolous or Irrelevant Dispute Notices:* 88,980.

*Estimated Burden per Frivolous or Irrelevant Dispute Notice:* 14 minutes.

*Estimated Annual Burden:* 88,980 × 14/60 = 20,762 hours.

*Total Estimated Annual Burden:* 161,960 + 20,762 = 182,722 hours.

*General Description of the Collection:* FDIC is required by section 312 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) to issue guidelines for use by furnishers regarding the accuracy and the integrity of the information about consumers that they furnish to consumer reporting agencies, and prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing guidelines. Section 312 also requires the Agencies to issue regulations identifying the circumstances under which a furnisher must reinvestigate disputes about the accuracy of information contained in a consumer report based on a direct request from a consumer.

**Request for Comment**

Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the collections of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the

use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 20th day of July 2015.

Federal Deposit Insurance Corporation.

**Valerie J. Best,**

*Assistant Executive Secretary.*

[FR Doc. 2015–18069 Filed 7–22–15; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 5, 2015.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Anthony Thomas Moore and Allison Tate Moore,* both of Burns, Tennessee, to retain 12.076 percent of the outstanding shares of Cumberland Bancorp, Inc., and its subsidiary, Cumberland Bank & Trust Company, both of Clarksville, Tennessee.

Board of Governors of the Federal Reserve System, July 17, 2015.

**Michael J. Lewandowski,**

*Assistant Secretary of the Board.*

[FR Doc. 2015–18009 Filed 7–22–15; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

**FOR FURTHER INFORMATION CONTACT:** Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, with revision, of the following report:

*Report title:* Report of Transaction Accounts, Other Deposits, and Vault Cash.

*Agency form number:* FR 2900.

*OMB control number:* 7100–0087.

*Frequency:* Weekly and quarterly.

*Reporters:* Depository institutions.

*Estimated annual reporting hours:* 192,473.

*Estimated average hours per response:* 1.25 hours for weekly filers and 3 hours for quarterly filers.

*Number of respondents:* 2,053 weekly and 4,919 quarterly.

*General description of report:* This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* Institutions with net transaction accounts greater than the exemption amount are called nonexempt institutions. Institutions with total transaction accounts, savings deposits, and small time deposits greater than or equal to the reduced reporting limit, regardless of the level of their net transaction accounts, are also referred to as nonexempt institutions. Nonexempt institutions submit FR 2900 data either weekly or quarterly. An institution is required to report weekly if its total transaction accounts, savings deposits, and small time deposits are greater than or equal to the nonexempt deposit cutoff. If the nonexempt institution's total transaction accounts, savings deposits, and small time deposits are less than the nonexempt deposit cutoff then the institution must report quarterly or may elect to report weekly. U.S. branches and agencies of foreign banks and banking Edge and agreement corporations submit the FR 2900 data weekly, regardless of their size. These mandatory data are used by the Federal Reserve for administering Regulation D (Reserve Requirements of Depository Institutions) and for constructing, analyzing, and monitoring the monetary and reserve aggregates.

*Current Actions:* On May 12, 2015 the Federal Reserve published a notice in the **Federal Register** (80 FR 27171) requesting public comment for 60 days on the extension, with revision, of the Report of Transaction Accounts, Other Deposits, and Vault Cash. The comment period for this notice expired on July 13, 2015. The Federal Reserve received one comment supporting the revisions. The revisions will be implemented as proposed, effective with an October 2015 as-of date.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following reports:

1. *Report title:* Supervisory and Regulatory Survey.

*Agency form number:* FR 3052.

*OMB control number:* 7100–0322.

*Frequency:* On occasion.[1]

*Reporters:* Financial businesses.

*Estimated annual reporting hours:* 60,000 hours.

*Estimated average hours per response:* 0.5 hours.

*Number of respondents:* 5,000.

*General description of report:* This information collection is authorized pursuant to the: Federal Reserve Act, (12 U.S.C. 225a, 324, 263, 602, and 625); Bank Holding Company Act, (12 U.S.C. 1844(c)); International Banking Act of 1978, (12 U.S.C. 3105(c)(2)); and Federal Deposit Insurance Act, (12 U.S.C. 1817(a)). Generally, respondent participation is voluntary. However,

[1] The Federal Reserve conducts the survey as needed up to 24 times per year.

with respect to collections of information from state member banks, bank holding companies (and their subsidiaries), Edge and agreement corporations, and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, the Federal Reserve could make the surveys mandatory. The ability of the Federal Reserve to maintain the confidentiality of information provided by respondents to the FR 3052 surveys is determined on a case-by-case basis depending on the type of information provided for a particular survey. Depending upon the survey questions, confidential treatment could be warranted under subsections (b)(4), (b)(6), and (b)(8) of the Freedom of Information Act (5 U.S.C. 552(b)(4), (6), and (8)).

*Abstract:* The supervision and policy functions of Federal Reserve have occasionally needed to gather data on an ad-hoc basis from the banking and financial industries on their financial condition (outside of the standardized regulatory reporting process) and decisions that organizations have made to adjust to the changes in the economy. Further, the data may relate to a particular business activity that requires a more detailed presentation of the information than is available through regulatory reports such as the (FFIEC 031 and FFIEC 041; OMB No. 7100–0036) (FFIEC 002; OMB No. 7100–0032) (FR 2886b; OMB No. 7100–0086), and (FR Y–9C; OMB No. 7100–0128). These data may be particularly needed in times of critical economic or regulatory changes or when issues of immediate supervisory concern arise from Federal Reserve supervisory initiatives and working groups or requests from Board Members and the Congress. The Federal Reserve uses this event-driven survey to obtain information specifically tailored to the Federal Reserve's supervisory, regulatory, operational, and other responsibilities. The Federal Reserve conducts the survey as needed up to 24 times per year. The frequency and content of the questions depend on changing economic, regulatory, supervisory, or legislative developments.

*Current Actions:* On May 14, 2015, the Federal Reserve published a notice in the **Federal Register** (80 FR 27686) requesting public comment for 60 days on the extension, without revision, of the Supervisory and Regulatory Survey. The comment period for this notice expired on July 13, 2015. The Federal Reserve did not receive any comments. The information collection will be extended for three years, without revision, as proposed.

2. *Report title:* Consumer Financial Stability Surveys.

*Agency form number:* FR 3053.

*OMB control number:* 7100–0323.

*Frequency:* On occasion.[2]

*Reporters:* Individuals, households, and financial and non-financial businesses.

*Estimated annual reporting hours:* Consumer Surveys: Quantitative and general surveys, 4,000 hours, Financial institution consumers, 1,000 hours, and Qualitative surveys, 600 hours; Financial institution survey: Financial institution staff, 150 hours; Stakeholder surveys: Stakeholder clientele, 500 hours and Stakeholder staff, 300 hours.

*Estimated average hours per response:* Consumer surveys: Quantitative and general surveys, 0.5 hours, Financial institution consumers, 0.5 hours and Qualitative surveys, 1.5 hours; Financial institution survey: Financial institution staff, 1.5 hours; Stakeholder surveys: Stakeholder clientele, 0.5 hours and Stakeholder staff, 1.5 hours.

*Number of respondents:* Consumer surveys: Quantitative and general surveys, 2000 respondents, Financial institution consumers, 500 respondents and Qualitative surveys, 100 respondents; Financial institution surveys: Financial institution staff, 25 respondents; Stakeholder surveys: Stakeholder clientele, 500 respondents and Stakeholder staff, 100 respondents.

*General description of report:* This information collection is generally voluntary (Federal Reserve Act, Sections 2A and 12A (12 U.S.C. 225a and 263)). In addition, depending upon the survey questions asked, the information collection may be authorized under one or more consumer protection statutes (Community Reinvestment Act, (12 U.S.C. 2905); Competitive Equality Banking Act, (12 U.S.C. 3806); Expedited Funds Availability Act, (12 U.S.C. 4008); Truth in Lending Act, (15 U.S.C. 1604); Fair Credit Reporting Act, (15 U.S.C. 1681s(e)); Equal Credit Opportunity Act, (15 U.S.C. 1691b); Electronic Funds Transfer Act, (15 U.S.C. 1693b and 1693o–2); Gramm-Leach-Bliley Act, (15 U.S.C. 6801(b)); and Flood Disaster Protections Act of 1973, (42 U.S.C. 4012a)). Additionally, depending on the survey respondent, the information collection may be authorized under a more specific statute (Federal Reserve Act, Section 9, 25, and 25A (12 U.S.C. 324, 602, and 625); Bank Holding Company Act, Section 5(c) (12 U.S.C. 1844(c)); International Banking Act of 1978, Section 7(c)(2) (12 U.S.C. 3105(c)(2)); and Federal Deposit Insurance Act, Section 7(a) (12 U.S.C. 1817(a))). However, with respect to collections of information from state member banks, bank holding companies (and their subsidiaries), Edge and agreement corporations, and U.S. branches and agencies of foreign banks authorized under the specific statutes noted above, the Federal Reserve could make the obligation to respond mandatory. In circumstances where the Board collects that data or the contractor provides the identifying information to the Board, such information could possibly be protected from Freedom of Information Act (FOIA) disclosure by FOIA exemptions 4 and 6 (5 U.S.C. 552(b)(4) and (6)).

*Abstract:* Board staff uses this event-driven survey to obtain information specifically tailored to the Federal Reserve's supervisory, regulatory, operational, informational, and other responsibilities. Board staff is authorized to conduct the FR 3053 up to 20 times per year, although the survey may not be conducted that frequently. The frequency and content of the questions depends on changing economic, regulatory, or legislative developments as well as changes in the financial services industry itself. Respondents comprise individuals, households, and financial and non-financial businesses. The annual burden is estimated to be 6,550 hours, based on twenty surveys: Three quarterly consumer-focused, one quarterly financial institution study, and two semi-annual stakeholder-focused surveys. The surveys are used to gather qualitative and quantitative information directly from: Consumers (consumer surveys), financial institutions and other financial companies offering consumer financial products and services (financial institution survey), and other stakeholders, such as state or local agencies, community development organizations, brokers, appraisers, settlement agents, software vendors, and consumer groups (stakeholder surveys).

*Current Actions:* On May 14, 2015, the Federal Reserve published a notice in the **Federal Register** (80 FR 27686) requesting public comment for 60 days on the extension, without revision, of the Consumer Financial Stability Surveys. The comment period for this notice expired on July 13, 2015. The Federal Reserve did not receive any comments. The information collection will be extended for three years, without revision, as proposed.

3. *Report title:* Annual Report of Deposits and Reservable Liabilities.

*Agency form number:* FR 2910a.

*OMB control number:* 7100–0175.

*Frequency:* Annually.

[2] The Federal Reserve conducts the survey as needed up to 20 times per year.

*Reporters:* Depository institutions.

*Estimated annual reporting hours:* 2,551.

*Estimated average hours per response:* 0.75 hours.

*Number of respondents:* 3,401.

*General description of report:* This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* The FR 2910a is an annual report generally filed by depository institutions that are exempt from reserve requirements under the Garn-St Germain Depository Institutions Act of 1982 and whose total deposits, measured from depository institutions' December quarterly condition reports, are greater than the exemption amount but less than the reduced reporting limit. The report contains three data items that are to be submitted for a single day, June 30: (1) Total transaction accounts, savings deposits, and small time deposits; (2) reservable liabilities; and (3) net transaction accounts. The data collected on this report serves two purposes. First, the data are used to determine which depository institutions will remain exempt from reserve requirements and consequently eligible for reduced reporting for another year. Second, the data are used in the annual indexation of the low reserve tranche, the exemption amount, the nonexempt deposit cutoff, and the reduced reporting limit.

*Current Actions:* On May 12, 2015 the Federal Reserve published a notice in the **Federal Register** (80 FR 27171) requesting public comment for 60 days on the extension, without revision, of the Annual Report of Deposits and Reservable Liabilities. The comment period for this notice expired on July 13, 2015. The Federal Reserve did not receive any comments. The information collection will be extended for three years, without revision, as proposed.

4. *Report title:* Report of Foreign (Non-U.S.) Currency Deposits.

*Agency form number:* FR 2915.

*OMB control number:* 7100–0237.

*Frequency:* Quarterly.

*Reporters:* Depository institutions.

*Estimated annual reporting hours:* 288.

*Estimated average hours per response:* 0.5 hours.

*Number of respondents:* 144.

*General description of report:* This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* All FR 2900 respondents, both weekly and quarterly, that offer deposits denominated in foreign currencies at their U.S. offices file the FR 2915 quarterly on the same reporting schedule as quarterly FR 2900 respondents. Foreign currency deposits are subject to reserve requirements and, therefore, are included in the FR 2900 data. However, because foreign currency deposits are not included in the monetary aggregates, the FR 2915 data are used to net foreign currency-denominated deposits from the FR 2900 data in order to exclude them from measures of the monetary aggregates. The FR 2915 is the only source of data on such deposits.

*Current Actions:* On May 12, 2015 the Federal Reserve published a notice in the **Federal Register** (80 FR 27171) requesting public comment for 60 days on the extension, without revision, of the Report of Foreign (Non-U.S.) Currency Deposits. The comment period for this notice expired on July 13, 2015. The Federal Reserve did not receive any comments. The information collection will be extended for three years, without revision, as proposed.

5. *Report title:* Allocation of Low Reserve Tranche and Reservable Liabilities Exemption.

*Agency form number:* FR 2930.

*OMB control number:* 7100–0088.

*Frequency:* Annually and on occasion.

*Reporters:* Depository institutions.

*Estimated annual reporting hours:* 30.

*Estimated average hours per response:* 0.25 hours.

*Number of respondents:* 120.

*General description of report:* This information collection is mandatory by the Federal Reserve Act (12 U.S.C. 248(a), 461, 603, and 615) and Regulation D (12 CFR 204). The data are given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* Institutions with offices (or groups of offices) in more than one state or Federal Reserve District, or those operating under operational convenience, are required to file the FR 2930 at least annually. An institution's net transaction accounts up to the exemption amount ($14.5 million in 2015) are reserved at zero percent. Net transaction accounts up to the low reserve tranche ($103.6 million in 2015) are reserved at 3 percent while amounts in excess of this amount are reserved at 10 percent. Only a single exemption amount and a single low reserve tranche are allowed per depository institution (including subsidiaries). Therefore, an institution that submits separate FR 2900 reports covering different offices is required to file the FR 2930 at least annually to allocate its reservable liabilities exemption and low reserve tranche among its offices. The Federal Reserve Board does not propose any changes to this report.

*Current Actions:* On May 12, 2015 the Federal Reserve published a notice in the **Federal Register** (80 FR 27171) requesting public comment for 60 days on the extension, without revision, of the Allocation of Low Reserve Tranche and Reservable Liabilities Exemption. The comment period for this notice expired on July 13, 2015. The Federal Reserve did not receive any comments. The information collection will be extended for three years, without revision, as proposed.

Board of Governors of the Federal Reserve System, July 20, 2015.

**Robert deV. Frierson,**

*Secretary of the Board.*

[FR Doc. 2015–18056 Filed 7–22–15; 8:45 am]

**BILLING CODE 6210–01–P**

## 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 August 14, 2015.

A. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Bear State Financial, Inc.,* Little Rock, Arkansas; to acquire 100 percent of Metropolitan National Bank, Springfield, Missouri.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *HYS Investments, LLC,* to acquire additional voting shares up to 26.10 percent of BOTS, Inc., parent of VisionBank, all in Topeka, Kansas.

Board of Governors of the Federal Reserve System, July 17, 2015.

**Michael J. Lewandowski,**

*Associate Secretary of the Board.*

[FR Doc. 2015–18010 Filed 7–22–15; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), to approve of and assign OMB numbers to collection of information requests and requirements conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB number.

**DATES:** Comments must be submitted on or before September 21, 2015.

**ADDRESSES:** You may submit comments, identified by *FR 2082 or RFP/Q,* 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 OMB 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 are available from 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 3515, 1801 K Street (between 18th and 19th Streets NW.) Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395–6974.

**FOR FURTHER INFORMATION CONTACT:** A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:**

#### Request for comment on information collection proposals

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

#### Proposal to approve under OMB delegated authority the extension for three years, without revision, of the following report

1. *Report title:* Registration of a Securities Holding Company.

*Agency form number:* FR 2082.

*OMB control number:* 7100–0347.

*Frequency:* On occasion.

*Reporters:* Securities holding companies.

*Estimated annual reporting hours:* 40 hours.

*Estimated average hours per response:* 8 hours.

*Number of respondents:* 5.

*General description of report:* The confidentiality of the forms required to be filed pursuant to section 241.3(b)(3)(i) is covered in specific memoranda relating to those forms. With respect to the ''Registration of a Securities Holding Company'' form required pursuant to section 241.3(a)(1), the information submitted on and with the form is normally public. However, a company may seek confidential treatment for any such information that it believes is exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(1)–(9)). A determination of confidentiality would be made on a case-by-case basis.

*Abstract:* On June 4, 2012, the Federal Reserve published a final rulemaking for Securities Holding Companies (Regulation OO) in the **Federal Register** (77 FR 32881). Regulation OO implements section 618 of the Dodd-

Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which permits nonbank companies that own at least one registered securities broker or dealer, and that are required by a foreign regulator or provision of foreign law to be subject to comprehensive consolidated supervision, to register with the Board and subject themselves to supervision by the Board.

**Proposal to approve under OMB delegated authority the extension for three years, with revision, of the following report**

1. *Report title:* Request for Proposal and Request for Price Quotations.

*Agency form number:* RFP and RFPQ.

*OMB control number:* 7100–0180.

*Frequency:* On occasion.

*Reporters:* Vendors of goods and services.

*Estimated annual reporting hours:* RFP: 17,500 hours; RFPQ: 4,400 hours; Subcontractor report: 50 hours.

*Estimated average hours per response:* RFP: 50 hours; RFPQ: 2 hours; Subcontractor report: 20 minutes.

*Number of respondents:* RFP: 350; RFPQ: 2,200; Subcontractor report: 150.

*General description of report:* The RFP and RFPQ are required to obtain a benefit and are authorized by Sections 10(3), 10(4), and 11(1) of the Federal Reserve Act (12 U.S.C. 243, 244, and 248(l)). With regard to the Subcontracting Report, Section 342(c) of Dodd-Frank requires the Federal Reserve to develop and implement standards and procedures to assess the diversity policies and practices in all business and activities of the agency at all levels, including procurement, insurance, and all types of contracts. (12 U.S.C. 5452(c)(1)). ''Such procedure shall include a written statement, in a form and with such content as the Director [of OMWI] shall prescribe . . . that a contractor shall ensure . . . the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors.'' (12 U.S.C. 5452(c)(2)).

Proposals from vendors that are not accepted and incorporated into contracts with the Federal Reserve would be protected from Freedom of Information (FOIA) disclosure by 41 U.S.C. 4702, which expressly prohibits FOIA disclosure of these proposals. Moreover, during the solicitation process vendors are permitted to mark information contained in their proposals that is proprietary or confidential with the label RESTRICTED DATA. For information so marked, the Federal Reserve also may determine on a case-by-case basis whether FOIA exemption 4, which applies to ''trade secrets and commercial or financial information,'' would protect information from disclosure pursuant to a FOIA request (5 U.S.C. 552(b)(4)).

*Abstract:* The Federal Reserve uses the RFP and the RFPQ as appropriate to obtain competitive proposals and contracts from approved vendors of goods and services. This information collection is required to collect data on prices, specifications of goods and services, and qualifications of prospective vendors.

*Current Actions:* In connection with the RFP and RFPQ process, the Federal Reserve proposes to require prime contractors to submit a Subcontracting Report that would collect information about their subcontractors' commitments toward diversity and inclusion of minority-owned and women-owned vendors in the subcontractor's activities.

Board of Governors of the Federal Reserve System, July 20, 2015.

**Robert deV. Frierson,**

*Secretary of the Board.*

[FR Doc. 2015–18059 Filed 7–22–15; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0152; Docket 2015–0055; Sequence 17]**

## Information Collection; Service Contracting

**AGENCY:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning service contracting.

**DATES:** Submit comments on or before September 21, 2015.

**ADDRESSES:** Submit comments identified by Information Collection 9000–0152, Service Contracting, by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0152, Service Contracting''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0152, Service Contracting'' on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0152, Service Contracting.

*Instructions:* Please submit comments only and cite Information Collection 9000–0152, Service Contracting, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA, 208–208–4949 or via email at *michaelo.jackson@gsa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

The policies implemented at FAR 37.115, Uncompensated Overtime, are based on Section 834 of Public Law 101–510 (10 U.S.C. 2331). The policies require insertion of FAR provision 52.237–10, Identification of Uncompensated Overtime, in all solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the number of hours to be provided.

The provision requires that offerors identify uncompensated overtime hours, in excess of 40 hours per week, and the uncompensated overtime rate for direct charge Fair Labor Standards Act-exempt personnel. This permits Government contracting officers to ascertain cost realism of proposed labor rates for professional employees and discourages the use of uncompensated overtime.

### B. Annual Reporting Burden

The burden placed on offerors is the time required to identify and support any hours in excess of 40 hours per week included in their proposal or subcontractor's proposal. It is estimated that there will be 17,500 service

contracts awarded annually at $100,000 or more, of which 65 percent or 11,375 contracts will be competitively awarded. About 7 proposals will be received for each contract award. Of the total 79,625 (11,375 × 7) proposals received, only 25 percent or 19,906 proposals are expected to include uncompensated overtime hours. It is estimated that offerors will take about 30 minutes to identify and support any hours in excess of 40 hours per week included in their proposal or subcontractor's proposal.

*Number of Respondents:* 19,906.

*Responses Per Respondent:* 1.

*Total Annual Responses:* 19,906.

*Average Burden Hours Per Response:* .5.

*Total Burden Hours:* 9,953.

**C. Public Comments**

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulation (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 9000–0152, Service Contracting, in all correspondence.

Dated: July 20, 2015.

**Edward Loeb,**

*Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2015–18077 Filed 7–22–15; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Clinical Laboratory Improvement Advisory Committee: Notice of Charter Amendment

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Clinical Laboratory Improvement Advisory Committee, Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS), has amended their charter to reduce the number of annual meetings and to change the designation of CDC, FDA and CMS from voting to non-voting ex officio members. The amended filing date is July 9, 2015.

For information, contact Nancy Anderson, Chief, Laboratory Practice Standards Branch, Division of Laboratory Programs, Standards, and Services, Center for Surveillance, Epidemiology and Laboratory Services, Office of Public Health Scientific Services, CDC, 1600 Clifton Road, NE., Mailstop F–11, Atlanta, Georgia 30329–4018; telephone (404) 498–2741.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 2015–18065 Filed 7–22–15; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Board of Scientific Counselors, National Center for Injury Prevention and Control, (BSC, NCIPC)

*Correction:* This notice was published in the **Federal Register** on June 16, 2015, Volume 80, Number 115, Page 34435. The Matters For Discussion and Contact Person For More Information should read as follows:

*Matters For Discussion:* The BSC, NCIPC will discuss, research strategies needed to guide the Center's focus, updates on the current research portfolio review and the Pediatric mild-Traumatic Injury Workgroup. There will be 15 minutes allotted for public comments at the end of the open session.

On the second day, the BSC, NCIPC will meet to conduct a Secondary Peer Review of extramural research grant applications received in response to four (4) Funding Opportunity Announcements (FOAs): PHS 2014002 Omnibus Solicitation of the NIH, CDC, FDA and ACF for Small Business Innovation Research Grant Applications (Parent SBIR {R42/R44}); CE15–003, Evaluating Structural, Economic, Environmental, or Policy Primary Prevention Strategies for Intimate Partner Violence and Sexual Violence; CE15–004, Evaluating Innovative and Promising Strategies to Prevent Suicide among Middle-Aged Men; and CE15–005, Research to Evaluate the CDC Heads Up Initiative in Youth Sports. Applications will be assessed as they relate to the Center's mission and programmatic balance. Recommendations from the secondary review will be voted upon and the application will be forwarded to the Center Director for consideration for funding support.

*Contact Person For More Information:* Arlene Greenspan, DrPH, MPH, PT, Associate Director for Science, Acting Designated Federal Officer, NCIPC, CDC, 4770 Buford Highway NE., Mailstop F–63, Atlanta, GA 30341, Telephone (770) 488–1279.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office Centers for Disease Control and Prevention.*

[FR Doc. 2015–18064 Filed 7–22–15; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2015–N–2523]**

### Intent To Review a Study Data Reviewer's Guide Template

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA), Center for Drug Evaluation and Research (CDER), is establishing a public docket to collect comments related to a proposed Study Data Reviewer's Guide (SDRG) template. As part of FDA's ongoing collaboration with the Pharmaceutical Users Software Exchange (PhUSE), an independent, non-profit consortium addressing computational science issues, a PhUSE working group developed the PhUSE SRDG template. The purpose of this review is to evaluate the template and determine whether FDA will recommend its use either as is, or in a modified form, for regulatory submissions of study data. FDA is seeking public comment on the use of the PhUSE SDRG template for regulatory submissions.

**DATES:** Although you can comment on the PhUSE SRDG template at any time, to ensure that the Agency considers your comments in this review, please submit either electronic or written comments by September 21, 2015.

**ADDRESSES:** Submit written requests for single copies of the PhUSE SDRG template to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Crystal Allard, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 21, Rm. 1518, Silver Spring, MD 20993–0002, 301–796–8856, *crystal.allard@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is a participating member of PhUSE, an independent, non-profit consortium of academic, regulatory, non-profit, and private sector entities. PhUSE provides a global platform for the discussion of topics encompassing the work of biostatisticians, data managers, statistical programmers, and e-clinical information technology professionals, with the mission of providing an open, transparent, and collaborative forum to address computational science issues. As part of this collaboration, PhUSE working groups develop and periodically publish proposals for enhancing the review and analysis of human and animal study data submitted to regulatory agencies. You can learn more about PhUSE working groups at *http://www.phuse.eu/cs-working-groups.aspx.*

In December 2014, FDA published the Study Data Technical Conformance Guide (the ''Guide,'' available at *http://www.fda.gov/ForIndustry/DataStandards/StudyDataStandards/default.htm*), which contains technical recommendations to sponsors for the submission of animal and human study data and related information in a standardized electronic format. In section 2.2 of the Guide, FDA recommends that each submitted study contain a Study Data Reviewer's Guide containing any special considerations or directions that may facilitate review of the study data. FDA notes in the Guide that the PhUSE SDRG template is an example of how to create an SDRG, but does not specifically recommend its use.

FDA now intends to review the PhUSE SDRG template, a deliverable of the working group effort described above, with the potential result that FDA could recommend the use of the template in its current form, or in a modified form, for use in the regulatory submission of study data in conformance with the Guide. FDA invites public comment on all matters regarding the use of the PhUSE SDRG template. Interested persons may submit either electronic comments to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

## II. Electronic Access

The PhUSE SDRG template is available online at *http://www.phusewiki.org/wiki/index.php?title=Study_Data_Reviewer's_Guide.*

Dated: July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18027 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0781]**

### Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a collection of information entitled, ''Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** On June 08, 2015, the Agency submitted a proposed collection of information entitled, ''Record Retention Requirements for the Soy Protein and Risk of Coronary Heart Disease Health Claim'' to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0428. The approval expires on July 31, 2018. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18042 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2015–D–2479]**

### Gastroparesis: Clinical Evaluation of Drugs for Treatment; Draft 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 a draft guidance for industry entitled ''Gastroparesis: Clinical Evaluation of Drugs for Treatment.'' This draft guidance is intended to provide FDA's current thinking regarding clinical trial design and clinical endpoint assessments to support development of drugs for the treatment of diabetic and idiopathic gastroparesis.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by September 21, 2015.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Ruyi He, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5122, Silver Spring, MD 20993–0002, 301–796–0910.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Gastroparesis: Clinical Evaluation of Drugs for Treatment.'' The purpose of this guidance is to assist sponsors in the clinical development of drugs for the treatment of diabetic and idiopathic gastroparesis.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on the clinical evaluation of drugs for the treatment of diabetic and idiopathic gastroparesis. 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. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001, respectively.

#### III. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov*.

#### IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov*.

Dated: July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18023 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0776]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reclassification Petitions for Medical Devices; Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration is correcting a notice entitled ''Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reclassification Petitions for Medical Devices'' that appeared in the **Federal Register** of June 12, 2015 (80 FR 33524). The document announced that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995. The document inadvertently contained inaccurate information regarding communications with industry, including inaccurate contact information. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of Friday, June 12, 2015, in FR Doc. 2015–14358, the following correction is made:

On page 33524, in the third column, in the third full paragraph, delete the last sentence starting with ''The trade organizations involved . . .'' and the following contact information.

Dated: July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18043 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2007–D–0369]**

### Product-Specific Bioequivalence Recommendations; Draft and Revised Draft Guidances for Industry; Availability; Correction

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of June 30, 2015 (80 FR 37273). The document announced the availability of additional draft and revised draft product-specific bioequivalence (BE) recommendations. The document was published with an incorrect table title and contents. This document corrects those errors.

**FOR FURTHER INFORMATION CONTACT:** Lisa Granger, Office of Policy and Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3330, Silver Spring, MD 20993–0002, 301–796–9115.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2015–16013, appearing in the **Federal Register** of Tuesday, June 30, 2015, the following corrections are made:

1. On page 37274, in the first column, the title of table 2, ''Table 2. Revised Draft Product-Specific BE Recommendations for Drug Products Cholestyramine'' is corrected to read ''Table 2. Revised Draft Product-Specific BE Recommendations for Drug Products''.

2. On page 37274, in the first column, in the first line of the table under table 2, ''Cholestyramine'' is added to precede ''Doxycycline hyclate, Prasugrel hydrochloride, Tiagabine hydrochloride''.

Dated: July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18024 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0449]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Sun Protection Factor Labeling and Testing Requirements and Drug Facts Labeling for Over-the-Counter Sunscreen Drug Products

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by August 24, 2015.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0717. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### SPF Labeling and Testing Requirements for OTC Sunscreen Products Containing Specified Active Ingredients and Marketed Without Approved Applications, and Drug Facts Labeling for All OTC Sunscreen Products—21 CFR 201.327(a)(1) and (i), 21 CFR 201.66(c) and (d) (OMB Control Number 0910–0717)—Extension

In the **Federal Register** of June 17, 2011 (76 FR 35620), we published a final rule establishing labeling and effectiveness testing requirements for certain OTC sunscreen products containing specified active ingredients without approved applications (2011 sunscreen final rule; § 201.327 (21 CFR 201.327)). In addition to establishing testing requirements, this sunscreen final rule lifts the delay of implementation of the prior 1999 sunscreen final rule (published May 21, 1999, at 64 FR 27666 and stayed December 31, 2001, 66 FR 67485) from complying with the 1999 labeling final rule (published March 17, 1999, 64 FR 13254) in which we amended our regulations governing requirements for human drug products to establish standardized format and content requirements for the labeling of all marketed OTC drug products in part 201 (21 CFR part 201). Specifically, the 1999 labeling final rule added new § 201.66 to part 201. Section 201.66 sets content and format requirements for the Drug Facts portion of labels on OTC drug products. We specifically exempted OTC sunscreen products from complying with the 1999 labeling final rule until we lifted the stay of the 1999 sunscreen final rule. The 2011 sunscreen final rule became effective December 17, 2012, for sunscreen products with annual sales of $25,000 or more and December 17, 2013, for sunscreen products with annual sales of less than $25,000 when we published an extension date notice on May 11, 2012 (77 FR 27591).

#### SPF Labeling and Testing for OTC Sunscreens Containing Specified Active Ingredients and Marketed Without Approved Applications

In the **Federal Register** of June 17, 2011 (76 FR 35678), we published a 60-day notice requesting public comment on the proposed collection of information in regard to SPF labeling and testing requirements for OTC sunscreen products containing specified ingredients and marketed without approved applications. In that notice, we stated that § 201.327 (a)(1) requires the principal display panel (PDP) labeling of a sunscreen covered by the 2011 final rule to include the SPF value determined by conducting the SPF test outlined in § 201.327(i). Therefore, this provision results in information collection with a third-party disclosure burden for manufacturers of OTC sunscreens covered by the rule. We determined that products need only complete the testing and labeling required by the rule one time, and then continue to utilize the resultant labeling (third-party disclosure) going forward without additional burden. This one-time testing would need to be conducted within the first 3 years after publication of the 2011 final rule for all

OTC sunscreens covered by that rule. We determined that the third-party disclosure burden by manufacturers of OTC sunscreens covered by the rule was based on an estimate: (1) Of the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information; (2) on the conduct of SPF testing based on the estimated number of existing formulations; (3) of the time to relabel currently marketed OTC sunscreens containing specified ingredients and marketed without approved applications; and (4) on testing and labeling of new products introduced each year. The estimate for this burden in the 2011 60-day PRA notice was a total of 30,066 hours in years one and two and a total burden of 966 in each subsequent year.

All currently marketed OTC sunscreen drug products are required at this time to be in compliance with the SPF labeling requirements specified by the 2011 final rule. However, our original estimate included the burden of new products introduced each year. We estimated that as many as 60 new OTC sunscreen products stock keeping units (SKUs) may be introduced each year which will have to be tested and labeled with the SPF value determined in the test. We estimated that the 60 new sunscreen SKUs represent 39 new formulations. The burden for testing and labeling these formulations was estimated at 30 hours per year.

We have received no further comments on our estimate of burden for the collection of this information other than two comments (FDA–2011–N–0449–0002 and FDA–2011–N–0449–0003). These comments were already addressed in FDA's notice of ''Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Sun Protection Factor Labeling and Testing Requirements and Drug Facts Labeling for Over-the-Counter Sunscreen Drug Products'' published on May 9, 2012 (77 FR 27230).

In the **Federal Register** of April 16, 2015 (80 FR 20499), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

| Activity | No. of respondents | No. of disclosures per respondent | Total annual disclosures | Average burden per disclosure | Total hours |
|---|---|---|---|---|---|
| Conduct SPF testing in accordance with § 201.327(i) for new sunscreens. | 20 | 1.95 | 39 | 24 | 936 |
| Create PDP labeling in accordance with § 201.327(a)(1) for new sunscreen SKUs. | 20 | 3 | 60 | 0.5 (30 min.) | 30 |
| Total | | | | | 966 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

*Drug Facts Labeling for OTC Sunscreens*

Because the 2011 final rule also lifts the delay of implementation of the Drug Facts regulations (§ 201.66) for OTC sunscreens, the rule also modifies the information collection associated with § 201.66 (currently approved under OMB control number 0910–0340) and adds an additional third-party disclosure burden resulting from requiring OTC sunscreen products to comply with Drug Facts regulations. In the **Federal Register** of March 17, 1999 (64 FR 13254), we amended our regulations governing requirements for human drug products to establish standardized format and content requirements for the labeling of all marketed OTC drug products, codified in § 201.66 (the 1999 Drug Facts labeling final rule). Section 201.66 sets requirements for the Drug Facts portion of labels on OTC drug products, requiring such labeling to include uniform headings and subheadings, presented in a standardized order, with minimum standards for type size and other graphical features. Therefore, currently marketed OTC sunscreen products will incur a one-time burden to comply with the requirements in § 201.66(c) and (d). The burden was estimated in the 60-day PRA notice published in the **Federal Register** of June 17, 2011 (76 FR 35678), as 43,200 hours for existing sunscreen SKUs and 720 hours for new sunscreen SKUs.

The compliance dates for the 2011 final rule lifting the delay of the § 201.66 labeling implementation data for OTC sunscreen products were December 17, 2012, for sunscreen products with annual sales of $25,000 or more and December 17, 2013, for sunscreen products with annual sales of less than $25,000, respectively, when we published an extension date notice on May 11, 2012 (77 FR 27591). All currently marketed sunscreen products are, therefore, already required to be in compliance with the Drug Facts labeling requirements in § 201.66 and will incur no further burden in the 1999 labeling final rule. However, new OTC sunscreen drug products will be subject to a one-time burden to comply with Drug Facts labeling requirements in § 201.66. In the 2011 60-day PRA, we estimated that as many as 60 new product SKUs marketed each year will have to comply with Drug Facts regulations. We estimated that these 60 SKUs would be marketed by 30 manufacturers. We estimated that approximately 12 hours would be spent on each label, based on the most recent estimate used for other OTC drug products to comply with the Drug Facts labeling final rule, including public comments received on this estimate in 2010 that addressed sunscreens. This is equal to 720 hours annually (60 SKUs × 12 hours/SKU). We stated that we do not expect any OTC sunscreens to apply for exemptions or deferrals of the Drug Facts regulations in § 201.66(e). However, we took this into consideration in 2013 and estimated the burden for an exemption or deferral by considering the number of exemptions or deferrals we have received since publication of the 1999 final rule (one response) and estimating that a request for deferral or exemption would require 24 hours to complete. Multiplying the annual frequency of response (0.125) by the number of hours per response (24) gives a total response time for requesting an exemption or deferral equal to 3 hours.

We estimate the burden of this collection of information as follows:

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

| Activity | No. of respondents | No. of disclosures per respondent | Total annual disclosures | Average burden per disclosure | Total hours |
|---|---|---|---|---|---|
| Format labeling in accordance with § 201.66(c) and (d) for new sunscreen SKUs. | 20 | 3 | 60 | 12 | 720 |
| Request for Drug Facts exemption or deferral § 201.66(e). | 1 | 0.125 | 0.125 | 24 | 3 |
| Total | | | | | 723 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated:' July 17, 2015.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2015–18026 Filed 7–22–15; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Findings of Research Misconduct

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

*Julia Bitzegeio, Ph.D., Aaron Diamond AIDS Research Center:* Based on the Respondent's admission, an assessment conducted by the Aaron Diamond AIDS Research Center (ADARC), and analysis conducted by ORI in its oversight review, ORI found that Dr. Julia Bitzegeio, former Postdoctoral Fellow, ADARC, engaged in research misconduct in research supported by National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health (NIH), grants R01 AI078788, R21 AI093255, and R37 AI064003.

ORI found that Respondent engaged in research misconduct by falsifying and/or fabricating data that were included in one (1) publication, two (2) unfunded grant applications, and one (1) unpublished manuscript:

*Journal of Virology* 87:3549–3560, 2013 (hereafter referred to as ''*JVI* 2013'').

- R01 AI114367–01A1
- R01 AI120787–01
- ''A single amino acid in the CD4 binding site of HIV–1 Env is a key determinant of species tropism.'' Unpublished manuscript

Specifically, ORI found that:

1. Respondent falsified and/or fabricated in vitro rates of viral replication or infection in human and macaque lymphocytes and infectious titers on reporter cells, for multiple strains of SIV based chimeric viruses such that the results were not accurately represented in:

- Figure 7 in *JVI* 2013
- Figures 6B and 8C in R01 AI114367–01A1
- Figures 1, 2B, and 3B in R01 AI120787–01
- Figures 1A–D, 2D, 3D, 5A–C, 5I, 6C, and S3D in the unpublished manuscript

2. Respondent falsified and/or fabricated in vitro binding data of SIV based chimeric viruses to human or macaque CD4 such that the results were not accurately represented in:

- Figure 6 in R01 AI120787–01
- Figures 5D–F in the unpublished manuscript

ADARC has submitted a request for correction of *JVI* 2013.

Dr. Bitzegeio has entered into a Voluntary Settlement Agreement and has voluntarily agreed:

(1) That if within three (3) years from the effective date of the Agreement, Respondent receives or applies for U.S Public Health Service (PHS) support, Respondent agreed to have her research supervised for a period of three (3) years beginning on the date of her employment in a position in which she receives or applies for PHS support and to notify her employer(s)/institution(s) of the terms of this supervision; Respondent agreed that prior to the submission of an application for PHS support for a research project on which her participation is proposed and prior to her participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of her duties is submitted to ORI for approval; the supervision plan must be designed to ensure the scientific integrity of her research contribution; Respondent agreed that she shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI; Respondent agreed to maintain responsibility for compliance with the agreed upon supervision plan;

(2) that if within three (3) years from the effective date of the Agreement, Respondent receives or applies for PHS support, Respondent agreed that any institution employing her shall submit in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived, and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract; and

(3) to exclude herself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of three (3) years, beginning on June 23, 2015.

**FOR FURTHER INFORMATION CONTACT:** Acting Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

**Donald Wright,**

*Acting Director, Office of Research Integrity.*

[FR Doc. 2015–18088 Filed 7–22–15; 8:45 am]

**BILLING CODE 4150–28–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning

individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Biophysical Studies of Receptors, Channels, and Transporters.

*Date:* July 30, 2015.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Peter B. Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 17, 2015.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2015–18005 Filed 7–22–15; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; 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 for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Biomedical Imaging and Bioengineering.

*Date:* September 18, 2015.

*Open:* 8:30 a.m. to 1:00 p.m.

*Agenda:* Report from the Institute Director, other Institute Staff, Task Group reports and Scientific presentations.

*Place:* The William F. Bolger Center, Franklin Building, Classroom 1, 9600 Newbridge Drive, Potomac, MD 20854.

*Closed:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* The William F. Bolger Center, Franklin Building, Classroom 1, 9600 Newbridge Drive, Potomac, MD 20854.

*Contact Person:* Jill Heemskerk, Ph.D., Associate Director, Office of Research Administration, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 241, Bethesda, MD 20892.

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.nibib1.nih.gov/about/NACBIB/NACBIB.htm,* where an agenda and any additional information for the meeting will be posted when available.

Dated: July 17, 2015.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2015–18004 Filed 7–22–15; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel NIMH Career Transition Award to Tenure-Track and Tenured Intramural Investigators (K22).

*Date:* August 11, 2015.

*Time:* 12:00 p.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* David M. Armstrong, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center/Room 6138/MSC 9608, 6001 Executive Boulevard, Bethesda, MD 20892–9608, 301–443–3534, *armstrda@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: July 17, 2015.

**Carolyn A. Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2015–18006 Filed 7–22–15; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on

respondents, including through the use of automated collection techniques or other forms of information technology.

**Proposed Project: Co-Location and Integration of HIV Prevention and Medical Care Into Behavioral Health Program-Revision**

The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services, (CMHS), Center for Substance Abuse Prevention (CSAP), Center for Substance Abuse Treatment (CSAT) are requesting approval from the Office of Management and Budget (OMB) for revised data collection activities associated with their Co-location and Integration of HIV Prevention and Medical Care into Behavioral Health Program.

This information collection is needed to provide SAMHSA with objective information to document the reach and impact of services funded to address HIV and Hepatitis in the context of substance use disorders and mental illness. The information will be used to monitor quality assurance and quality performance outcomes for organizations funded by its grant programs. Collection of the information included in this request is authorized by Section 505 of the Public Health Service Act (42 U.S.C. 290aa–4)—Data Collection.

Further support for this collection was provided in the 2013 Senate Appropriations Report 113–71. The report urged SAMHSA to ''focus its efforts on building capacity and outreach to individuals at risk or with a primary substance abuse disorder and to improve efforts to identify such individuals to prevent the spread of HIV.'' Additional support for this data collection effort is provided by the 2013 National HIV/AIDS Strategy which instructed SAMHSA to ''support and rigorously evaluate the development and implementation of new integrated behavioral health models to address the intersection of substance use, mental health, and HIV.''

The table below reflects the revised annualized hourly burden.

| Instrument | Number of respondents | Number of responses per respondent | Total number of responses | Hours per response per respondent | Total burden hours |
|---|---|---|---|---|---|
| RHHT Testing Form: | ..... | ..... | ..... | ..... | ..... |
| Co-Located and Integrated Care Program (CMHS, CSAT, CSAP) | 5,000 | 1 | 5,000 | 0.13 | 650 |
| Targeted Capacity Expansion: Substance Use Disorder Treatment for Racial/Ethnic Minority Populations at High-Risk for HIV/AIDS CSAT RFA: TI–15–006 | 5,000 | 1 | 5,000 | 0.13 | 650 |
| Targeted Capacity Expansion: Substance Abuse Treatment for Racial/Ethnic Minority Women at High Risk for HIV/AIDS CSAT RFA: TI–13–011 | 8,000 | 1 | 8,000 | 0.13 | 1,040 |
| Targeted Capacity Expansion Program: Substance Abuse Treatment for Racial/Ethnic Minority Populations at High-Risk for HIV/AIDS CSAT RFA: TI–12–007 | 10,400 | 1 | 10,400 | 0.13 | 1,352 |
| Minority Serving Intuitions (MSI) Partnerships with Community-Based Organizations (CBO) (MSI CBO). FY 2013 CSAP | 4,000 | 1 | 4,000 | 0.13 | 520 |
| Minority Serving Intuitions (MSI) Partnerships with Community-Based Organizations (CBO) (MSI CBO). FY 2014 CSAP | 3,500 | 1 | 3,500 | 0.13 | 455 |
| Minority Serving Intuitions (MSI) Partnerships with Community-Based Organizations (CBO) (MSI CBO). FY 2015 CSAP | 5,000 | 1 | 5,000 | 0.13 | 650 |
| Capacity Building Initiative for Substance Abuse and HIV Prevention Services for At-Risk Racial/Ethnic Minority Youth and Young Adults (HIV CBI) FY 2015 CSAP | 6,000 | 1 | 6,000 | 0.13 | 780 |
| Annual Total | 46,900 | ..... | 46,900 | ..... | 6,097 |

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 or email her a copy at *summer.king@samhsa.hhs.gov.* Written comments should be received by September 21, 2015.

**Summer King,**

*Statistician.*

[FR Doc. 2015–18039 Filed 7–22–15; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R2–ES–2015–N133; FXES11130200000–156–FF02ENEH00]**

### Endangered and Threatened Species Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications; request for public comment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activities. Both the Act and the National Environmental Policy Act require that we invite public comment before issuing these permits.

**DATES:** To ensure consideration, written comments must be received on or before August 24, 2015.

**ADDRESSES:** Susan Jacobsen, Chief, Division of Classification and Restoration, by U.S. mail at Division of

Classification and Recovery, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, NM 87103; or by telephone at 505–248–6920. Please refer to the respective permit number for each application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Susan Jacobsen, Chief, Division of Classification and Restoration, by U.S. mail at P.O. Box 1306, Albuquerque, NM 87103; or by telephone at 505–248–6920.

**SUPPLEMENTARY INFORMATION:** The Act (16 U.S.C. 1531 *et seq.*) prohibits activities with endangered and threatened species unless a Federal permit allows such activities. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of survival or propagation, or interstate commerce. Our regulations regarding implementation of section 10(a)(1)(A) permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

**Applications Available for Review and Comment**

We invite local, State, Tribal, and Federal agencies and the public to comment on the following applications. Please refer to the appropriate permit number (*e.g.,* Permit No. TE–123456) when requesting application documents and when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

*Permit TE–009926*

*Applicant:* Gulf South Research Corporation, Baton Rouge, Louisiana.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys of black-capped vireo (*Vireo atricapilla*) within Texas and Oklahoma.

*Permit TE–67910B*

*Applicant:* Cherokee National Environmental Solutions LLC., Catoosa, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Arkansas, Kansas, Nebraska, and Oklahoma.

*Permit TE–67912B*

*Applicant:* Chloeta Fire, LLC., Jay, Oklahoma.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of American burying beetle (*Nicrophorus americanus*) within Oklahoma.

*Permit TE–88519A*

*Applicant:* U.S. Forest Service—Lincoln National Forest, Cloudcroft, New Mexico.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for New Mexico meadow jumping mouse (*Zapus hudsonius luteus*) within New Mexico.

*Permit TE–043231*

*Applicant:* Stantec Consulting Services, Inc., Sandy, Utah.

Applicant requests a renewal to a current permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona, Colorado, New Mexico, Nevada, and Utah.

*Permit TE–181762*

*Applicant:* Sea Turtle Inc., South Padre Island, Texas.

Applicant requests a renewal to a current permit for research and recovery purposes to conduct presence/absence surveys, stranding activities, holding, and rehabilitation for Kemp's ridley (*Lepidochelys kempii*) and hawksbill (*Eretmochelys imbricata*) sea turtles within Texas.

*Permit TE–67917B*

*Applicant:* Caitlin Gabor, San Marcos, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of Barton Springs salamander (*Eurycea sosorum*) within Texas.

*Permit TE–67919B*

*Applicant:* Kartye Land Management, LLC., Lufkin, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of golden-cheeked warbler (*Dendroica chrysoparia*), black-capped vireo (*Vireo atricapilla*), and red-cockaded woodpecker (*Picoides borealis*) within Texas.

*Permit TE–822998*

*Applicant:* U.S. Forest Service—Coronado National Forest, Tucson, Arizona.

Applicant requests a renewal to a current permit for research and recovery purposes to conduct presence/absence surveys of the following species within Arizona and New Mexico:

- Desert pupfish (*Cyprinodon macularius*)
- Gila chub (*Gila intermedia*)
- Gila topminnow (*Poeciliopsis occidentalis occidentalis*)
- Jaguar (*Pathera onca*)
- Lesser long-nosed bat (*Leptonycteris curasoae yerbabuenae*)
- Loach minnow (*Rhinichthys cobitis*)
- Masked bobwhite quail (*Colinus viginianus ridgwayi*)
- Mexican long-nosed bat (*Leptonycteris nivalis*)
- Mount Graham red squirrel (*Tamiasciurus hudsonius grahamensis*)
- Northern aplomado falcon (*Falco femoralis septentrionalis*)
- Ocelot (*Leopardus pardalis*)
- Sonoran tiger salamander (*Ambystoma tigrinum stebbinsi*)
- Southwestern willow flycatcher (*Empidonax traillii extimus*)
- Spikedace (*Meda fulgida*)
- Yaqui chub (*Gila purpurea*)

*Permit TE–051832*

*Applicant:* Phoenix Zoo, Phoenix, Arizona.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct husbandry and holding of Gila chub (*Gila intermedia*) within the zoo in Arizona.

*Permit TE–69881B*

*Applicant:* Brendan Larsen, Tucson, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys, mist netting, and holding of lesser long-nosed bats (*Leptonycteris curasoae yerbabuenae*) within Arizona.

*Permit TE–800923*

*Applicant:* University of Arizona, Tucson, Arizona.

Applicant requests a renewal to a current permit for research and recovery purposes to conduct presence/absence surveys for the following species in Arizona:

- Desert pupfish (*Cyprinodon macularius*)
- Gila chub (*Gila intermedia*)
- Gila topminnow (*Poeciliopsis occidentalis occidentalis*)
- Loach minnow (*Rhinichthys cobitis*)

• Spikedace (*Meda fulgida*)

**National Environmental Policy Act (NEPA)**

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

**Public Availability of Comments**

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority**

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*)

Dated: July 15, 2015.

**Joy E. Nicholopoulos,**

*Acting Regional Director, Southwest Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2015–18052 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–ES–2015–N132;FXES11130400000EA–123–FF04EF1000]**

## Endangered and Threatened Wildlife and Plants; Availability of Proposed Low-Effect Habitat Conservation Plans, Lake, Volusia, and Brevard County, FL

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comment/information.

**SUMMARY:** We, the Fish and Wildlife Service (Service), have received three applications for incidental take permits (ITPs) under the Endangered Species Act of 1973, as amended (Act). Lake County Board of County Commissioners requests a 5-year ITP; Property Investment Brokers requests a 10-year ITP; and Casabella Development, LLC requests a 5-year ITP. We request public comment on the permit applications and accompanying proposed habitat conservation plans (HCPs), as well as on our preliminary determination that the plans qualify as low-effect under the National Environmental Policy Act (NEPA). To make this determination, we used our environmental action statement and low-effect screening form, which are also available for review.

**DATES:** To ensure consideration, please send your written comments by August 24, 2015.

**ADDRESSES:** If you wish to review the applications and HCPs, you may request documents by email, U.S. mail, or phone (see below). These documents are also available for public inspection by appointment during normal business hours at the office below. Send your comments or requests by any one of the following methods.

*Email: northflorida@fws.gov.* Use ''Attn: Permit number TE71097B–0'' as your message subject line for Lake County Board of County Commissioners; ''Attn: Permit number TE71095B–0'' for Property Investment Brokers; and ''Attn: Permit number TE71098B–0'' for Casabella Development, LLC.

*Fax:* Field Supervisor, (904) 731–3191, Attn: Permit number [Insert permit number].

*U.S. mail:* Field Supervisor, Jacksonville Ecological Services Field Office, Attn: Permit number [Insert permit number], U.S. Fish and Wildlife Service, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256.

*In-person drop-off:* You may drop off information during regular business hours at the above office address.

**FOR FURTHER INFORMATION CONTACT:** Erin M. Gawera, telephone: (904) 731–3121; email: *erin_gawera@fws.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and our implementing Federal regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17 prohibit the ''take'' of fish or wildlife species listed as endangered or threatened. Take of listed fish or wildlife is defined under the Act as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct'' (16 U.S.C. 1532). However, under limited circumstances, we issue permits to authorize incidental take—*i.e.,* take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Regulations governing incidental take permits for threatened and endangered species are at 50 CFR 17.32 and 17.22, respectively. The Act's take prohibitions do not apply to federally listed plants on private lands unless such take would violate State law. In addition to meeting other criteria, an incidental take permit's proposed actions must not jeopardize the existence of federally listed fish, wildlife, or plants.

**Applicants' Proposals**

*Lake County Board of County Commissioners*

Lake County Board of County Commissioners is requesting take of approximately 1.08 ac of occupied sand skink foraging and sheltering habitat incidental to construction of a fire station, and they seek a 5-year permit. The 6.38-ac project is located on parcel numbers 09–22–26–110003900000, 09–22–26–110003800000, and 09–22–26–110003800002 within Section 26, Township 22 South, and Range 26 East, Lake County, Florida. The project includes construction of a fire station and the associated infrastructure, and landscaping. The applicant proposes to mitigate for the take of the sand skink by the purchase of 2.16 mitigation credits within the Hatchineha Conservation Bank.

*Property Investment Brokers*

Property Investment Brokers is requesting take of approximately 1 ac of occupied Florida scrub-jay foraging and sheltering habitat incidental to construction of an access road and stormwater pond, and they seek a 10-year permit. The 36.38-ac project is located on parcel numbers 06183104000410, 06183106080010, 06183106080070, 06183104000460, 06183104000320, 06183104000540, 06183105060010, 06183105070250, 06183105070010, 06183105080390, 06183105080350, 06183105080310, 06183105080250, 06183105080120, 06183105080200, 06183105090010, 06183105100120, 06183105100140, 06183105100200, 06183106050010, 06183106050070, 06183106050210, 06183106040300, 06183106040240, 06183106070420, 06183106040180, 06183106070010, 06183106070011, 06183106040010, 06183106040090, 06183106030260, 06183106030240, 06183106080410, 06183106080010, 06183106080070 within Section 6, Township 18 South, and Range 31 East, Volusia County, Florida. The project includes construction of an access road and stormwater pond and the associated

infrastructure, and landscaping. The applicant proposes to mitigate for the take of the Florida scrub-jay through the deposit of funds in the amount of $30,654.00 to the Nature Conservancy's Conservation Fund, for the management and conservation of the Florida scrub-jay based on Service Mitigation Guidelines.

*Casabella Development, LLC*

Casabella Development, LLC is requesting take of approximately 1.50 ac of occupied Florida scrub-jay foraging and sheltering habitat incidental to construction of a residential development, and they seek a 5-year permit. The 12.64-ac project is located on parcel number 26–36–24–00–00018.0–0000.00 within Section 31, Township 26 South, and Range 37 East, Brevard County, Florida. The project includes construction of a residential development and the associated infrastructure, and landscaping. The applicant proposes to mitigate for the take of the Florida scrub-jay through the preservation of approximately 3.47 acres of high-quality Florida scrub-jay habitat within the Valkaria Site of the Brevard Coastal Scrub Ecosystem. The Applicant will preserve and donate two currently unencumbered parcels (Brevard County tax account numbers 2952135 and 2400680) to the Brevard County Environmentally Endangered Lands (EEL) Program so that these parcels can be managed and maintained as suitable Florida scrub-jay habitat in perpetuity. The Applicant will also provide the EEL Program with a $1,200.00/acre (totaling $ 4,164.00) management endowment to ensure the continued success of monitoring and maintaining these lands as suitable Florida scrub-jay habitat.

**Our Preliminary Determination**

We have determined that the applicants' proposals, including the proposed mitigation and minimization measures, would have minor or negligible effects on the species covered in their HCPs. Therefore, we determined that the ITPs for each of the applicants are ''low-effect'' projects and qualify for categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of the Interior Manual (516 DM 2 Appendix 1 and 516 DM 6 Appendix 1). A low-effect HCP is one involving (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources.

**Next Steps**

We will evaluate the HCPs and comments we receive to determine whether the ITP applications meet the requirements of section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). If we determine that the applications meet these requirements, we will issue ITP numbers TE71097B–0, TE71095B–0, and TE71098B–0. We will also evaluate whether issuance of the section 10(a)(1)(B) ITPs complies with section 7 of the Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue the ITPs. If the requirements are met, we will issue the permits to the applicants.

**Public Comments**

If you wish to comment on the permit applications, HCPs, and associated documents, you may submit comments by any one of the methods in **ADDRESSES**.

**Public Availability of Comments**

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority**

We provide this notice under Section 10 of the Act and NEPA regulations (40 CFR 1506.6).

Dated: July 16, 2015.

**Jay B. Herrington,**

*Field Supervisor, Jacksonville Field Office, Southeast Region.*

[FR Doc. 2015–18045 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–ES–2015–N136; FXES11130100000–156–FF01E00000]**

### Endangered Species; Recovery Permit Application

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following application for a recovery permit to conduct activities with the purpose of enhancing the survival of an endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

**DATES:** To ensure consideration, please send your written comments by August 24, 2015.

**ADDRESSES:** Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Colleen Henson, Fish and Wildlife Biologist, at the above address, or by telephone (503–231–6131) or fax (503–231–6243).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

**Application Available for Review and Comment**

We invite local, State, and Federal agencies and the public to comment on the following application. Please refer to the permit number for the application when submitting comments.

Documents and other information submitted with this application are

available for review by request from the Program Manager for Restoration and Endangered Species Classification at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552).

**Permit Number: TE–043628**

*Applicant: Institute for Applied Ecology, Corvallis, Oregon*

The applicant requests a permit renewal with changes to take (capture, handle, and release) the Taylor's checkerspot butterfly (*Euphydryas editha taylori*), in conjunction with monitoring and habitat assessment activities, for the purpose of enhancing the species' survival.

**Public Availability of Comments**

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority**

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: July 14, 2015.

**Stephen Zylstra,**

*Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2015–18048 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–ES–2015–N134; FXES11130100000–156–FF01E00000]**

### Endangered Species; Issuance of Permits

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of issuance of permits.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, have issued the following permits to conduct certain activities with endangered species under the authority of the Endangered Species Act, as amended (Act).

**ADDRESSES:** Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE. 11th Avenue, Portland, OR 97232–4181.

**FOR FURTHER INFORMATION CONTACT:** Colleen Henson, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

**SUPPLEMENTARY INFORMATION:** We have issued the following permits to conduct activities with endangered species in response to recovery and interstate commerce permit applications we received under the authority of section 10 of the Act (16 U.S.C. 1531 *et seq.*). These permits were issued between July 1 and December 31, 2014. Each permit listed below was issued only after we determined that it was applied for in good faith, that granting the permit would not be to the disadvantage of the listed species, that the proposed activities were for scientific research or would benefit the recovery or the enhancement of survival of the species, and that the terms and conditions of the permit were consistent with the purposes and policy set forth in the Act.

| Applicant | Permit number | Date issued | Date expires |
|---|---|---|---|
| Naval Facilities Engineering Command Pacific | 096741 | 07/02/2014 | 07/01/2017 |
| U.S. Fish And Wildlife Service, Region 1 | 702631 | 07/14/2014 | 07/13/2017 |
| Renee Robinette Ha | 09155B | 07/16/2014 | 07/15/2017 |
| Yakama Nation Wildlife Program | 040238 | 07/17/2014 | 05/25/2017 |
| Idaho Power Company | 799558 | 08/07/2014 | 08/04/2018 |
| Grette Associates, LLC | 40879B | 08/18/2014 | 08/17/2017 |
| Directorate of Public Works, U.S. Army | 043638 | 10/09/2014 | 10/08/2017 |
| Hawaii Volcanoes National Park | 018078 | 10/16/2014 | 10/15/2017 |
| Hawaii Volcanoes National Park | 739923 | 10/30/2014 | 08/22/2019 |
| Kootenai Tribe of Idaho | 798744 | 11/07/2014 | 09/28/2019 |
| U.S. Geological Survey | 21913A | 11/24/2014 | 11/18/2018 |
| Gifford Pinchot National Forest | 019053 | 12/11/2014 | 12/10/2018 |
| North Cascades National Park | 13191A | 12/11/2014 | 12/10/2018 |
| Olympic National Park | 048795 | 12/11/2014 | 12/10/2018 |

**Availability of Documents**

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

We provide this notice under the section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: July 14, 2015.

**Stephen Zylstra,**

*Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.*

[FR Doc. 2015–18053 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–HQ–IA–2015–N141; FXIA16710900000–156–FF09A30000]**

### Endangered Species; Marine Mammals; Receipt of Applications for Permit

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications for permit.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to

comment on the following applications to conduct certain activities with endangered species, marine mammals. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) prohibit activities with listed species unless Federal authorization is acquired that allows such activities.

**DATES:** We must receive comments or requests for documents on or before August 24, 2015. We must receive requests for marine mammal permit public hearings, in writing, at the address shown in the **ADDRESSES** section by August 24, 2015.

**ADDRESSES:** Brenda Tapia, U.S. Fish and Wildlife Service, Division of Management Authority, Branch of Permits, MS: IA, 5275 Leesburg Pike, Falls Church, VA 22041; fax (703) 358–2281; or email *DMAFR@fws.gov.*

**FOR FURTHER INFORMATION CONTACT:** Monica Thomas, (703) 358–2104 (telephone); (703) 358–2281 (fax); *DMAFR@fws.gov* (email).

**SUPPLEMENTARY INFORMATION:**

## I. Public Comment Procedures

*A. How do I request copies of applications or comment on submitted applications?*

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

*B. May I review comments submitted by others?*

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

## III. Permit Applications

*A. Endangered Species*

Applicant: Virginia Aquarium and Marine Center Foundation, Virginia Beach, VA; PRT–55108B

The applicant requests a permit to import one male and one female captive-bred false gharial (*Tomistoma schlegelii*) for the purpose of enhancement of the survival of the species through captive propagation.

Applicant: Brady Champion Ranch, LLC, Rochelle, TX; PRT–51308B

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess Barasingha (*Rucervus duvaucelii*), Eld's deer (*Rucervus eldii*), and Red lechwe (*Kobus lechwe*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Lionshare Farm Zoological, LLC, Greenwich, CT; PRT–60641B

The applicant requests a permit to export one male and one female captive-bred cheetah (*Acinonyx jubatus*) for the purpose enhancement of the survival of the species through reintroduction to the wild.

Applicant: California Academy of Sciences, San Francisco, CA; PRT–58979B

The applicant requests a permit to import one skull of a wild brown hyena (*Parahyaena brunnea*), for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 1-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64797A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess Barasingha (*Rucervus duvaucelii*), Arabian oryx (*Oryx leucoryx*), and Red lechwe (*Kobus lechwe*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period

Applicant: Brady Champion Ranch, LLC, Rochelle, TX; PRT–51130B

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the species listed below to enhance species propagation or survival: Grevy's zebra (*Equus grevyi*), Hartmann's mountain zebra (*Equus zebra hartmannae*), Przewalski's horse (*Equus przewalskii*), Barasingha (*Rucervus duvaucelii*), Eld's brow-antlered deer (*Rucervus eldii*), Bontebok (*Damaliscus pygargus pygargus*), Cuvier's gazelle (*Gazella cuvieri*), Arabian oryx (*Oryx leucoryx*), Red lechwe (*Kobus lechwe*), Seladang (*Bos gaurus*), and Banteng (*Bos javanicus*). This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Washington Park Zoo, IN; PRT–58205B

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the following species to enhance species propagation or survival: Ring-tailed lemur (*Lemur catta*) and Cottontop tamarin (*Saguinus oedipus*). This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Sam Noble Oklahoma Museum of Natural History, Norman, OK: PRT–075249

The applicant requests renewal of their permit to export and reimport nonliving museum specimens of endangered and threatened species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Timothy Twietmeyer, Weston, FL; PRT–70086B

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*B. Endangered Marine Mammals and Marine Mammals*

Applicant: Melissa McKinney, Storrs, CT; PRT–59633B

The applicant requests a permit to import and export wild walrus (*Odobenus rosmarus divergens*), (*Odobenus rosmarus rosmarus*), and polar bear (*Ursus maritimus*) biological samples for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

**Brenda Tapia,**

*Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.*

[FR Doc. 2015–18041 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Geological Survey

**[GX15CC009UKWG00]**

### Agency Information Collection Activities: Request for Comments

**AGENCY:** U.S. Geological Survey (USGS), Department of the Interior.

**ACTION:** Notice of a new information collection, State Water Use Cooperative Funding Application

**SUMMARY:** We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC.

**DATES:** To ensure that your comments are considered, we must receive them on or before September 21, 2015.

**ADDRESSES:** You may submit comments on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive MS 807, Reston, VA 20192 (mail); (703) 648–7197 (fax); or *gs-info_collections@usgs.gov* (email). Please reference 'Information Collection 1028–NEW, 'State Water Use Cooperative Funding Application' in all correspondence.

**FOR FURTHER INFORMATION CONTACT:** Melinda Dalton, USGS, at (678) 924–6637 or *msdalton@usgs.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The USGS is working with State Water Resource agencies to operate a Water Use Data and Research program (WUDR). Section 9508 of the SECURE Water Act directs the Secretary of the Interior to administer grants to State water resource agencies to assist in developing water use and availability datasets that are integrated with each appropriate dataset developed or maintained by the Secretary or grants that integrate any water use or water availability dataset of the State water resource agency into each appropriate dataset developed or maintained by the Secretary. Responsibility for administration of this State Water Use Grants program has been delegated to the U.S. Geological Survey. State Water Use Grants will be used to improve the collection and reporting of water use categories by State agencies, including the inclusion of categories that have been discontinued in the past due to limited resources. The total authorized funding for the State Water Use Grants program is $12,500,000 for a period of five years.

In FY15 grant funds will be awarded non-competitively, with all 50 states receiving awards ($26,000 each) to develop workplans that outline priorities for use of grant funds, with the goal of States reporting, to the USGS, withdrawal and ancillary information for each major category of water use that improve national water withdrawal and consumptive use estimates. The USGS has developed a draft baseline standard table for all water use categories and will require that States identify current data collection levels (tiers) for each category as part of workplan development. States will be required to use these standards to identify categories for improvement in data collection and/or research activities that improve data estimation techniques nationally. For States that already meet the baseline standards, goals are provided in Tier 2 and 3 for additional data that would benefit national estimates and provide information for water availability studies by water managers, academia, federal, and or local agencies. In order to receive awards as part of the competitive process beginning in FY16, States must submit a completed workplan.

Beginning in FY16 grant funds will be announced and awarded as part of a competitive process that will be guided, annually, by a technical committee whose members will include representatives from the stakeholder community as well as USGS. State Grant funds will be coordinated with a single agency in each State and the USGS is working, through the USGS Regional Water Use Specialists, to identify which agencies will be the lead contact in each State. Collaboration and coordination with USGS personnel will be required as part of the Grants program. Data must be stored electronically and made available at the HUC–8 and county level in formats appropriate for existing USGS databases. Additionally, methods used for data collection (estimated values, coefficients, etc.) and a description of data quality assurance and control will be required.

#### II. Data

*OMB Control Number:* 1028–NEW.

*Title:* State Water Use Cooperative Funding Application.

*Type of Request:* New information collection.

*Affected Public:* State water-resource agencies who collect water use data.

*Respondent's Obligation:* Mandatory to be considered for funding.

*Frequency of Collection:* Annually.

*Estimated Annual Number of Respondents:* 52.

*Estimated Total Number of Annual Responses:* 52.

*Estimated Time per Response:* 40 hours to prepare the proposal. This includes time to review the WUDR Guidance Document to understand the program design and requirements for data providers.

*Estimated Annual Burden Hours:* 2080.

*Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden:* None.

*Public Disclosure Statement:* The PRA (44 U.S.C. 3501, *et seq.*) provides that 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 and current expiration date.

**III. Request for Comments**

We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public view, we cannot guarantee that we will be able to do so.

**Sonya Jones,**

*Program Coordinator, Water Availability and Use Program.*

[FR Doc. 2015–18057 Filed 7–22–15; 8:45 am]

**BILLING CODE 4311–AM–P**

## DEPARTMENT OF THE INTERIOR

### Geological Survey

### Scientific Earthquake Studies Advisory Committee

**AGENCY:** U.S. Geological Survey, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to Public Law 106–503, the Scientific Earthquake Studies Advisory Committee (SESAC) will hold its next meeting on September 1–2, 2015, in the Ernst & Young Gallery of the Fincher Building, Cox School of Business, at the Southern Methodist University in Dallas, Texas. The Committee is comprised of members from academia, industry, and State government. The Committee shall advise the Director of the U.S. Geological Survey (USGS) on matters relating to the USGS's participation in the National Earthquake Hazards Reduction Program.

The Committee will review the research and monitoring activities supported by the USGS Earthquake Hazards Program that are focused on the Central and Eastern U.S.

Meetings of the Scientific Earthquake Studies Advisory Committee are open to the public.

**DATES:** September 1–2, 2015, commencing at 9:00am on the first day and adjourning at 5:00pm and commencing at 9:00am and adjourning by 1:00pm on September 2, 2015.

*Contact:* Dr. William Leith, U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive, Reston, Virginia 20192, (703) 648–6786, wleith@usgs.gov.

*Billing Code:* GX15GG00995TR00.

**William Leith,**

*Senior Science Advisor for Earthquake and Geologic Hazards.*

[FR Doc. 2015–18066 Filed 7–22–15; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCA942000 L57000000.BX0000 13X L5017AR]**

### Filing of Plats of Survey: California

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The plats of survey of lands described below are scheduled to be officially filed in the Bureau of Land Management, California State Office, Sacramento, California.

**DATES:** August 24, 2015.

**ADDRESSES:** A copy of the plats may be obtained from the California State Office, Bureau of Land Management, 2800 Cottage Way, Sacramento, California 95825, upon required payment.

**FOR FURTHER INFORMATION CONTACT:** Chief, Branch of Geographic Services, Bureau of Land Management, California State Office, 2800 Cottage Way W–1623, Sacramento, California 95825, (916) 978–4310. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1(800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** A person or party who wishes to protest a survey must file a notice that they wish to protest with the Chief, Branch of Geographic Services. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Chief, Branch of Geographic Services within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. 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.

**Mount Diablo Meridian, California**

T. 18 N., R. 14 W., subdivision and survey, accepted June 15, 2015.

T. 1 S., R. 19 E., supplemental plat, accepted June 25, 2015.

T. 23 N., R. 13 W., dependent resurvey and survey, accepted July 13, 2015.

**San Bernardino Meridian, California**

T. 2 N., R. 2 W., dependent resurvey and survey, accepted June 15, 2015.

**Authority:** 43 U.S.C., Chapter 3.

Dated: July 14, 2015.

**Lance J. Bishop,**

*Chief Cadastral Surveyor, California.*

[FR Doc. 2015–18037 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–40–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCAN01000 L10200000.XZ0000 14X LXSIOVHD0000]**

### Notice of Public Meeting: Northern California Resource Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Public Meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U. S. Department of the Interior, Bureau of Land Management (BLM) Northern California Resource Advisory Council will meet as indicated below.

**DATES:** The meeting will be held on Wednesday and Thursday, August 26 and 27, 2015, at the in the conference center of the Oxford Suites, located at 1967 Hilltop Drive, Redding, California. On Aug. 26, the council will convene at 10 a.m., public comments will be taken at 4 p.m. On Aug. 27, members will convene at the Oxford Suites and depart immediately for a field tour to public lands in the Sacramento River Bend Outstanding Natural Area. Members of the public are welcome to attend the meeting and tour however, they must provide their own transportation.

**FOR FURTHER INFORMATION CONTACT:** Nancy Haug, BLM Northern California District manager, (530) 224–2160; or Joseph J. Fontana, public affairs officer, (530) 252–5332.

**SUPPLEMENTARY INFORMATION:** The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in on BLM-administered lands in northern California and far northwest Nevada. At this meeting the RAC will discuss organizational matters and land use planning issues. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and meals. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: July 13, 2015.

**Dana Wilson,**

*Acting Deputy State Director, Communications.*

[FR Doc. 2015–18036 Filed 7–22–15; 8:45 am]

**BILLING CODE 4310–40–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Activity Tracking Devices, Systems, and Components Thereof, DN 3075;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,[1] and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *USITC.*[2] The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.[3]

[1] Electronic Document Information System (EDIS): *http://edis.usitc.gov*

[2] United States International Trade Commission (USITC): *http://edis.usitc.gov.*

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure on behalf of AliphCom d/b/a Jawbone and Bodymedia, Inc. on July 7, 2015. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain activity tracking devices, systems, and components thereof. The complaint names as respondents Fitbit, Inc. of San Francisco, CA; Flextronics International Ltd. of San Jose, CA; Flextronics International of Singapore; and Flextronics Sales & Marketing (A–P) Ltd. of Mauritius. The complainant requests that the Commission issue a limited exclusion order and cease and desist orders.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant 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 requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested 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 requested exclusion order and/or a cease and

desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

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 docket number (''Docket No. 3075'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *Electronic Filing Procedures* [4]). 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 nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on *EDIS*.[5]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: July 8, 2015.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2015–18175 Filed 7–22–15; 8:45 am]

**BILLING CODE 7020–02–P**

[4] Handbook for Electronic Filing Procedures: *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf.*

[5] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–15–022]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** July 29, 2015 at 10:00 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 731–TA–776–779 (Third Review) (Preserved Mushrooms from Chile, China, India, and Indonesia). The Commission is currently scheduled to complete and file its determinations and views of the Commission on August 14, 2015.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Dated: July 21, 2015.

**William R. Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2015–18205 Filed 7–21–15; 4:15 pm]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Rehabilitation Maintenance Certificate

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, ''Rehabilitation Maintenance Certificate,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before August 24, 2015.

**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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201503-1240-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks approval under the PRA for revisions to the Rehabilitation Maintenance Certificate, Form OWCP–17, information collection. The OWCP administers the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The FECA provides that the OWCP may pay an individual undergoing vocational rehabilitation a maintenance allowance not to exceed $200 a month. The LHWCA provides that a person undergoing such vocational rehabilitation shall receive a maintenance allowance as additional compensation. The OWCP uses information provided on Form OWCP–17 to determine the amount of any maintenance allowance to be paid. A program participant or contractor the agency hires to provide vocational rehabilitation services submits the form

to the OWCP to request payment of an additional rehabilitation maintenance amount to cover incidental costs of obtaining vocational rehabilitation services. For example, when a disabled worker attends a training program, Form OWCP–17 may be used to request reimbursement of out-of-pocket costs such as travel expenses. This information collection has been classified as a revision; several minor changes were made to Form OWCP–17 that should enhance recordkeeping, ease of use, and to reflect current administrative practices. The FECA and the LHWCA authorize this information collection. *See* 5 U.S.C. 8121 and 33 U.S.C. 939.

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. The DOL obtains OMB approval for this information collection under Control Number 1240–0012. The current approval is scheduled to expire on August 31, 2015; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on April 29, 2015 (80 FR 23823).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0012. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* DOL–OWCP.

*Title of Collection:* Rehabilitation Maintenance Certificate.

*OMB Control Number:* 1240–0012.

*Affected Public:* Individuals or Households.

*Total Estimated Number of Respondents:* 370.

*Total Estimated Number of Responses:* 3,752.

*Total Estimated Annual Time Burden:* 625 hours.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: July 17, 2015.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2015–18068 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–CR–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request for Information Collection for the National Guard Youth ChalleNGe Job ChalleNGe Evaluation, New Collection

**ACTION:** Notice

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee's section below on or before September 21, 2015.

**ADDRESSES:** You may submit comments by either one of the following methods: Email: *ChiefEvaluationOffice@dol.gov;* Mail or Courier: Molly Irwin, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Molly Irwin by telephone at 202–693–5091 (this is not a toll-free number) or by email at *ChiefEvaluationOffice@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The National Guard Youth ChalleNGe program is one of a handful of interventions that have demonstrated positive, sustained impacts on the educational attainment and labor market outcomes of youth who are not in school or the labor force. The goal of Youth ChalleNGe, a residential program, is to build confidence and maturity, teach practical life skills, and help youth obtain a high school diploma or GED. The program's numerous activities address its eight core pillars: Leadership/followership, responsible citizenship, service to community, life-coping skills, physical fitness, health and hygiene, job skills, and academic excellence.

To build on the success of Youth ChalleNGe, the Employment and Training Administration issued $12 million in grants in early 2015 for three Youth ChalleNGe programs to: (1) Expand the program's target population to include youth who have been involved with the courts and (2) add an occupational training component, known as Job ChalleNGe. The addition of the Job ChalleNGe component will expand the residential time by five months and offer the following activities: (1) Occupation skills training, (2) individualized career and academic counseling, (3) work-based learning opportunities, and (4) leadership development activities.

The National Guard Youth ChalleNGe Job ChalleNGe Evaluation, funded by the U.S. Department of Labor, Chief Evaluation Office, will help policymakers and program administrators determine the impacts of expanding Youth ChalleNGe to court-involved youth and adding the Job ChalleNGe component to the existing Youth ChalleNGe model. The study will evaluate how these program

enhancements are implemented and how effective they are, both for youth overall and for court-involved youth in particular. The study will address four research questions: (1) How were the programs implemented?, (2) What impacts did Youth ChalleNGe and Job ChalleNGe have on the outcomes of participants?, (3) To what extent did participation in Job ChalleNGe change the overall impact of Youth ChalleNGe on program participants?, and (4) To what extent did impacts vary for selected subpopulations of participants?

The first research question will be addressed through an implementation study of the three grantee demonstrations. The remaining three questions will be addressed through an impact study of the Youth ChalleNGe and Job ChalleNGe programs. For the impact study, the feasibility of using randomized controlled trials to estimate program effectiveness will be assessed; if needed, a comparison group of youth from Youth ChalleNGe sites that did not receive grants will be included in the study. Only youth who agree to participate in the study will be allowed to participate in the Youth ChalleNGe and Job ChalleNGe programs at the grantees included in the study; active consent will be obtained from youth 18 years of age or older and from a parent or guardian of youth under the age of 18.

This **Federal Register** Notice provides the opportunity to comment on two proposed data collection instruments that will be used in the National Guard Youth ChalleNGe Job ChalleNGe evaluation:

(1) Baseline Information Form (BIF). A BIF will be included in the Youth ChalleNGe application packet and completed by youth. The form will collect demographic information as well as baseline measures of major outcome variables, including: Current employment, past delinquency, expectations about future education, work experience and other topics, and detailed contact information.

(2) Site visit protocols. Site visits will occur twice. The first will occur early in the study period and will collect information about grantees' plans and procedures, the backgrounds and experiences of youth served, the nature of employers' involvement in the programs, and other topics. The second visit will occur later in the grant and evaluation periods and will collect information on whether and how plans and activities for the Youth ChalleNGe and Job ChalleNGe programs have changed since the first visit.

A future information collection request will include an 18-month follow up survey of youth in the Job ChalleNGe treatment and control or comparison groups.

## II. Review Focus

Currently, DOL is soliciting comments concerning the above data collection for the National Guard Youth ChalleNGe Job ChalleNGe Evaluation. DOL is particularly interested in comments that do the following:

- Evaluate whether the proposed collection of information is necessary for the proper performance functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's burden estimate of the proposed information collection, 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 (for example, permitting electronic submissions of responses).

## III. Current Actions

At this time, DOL is requesting clearance for the BIF and the site visit protocols.

*Type of Review:* New collection.

*Title:* National Guard Youth ChalleNGe Job ChalleNGe Evaluation.

*OMB Number:* OMB Control Number 1205–0NEW.

ESTIMATED TOTAL BURDEN HOURS

| Respondents | Number of respondents | Number of responses per respondent | Average burden time per response (minutes) | Total burden hours |
|---|---|---|---|---|
| **Baseline Information Forms** | | | | |
| Youth | [a] 4,050 | 1 | 15 | 1,013 |
| **Site Visits** [b] | | | | |
| Visit 1: | | | | |
| Staff | [c] 113 | 1 | 60 | 113 |
| Employers | 3 | 1 | 60 | 3 |
| Participants | 42 | 1 | 60 | 42 |
| Visit 2: | | | | |
| Staff | [c] 104 | 1 | 30 | 104 |
| Employers | 6 | 1 | 60 | 6 |
| Participants | 42 | 1 | 60 | 42 |
| Total | 4,360 | ..... | ..... | 1,323 |

[a] This corresponds to 2,700 treatment and 1,350 control group youths across the Youth ChalleNGe and Job ChalleNGe programs in the study.
[b] This is based on visits to three sites.
[c] Some respondents will participate in interviews that last more than 1 hour. Therefore, the table provides an upper estimate of the number of separate respondents.

*Affected Public:* Youth applying for and/or participating in the Youth ChalleNGe program and the Job ChalleNGe program; Youth ChalleNGe and Job ChalleNGe program and partner staff; and employers.

*Form(s):* Total respondents: 4,050 youth; 113 program and partner staff, and 9 employers.

Annual Frequency: One time for the BIF, one time for each site visit.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 13, 2015.

**Marybeth Maxwell,**

*Deputy Assistant Secretary for Policy, U.S. Department of Labor.*

[FR Doc. 2015–18076 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–HX–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Federal Contract Compliance Programs (OFCCP) sponsored information collection request (ICR) titled, ''Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*. Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before August 24, 2015.

**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 of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201504-1250-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OFCCP, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov*.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors information collection codified in regulations 41 CFR parts 60–1, 60–2, 60–3, 60–4, and 60–50. Among other things, these regulations set forth information disclosure and reporting requirements for covered Federal contractors, subcontractors, and federally assisted construction contractors and subcontractors (collectively referred to as contractors). This information collection request supports the final rule published December 8, 2014, (79 FR 72703) implementing Executive Order 11246, Equal Employment Opportunity (published September 28, 1965, 30 FR 12319) and Executive Order 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (published July 23, 2014, 79 FR 42971).

The final rule sets forth the following information disclosure and reporting requirements for covered Federal contractors: (1) Contractors must incorporate specific language into the equal opportunity clause used in covered subcontracts and purchase orders; (2) contractors are expressly to state in solicitations for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin; and (3) contractors are to disclose when their employees or prospective employees are denied a visa of entry to a country in which or with which the contractors are doing business. Executive Order 11246, ''Equal Employment Opportunity,'' section 202; and Executive Order 13672, ''Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government,'' section 2 authorize this information collection. *See* E.O. 11246 section 202 (published September 28, 1965, 30 FR 12319) and E.O. 13672 section 2 (published July 23, 2014, 79 FR 42971).

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. The DOL obtains OMB approval for this information collection under Control Number 1250–0009.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire September 30, 2015. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related final rule published in the **Federal Register** on December 8, 2014 (79 FR 72703).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1250–0009. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* DOL–OFCCP.

*Title of Collection:* Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors.

*OMB Control Number:* 1250–0009.

*Affected Public:* Private Sector—businesses or other for-profits, farms, and not-for-profit institutions.

*Total Estimated Number of Respondents:* 200,000.

*Total Estimated Number of Responses:* 200,000.

*Total Estimated Annual Time Burden:* 38,769 hours.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: July 17, 2015.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2015–18067 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–CM–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Affordable Care Act Internal Claims and Appeals and External Review Procedures for Non-Grandfathered Plans

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Affordable Care Act Internal Claims and Appeals and External Review Procedures for Non-Grandfathered Plans,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*. Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before August 21, 2015.

**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 of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201507-1210-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Affordable Care Act internal claims and appeals and external review procedures for non-grandfathered health plans information collection information collection requirements codified in regulations 29 CFR 2590.715–2719(b)(2) and 2560.503–1. This ICR includes the reporting and third party notice and disclosure requirements a plan must satisfy under interim final regulations implementing provisions of the Affordable Care Act, which amended the Public Health Service Act among other things. The subject regulations pertain to internal claims and appeals and to the external review process. The EBSA makes several model notices available in a compliance assistance effort. Public Health Service Act section 2719 authorizes this information collection. *See* 42 U.S.C. 300gg–19.

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. The DOL obtains OMB approval for this information collection under Control Number 1210–0144.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on July 31, 2015. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 15, 2014 (79 FR 61903).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0144. The OMB is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

*Agency:* DOL–EBSA.

*Title of Collection:* Affordable Care Act Internal Claims and Appeals and External Review Procedures for Non-Grandfathered Plans.

*OMB Control Number:* 1210–0144.

*Affected Public:* Private Sector-businesses or other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 276,000.

*Total Estimated Number of Responses:* 276,000.

*Total Estimated Annual Time Burden:* 2,000 hours.

*Total Estimated Annual Other Costs Burden:* $1,100,000.

Dated: July 16, 2015.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2015–18002 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

### Proposed Extension of Existing Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Overpayment Recovery Questionnaire (OWCP–20). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before September 21, 2015.

**ADDRESSES:** Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3323, Washington, DC 20210, telephone/fax (202) 354–9647, Email *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail or Email).

**SUPPLEMENTARY INFORMATION:**

I. *Background:* The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* This information collection is used by OWCP examiners to ascertain the financial condition of the beneficiary to determine if the overpayment or any part can be recovered; to identify the possible concealment or improper transfer of assets; and to identify and consider present and potential income and current assets for enforced collection proceedings. The questionnaire provides a means for the beneficiary to explain why he/she is without fault in an overpayment matter. If this information were not collected BLBA, EEOICPA and FECA would have little basis to determine appropriate collection proceedings. This information collection is currently approved for use through December 31, 2015.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

* evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* enhance the quality, utility and clarity of the information to be collected; and

* minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks the approval of the extension of this currently approved information collection in order to determine whether or not the recovery of any Black Lung Benefits Act (BLBA), Energy Employees Occupational Illness Compensation Program Act (EEOICPA) or Federal Employees' Compensation Act (FECA) overpayment may be waived, compromised, terminated, or collected in full.

*Type of Review:* Extension.

*Agency:* Office of Workers' Compensation Programs.

*Title:* Overpayment Recovery Questionnaire.

*OMB Number:* 1240–0051.

*Agency Number:* OWCP–20.

*Affected Public:* Individuals and households.

*Total Respondents:* 3,393.

*Total Responses:* 3,393.

*Time per Response:* 1 hour.

*Estimated Total Burden Hours:* 3,393.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $1,954.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 17, 2015.

**Yoon Ferguson,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.*

[FR Doc. 2015–18000 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–CR–P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

### Proposed Extension of Existing Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed extension of the existing collection: Uniform Billing Form (OWCP–04). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before September 21, 2015.

**ADDRESSES:** Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3323, Washington, DC 20210, telephone/fax (202) 354–9647, Email *ferguson.yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

**SUPPLEMENTARY INFORMATION:**

I. *Background:* The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* All three of these statutes require that OWCP pay for medical treatment of beneficiaries; this medical treatment can include inpatient/outpatient hospital services, as well as services provided by nursing homes, skilled nursing facilities and home health aides in the home. In order to determine whether billed amounts are appropriate, OWCP needs to identify the patient, the specific services that were rendered and their relationship to the work-related injury or illness. The regulations implementing these statutes require the use of Form OWCP–04 or UB–04 for the submission of medical bills from institutional providers (20 CFR 10.801, 30.701, 725.405, 725.406, 725.701 and 725.704). The Uniform Billing form, known as the paper UB–04, has been approved by the American Hospital Association, the Centers for Medicare and Medicaid Services and the Civilian Health and Medical Program of Uniformed Services (CHAMPUS), by various other government health care providers, and the private sector, to request payment to institutional providers of medical services. The paper UB–04 has been designed by the National Uniform Billing Committee and is neither a government-printed form nor distributed by OWCP. However, this collection includes the paper UB–04 as a collection instrument, with detailed instructions prepared by OWCP to ensure that it obtains only the information needed to consider requests for payment from institutional providers using this billing form. This information collection is currently approved for use through January 31, 2016.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* enhance the quality, utility and clarity of the information to be collected; and

* minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks the approval of the extension of this currently approved information collection in order to carry out its responsibility to provide payment for covered medical services to beneficiaries who are covered under FECA, BLBA and EEOICPA.

*Type of Review:* Extension.

*Agency:* Office of Workers' Compensation Programs.

*Title:* Uniform Billing Form.

*OMB Number:* 1240–0019.

*Agency Number:* OWCP–04.

*Affected Public:* Individuals or households; Businesses or other for-profit; Not-for-profit institutions.

*Total Respondents:* 6,277.

*Total Responses:* 221,992.

*Time per Response:* 1–7 minutes

*Estimated Total Burden Hours:* 25,503.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 17, 2015.

**Yoon Ferguson,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.*

[FR Doc. 2015–18001 Filed 7–22–15; 8:45 am]

**BILLING CODE 4510–CR–P**

## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** National Science Foundation.

**ACTION:** Notice.

**SUMMARY:** The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology, and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Written comments should be received by September 21, 2015, to be assured of consideration. Comments received after that date would be considered to the extent practicable.

**ADDRESSES:** Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 1265, Arlington, VA 22230, or by email to *splimpto@nsf.gov.*

**FOR FURTHER INFORMATION CONTACT:** Suzanne Plimpton on (703) 292–7556 or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Monitoring for the National Science Foundation's Math and Science Partnership (MSP) Program.

*OMB Control No.:* 3145–0199.

*Expiration Date of Approval:* January 31, 2016.

**1. Abstract**

• This document has been prepared to support the clearance of data collection instruments to be used in the evaluation of the Math and Science Partnership (MSP) program. The goals for the program are to (1) ensure that all K–12 students have access to, are prepared for, and are encouraged to participate and succeed in challenging curricula and advanced mathematics and science courses; (2) enhance the quality, quantity, and diversity of the K–12 mathematics and science teacher workforce; and (3) develop evidence-based outcomes that contribute to our understanding of how students effectively learn the knowledge, skills and ways of thinking inherent in mathematics, computer science, engineering, and/or the natural sciences. The motivational force for realizing these goals is the formation of partnerships between institutions of higher education (IHEs) and K–12 school districts. The role of IHE content faculty is the cornerstone of this intervention. In fact, it is the rigorous involvement of science, mathematics, and engineering faculty—and the expectation that both IHEs and K–12 school systems will be transformed—that distinguishes MSP from other education reform efforts.

• The components of the overall MSP portfolio include active projects whose initial awards were made in prior MSP competitions: (1) Comprehensive Partnerships that implement change in mathematics and/or science educational practices in both higher education institutions and in schools and school districts, resulting in improved student achievement across the K–12 continuum; (2) Targeted Partnerships that focus on improved K–12 student achievement in a narrower grade range or disciplinary focus within mathematics or science; (3) Institute Partnerships: Teacher Institutes for the 21st Century that focus on the development of mathematics and science teachers as school—and district-based intellectual leaders and master teachers; (4) Research, Evaluation and Technical Assistance (RETA) projects that build and enhance large-scale research and evaluation capacity for all MSP awardees and provide them with tools and assistance in the implementation and evaluation of their work; (5) MSP-Start Partnerships are for awardees new to the MSP program, especially from minority-serving institutions, community colleges and primarily undergraduate institutions, to support the necessary data analysis, project design, evaluation and team building activities needed to develop a full MSP Targeted or Institute Partnership; and (6) Phase II Partnerships for prior MSP Partnership awardees focus on specific innovation areas of their work where evidence of significant positive impact is clearly documented and where an investment of additional resources and time would produce more robust findings and results.

The MSP monitoring information system, comprised of eight web-based surveys, collects a common core of data about each component of MSP. The Web application for MSP has been developed with a modular design that incorporates templates and self-contained code modules for rapid development and ease of modification. A downloadable version will also be available for respondents who prefer a paper version that they can mail or fax to the external contractor.

*Use of the information:* This information is required for effective program planning, administration, communication, program and project monitoring and evaluation, and for measuring attainment of NSF's program, project and strategic goals; the Deficit Reduction Act of 2005 (Pub. L. 109–171) which established the Academic Competitiveness (ACC). The MSP program is also directly aligned with two of NSF's long-term investment categories: (1) Transform the Frontiers and (2) Innovate for Society.

**2. Expected Respondents**

The expected respondents are principal investigators of all Targeted and Institute partnership projects; STEM and education faculty members and administrators who participated in MSP; school districts and IHEs that are partners in an MSP project; and teachers participating in Institute Partnerships.

**3. Burden on the Public**

*Number of Respondents:* 1936.

*Burden of the Public:* The estimated total annual response burden for this collection is 17,727 hours.

This figure is based upon the previous 3 years of collecting information under this clearance and anticipated collections. The average annual reporting burden is estimated to be between less than 1 and 50 hours per respondent depending on whether a respondent is a direct participant who is self-reporting or representing a project and reporting on behalf of many project participants. The majority of respondents (60%) are estimated to require fewer than two hours to complete the survey. The burden on the public is negligible because the study is limited to project participants that have received funding from the MSP Program.

Dated: July 17, 2015.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2015–18028 Filed 7–22–15; 8:45 am]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Request for Public Comment on an Updated Standardized Research Performance Progress Report Format to be Used for Both Interim and Final Performance Progress Reporting

**AGENCY:** National Science Foundation (NSF).

**ACTION:** Request for public comment on an updated standardized Research Performance Progress Report (RPPR) format to be used for both interim and final performance progress reporting.

**SUMMARY:** The RPPR that was originally developed for use in preparation and submission of annual and other interim performance progress reports resulted from an initiative of Research Business Models (RBM), an Interagency Working Group of the Social, Behavioral & Economic Research Subcommittee of the Committee on Science (CoS), a committee of the National Science and Technology Council (NSTC). The original version of the RPPR format was approved for implementation in the **Federal Register** (FR) [Volume 75, pages 1816–1819, January 13, 2010]. As part of this FR notice, it was stated that the development of a final RPPR format would take place upon completion of the interim RPPR exercise.

A revised draft of the format has been developed to incorporate lessons learned by agencies during the initial implementation of the RPPR. The approach also has been changed from using the format for interim performance progress reports only to using the format for both interim and final performance progress reports.

On behalf of the RBM, the National Science Foundation (NSF) has agreed to continue to serve as the sponsor of the updated version of this Federal-wide performance progress reporting format. The general public and Federal agencies are invited to comment on the proposed revised format during the 60-day public comment period. A ''For Comment'' version of the draft format for use in submission of interim and final Research Performance Progress Reports,

along with a summary of significant changes, are posted on the NSF Web site at: *http://www.nsf.gov/bfa/dias/policy/rppr/index.jsp.*

After obtaining and considering public comment, the RBM will prepare the format for final clearance. Each agency that uses the RPPR will need to seek OMB approval of this collection via the Paperwork Reduction Act for a period of no longer than three years.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of agencies funding research and research-related activities, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected from respondents, including through the use of automated collection techniques or other forms of information technology; and (c) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Comments must be received by September 21, 2015.

**ADDRESSES:** Comments should be addressed to Suzanne H. Plimpton, Reports Clearance Officer, Office of the General Counsel, National Science Foundation, 4201 Wilson Blvd., Arlington, VA, 22230, email: *splimpto@nsf.gov;* telephone: (703) 292–7556; FAX (703) 292–9242. We encourage respondents to submit comments electronically to ensure timely receipt. We cannot guarantee that comments mailed will be received before the comment closing date. Please include ''*Research Performance Progress Reporting*'' in the subject line of the email message; please also include the full body of your comments in the text of the message and as an attachment. Include your name, title, organization, postal address, telephone number, and email address in your message.

**FOR FURTHER INFORMATION CONTACT:** To view the proposed RPPR format, see: *http://www.nsf.gov/bfa/dias/policy/rppr/index.jsp.* For information on the RPPR, contact Jean Feldman, Head, Policy Office, Division of Institution & Award Support, National Science Foundation, 4201 Wilson Blvd., Arlington, VA, 22230, email: *jfeldman@nsf.gov;* telephone (703) 292–8243; FAX: (703) 292–9171. For further information on the NSTC RBM Interagency Working Group, contact Kei Koizumi, at the Office of Science and Technology Policy, 1650 Pennsylvania Avenue NW., Washington, DC 20504; email: *kkoizumi@ostp.eop.gov;* telephone 202–456–6133; FAX 202–456–6021. See also the RBM Web site located at: *http://rbm.nih.gov*.

Dated: July 17, 2015.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2015–18007 Filed 7–22–15; 8:45 am]

**BILLING CODE 7555–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2015–105; Order No. 2597]**

### New Postal Product

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing concerning an additional Global Expedited Package Services 3 negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* July 24, 2015.

**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

On July 16, 2015, the Postal Service filed notice that it has entered into an additional Global Expedited Package Services 3 (GEPS 3) negotiated service agreement (Agreement).[1]

To support its Notice, the Postal Service filed a copy of the Agreement, a copy of the Governors' Decision authorizing the product, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

[1] Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, July 16, 2015 (Notice).

### II. Notice of Commission Action

The Commission establishes Docket No. CP2015–105 for consideration of matters raised by the Notice.

The Commission invites comments on whether the Postal Service's filing is consistent with 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than July 24, 2015. The public portions of the filing can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in this docket.

### III. Ordering Paragraphs

*It is ordered:*

1. The Commission establishes Docket No. CP2015–105 for consideration of the matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).

3. Comments are due no later than July 24, 2015.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Ruth Ann Abrams,**

*Acting Secretary.*

[FR Doc. 2015–18019 Filed 7–22–15; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–75480; File No. SR–BOX–2015–27]**

### Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Programs That Permit the Exchange To Have No Minimum Size Requirement for Orders Entered Into the PIP and COPIP

July 17, 2015.

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 July 16, 2015, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Interpretive Material to Rule 7150 (Price Improvement Period ''PIP'') and Interpretive Material to Rule 7245 (Complex Order Price Improvement Period ''COPIP'') to extend 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 extend the PIP and COPIP Pilot Programs for an additional twelve months or until the date on which the pilot programs are approved on a permanent basis, whichever is earlier. The PIP and COPIP Pilot Programs allow the Exchange to have no minimum size requirement for orders entered into the PIP [3] and the COPIP.[4] The Exchange has been providing certain data to the Commission during the PIP and COPIP Pilot Programs. The proposed rule change retains the text of IM–7150–1 to Rule 7150 and IM–7245–1 to Rule 7245; and seeks to extend the operation of the PIP and COPIP Pilot Programs until July 18, 2016.

The Exchange notes that the PIP and COPIP Pilot Programs permit Participants 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 national best bid or offer. 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,[5] cBBO [6] and BBO on the Complex Order Book for the Strategy at the time of commencement.

The Exchange believes that extending the pilot period is appropriate because it will allow the Exchange the Commission additional time to analyze data regarding the PIP and COPIP Pilot Programs that the Exchange has committed to provide. As such, the Exchange believes that it is appropriate to extend the current operation of the Pilot Programs. In further support of this proposed rule change, the Exchange will submit to the Commission data from the PIP and COPIP Pilot Programs. Further, the Exchange represents that it will provide certain additional data requested by the Commission regarding trading in the PIP and COPIP Auctions for the six (6) month period from January 1, 2015 through June 30, 2015. The Exchange agrees to provide this data by January 18, 2015 and to make a summary of the data provided to the Commission publically available. The Exchange continues to believe that there remains meaningful competition for all size orders and there is significant price improvement for all orders executed through the PIP and COPIP; and that there is an active and liquid market functioning on the Exchange outside the PIP and COPIP auctions. The Exchange believes the additional data will substantiate the Exchange's belief and provide further evidence in support of permanent approval of the PIP and COPIP Pilot Programs.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[7] in general, and Section 6(b)(5) of the Act,[8] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing

[3] The PIP Pilot Program is currently set to expire on July 18, 2015. *See* Securities Exchange Act Release Nos. 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 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''), 73314 (October 7, 2014) 79 FR 61682 (October 14, 2014) (SR–BOX–2014–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend 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'') Until December 18, 2014), and 73831 (December 12, 2014) 79 FR 75211 (December 17, 2014) (SR–BOX–2014–27) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Interpretive Material to Rule 7150 and Interpretive Material to Rule 7245 To Extend the Pilot Period That Permit the Exchange To Have No Minimum Size Requirement for Orders Entered Into the PIP and COPIP Until July 18, 2015).

[4] The COPIP Pilot Program is currently set to expire on July 18, 2015. *See* Securities Exchange Act Release Nos. 71148 (December 19, 2013) 78 FR 78437 (December 26, 2013) (Notice of Filing of Amendment Nos. 1 and 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), 72545 (July 7, 2014) 79 FR 40182 (July 11, 2014) (SR–BOX–2014–19) (Notice of Filing and Immediate Effectiveness of a 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''), and 73314 (October 7, 2014) 79 FR 61682 (October 14, 2014) (SR–BOX–2014–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend 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'') Until December 18, 2014) and 73831 (December 12, 2014) 79 FR 75211 (December 17, 2014) (SR–BOX–2014–27) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Interpretive Material to Rule 7150 and Interpretive Material to Rule 7245 To Extend the Pilot Period That Permit the Exchange To Have No Minimum Size Requirement for Orders Entered Into the PIP and COPIP Until July 18, 2015).

[5] 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.

[6] 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.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the data demonstrates that there is sufficient investor interest and demand to extend the PIP and COPIP Pilot Programs for an additional twelve months or until the date on which the pilot programs are approved on a permanent basis, whichever is earlier. The Exchange represents that the PIP and COPIP Pilot Programs are designed to create tighter markets and ensure that each order receives the best possible price.

*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. Specifically, the Exchange believes that, by extending the expiration of the PIP and COPIP Pilot Programs, the proposed rule change will allow additional time to analyze data regarding the PIP and COPIP Pilot Programs that the Exchange has committed to provide.

*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**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) [10] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) 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 if consistent with the protection of investors and the public interest.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period because the current pilot programs are set to expire on July 18, 2015. The Exchange noted that such waiver will permit the pilot programs to continue without interruption.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot programs to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption in the pilot programs. For these reasons, the Commission designates the proposed rule change to be operative on July 18, 2015.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BOX–2015–27 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–BOX–2015–27. 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–2015–27, and should be submitted on or before August 13, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18033 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 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.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–75478; File No. SR–EDGX–2015–34]**

## Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGX Exchange, Inc.

July 17, 2015.

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 July 14, 2015, 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 the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change 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 amend its schedule of fees and rebates applicable to Members [5] and non-Members of the Exchange pursuant to EDGX Rule 15.1(a) and (c) (''Fee Schedule'') to correct a typographical error on the Fee Schedule and to make additional changes intended to improve the Fee Schedule.

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.

### 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 Exchange submitted a proposed rule change with the Commission, for effectiveness on July 6, 2015, to modify the Exchange's Fee Schedule.[6] Pursuant to the filing, the Exchange removed various footnotes, including footnotes 11 and 12 from the prior Fee Schedule, and also added back in a new footnote 11. In connection with this change, the Exchange erroneously appended footnote 12 to a new fee code, fee code HI, even though there is no longer a footnote 12. The Exchange proposes to eliminate the reference to footnote 12 with respect to fee code HI.

In addition to deleting the reference to footnote 12, the Exchange proposes to append footnote 11 to fee code HA. Fee code HA is appended to orders with a Non-Displayed [7] instruction that add liquidity. New footnote 11 that was added as of July 6, 2015, provides additional information to readers of the Fee Schedule regarding the application of the liquidity code to the Reserve Quantity [8] of orders as well as orders with a Discretionary Range [9] instruction, making clear that pricing applicable to added non-displayed liquidity does not apply to such orders. The Exchange proposes to also append this new footnote to fee code HA, which also relates to orders with a Non-Displayed instruction.

The Exchange also proposes to modify footnote 11, which, as noted above, was recently added by the Exchange. The current footnote states that the ''fee'' for adding non-displayed liquidity does not apply to the Reserve Quantity of an order or an order with a Discretionary Range instruction. In this case, the Exchange intended the term ''fee'' to mean ''pricing.'' However, to avoid confusion, given that the current pricing for adding non-displayed liquidity yielding either fee code HA or HI is either without fee or results in a rebate, the Exchange proposes to amend the footnote to read that the ''fee or rebate'' for adding non-displayed liquidity does not apply to the Reserve Quantity of an order or an order with a Discretionary Range instruction.

Finally, the Exchange notes that each of the above proposed changes do not amend the amount or application of any fee or rebate.

Implementation Date

The Exchange proposes to implement these amendments to its Fee Schedule immediately.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[10] in general, and furthers the objectives of Section 6(b)(4),[11] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. Specifically, the Exchange believes it is equitable, reasonable and non-discriminatory to delete fee reference to footnote 12, append footnote 11 to fee code HA, and modify footnote 11 as described above because each of these changes are designed to avoid investor confusion and improve the Exchange's Fee Schedule.

*(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. The proposed rule change corrects a typographical error recently introduced to the Fee Schedule and also provides additional information to readers of the Fee Schedule by appending footnote 11 to fee code HA and modifying footnote 11 as described above. The proposed changes do not amend the amount or application of any fee or rebate.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] *See* Securities Exchange Act Release No. 75435 (July 13, 2015) (SR–EDGX–2015–32).

[7] *See* Exchange Rule 11.6(e)(2).

[8] *See* Exchange Rule 11.6(m).

[9] *See* Exchange Rule 11.6(d).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(4).

### 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) of the Act [12] and paragraph (f) of Rule 19b–4 thereunder.[13] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–EDGX–2015–34 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–EDGX–2015–34. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2015–34 and should be submitted on or before August 13, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18035 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–75482; File No. SR–ISE–2015–23]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend the Price Improvement Mechanism Pilot Program

July 17, 2015.

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 July 16, 2015, 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 and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to extend two pilot programs related to its Price Improvement Mechanism (''PIM''). The text of the proposed rule change is available on the Exchange's Web site *www.ise.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.

### 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 Exchange currently has two pilot programs related to its PIM (collectively, the ''PIM Pilot Programs'' or ''Pilot Programs'').[3] The current Pilot Period provided in paragraphs .03 and .05 of the Supplementary Material to Rule 723 is set to expire on July 17, 2015.[4] Paragraph .03 provides that there is no minimum size requirement for orders to be eligible for the Price Improvement Mechanism. Paragraph .05 concerns the termination of the exposure period by unrelated orders. In accordance with the Approval Order, the Exchange has continually submitted certain data in support of extending the current Pilot Programs. The Exchange proposes to extend these Pilot Programs in their present form, through July 18, 2016, to give the Exchange and the Commission additional time to evaluate the effects of these Pilot Programs before the Exchange requests permanent approval of the rules. To aid the Commission in its evaluation of the PIM Functionality, ISE represents that it will provide

[3] *See* Securities Exchange Act Release Nos. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR–ISE–2003–06) (Approving the PIM pilot (the ''Approval Order'')); 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); and 72467 (June 25, 2014), 79 FR 37377 (July 1, 2014) (SR–ISE–2014–33).

[4] *See* Securities Exchange Act Release No. 34–72467 (June 25, 2014), 79 FR 37377 (July 1, 2014) (SR–ISE–2014–33).

certain additional data requested by the Commission regarding trading in the PIM for the six (6) month period from January 1, 2015 through June 30, 2015. The Exchange agrees to provide this data by January 18, 2016 and to make the summary of the data provided to the Commission publicly available.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the Pilot Programs are consistent with the Exchange Act because they provide opportunity for price improvement for all orders executed in the Exchange's Price Improvement Mechanism. The proposed extension would allow the Pilot Programs to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption to the pilot. Further, the Exchange believes that the data demonstrates that there is sufficient investor interest and demand to extend the Pilot Programs for an additional twelve months. The Exchange further believes it is appropriate to extend the Pilot Programs to provide the Exchange and Commission more data upon which to evaluate the rules. With this data, the Commission can evaluate whether the new data shows there is meaningful competition for all size orders within the PIM, whether there is significant price improvement for all orders executed through the PIM, and whether there is an active and liquid market functioning on the Exchange outside of the PIM.

*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 Exchange Act. Specifically, the Exchange believes that, by extending the expiration of the Pilot Programs, the proposed rule change will allow for further analysis of the PIM. In doing so, the proposed rule change will also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

*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: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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 and Rule 19b-4(f)(6) thereunder.[5]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[6] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[7] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period because the Pilot Programs are set to expire on July 17, 2015. The Exchange noted that such waiver will allow the Pilot Programs to continue uninterrupted.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Pilot Programs to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption in the Pilot Programs. For this reason, the Commission designates the proposed rule change to be operative on July 17, 2015.[8]

[5] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its 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.

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2015–23 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–2015–23. 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–ISE–2015–23, and should be submitted on or before August 13, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18031 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 31718; 812–14504]**

## Pioneer ETMF Series Trust I, et al.; Notice of Application

July 16, 2015.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

*Applicants:* Pioneer ETMF Series Trust I (the ''Trust''), Pioneer Investment Management, Inc. (the ''Adviser'') and Pioneer Funds Distributor, Inc. (the ''Distributor'').

*Summary of Application:* Applicants request an order (''Order'') that permits: (a) Actively managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at the next-determined net asset value plus or minus a market-determined premium or discount that may vary during the trading day; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares; and (f) certain series to create and redeem Shares in kind in a master-feeder structure. The Order would incorporate by reference terms and conditions of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

**DATES:** *Filing Dates:* The application was filed on June 30, 2015.

*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 August 12, 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:** The Commission: Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Pioneer ETMF Series Trust I, Pioneer Investment Management, Inc. and Pioneer Funds Distributor, Inc., 60 State Street, Boston, Massachusetts 02109.

**FOR FURTHER INFORMATION CONTACT:** Jean E. Minarick, Senior Counsel, or Dalia Osman Blass, 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.

### Applicants

1. The Trust will be registered as an open-end management investment company under the Act and is a business trust organized under the laws of the State of Delaware. Applicants seek relief with respect to sixteen Funds (as defined below, and those Funds, the ''Initial Funds''). The portfolio positions of each Fund will consist of securities and other assets selected and managed by its Adviser or Subadviser (as defined below) to pursue the Fund's investment objective.

2. The Adviser, a Delaware corporation, will be the investment adviser to the Initial Funds. An Adviser (as defined below) will serve as investment adviser to each Fund. The Adviser is, and any other Adviser will be, registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser and the Trust may retain one or more subadvisers (each a ''Subadviser'') to manage the portfolios of the Funds. Any Subadviser will be registered, or not subject to registration, under the Advisers Act.

3. The Distributor is a Massachusetts corporation and a broker-dealer registered under the Securities Exchange Act of 1934 and will act as the principal underwriter of Shares of the Funds. Applicants request that the requested relief apply to any distributor of Shares, whether affiliated or unaffiliated with the Adviser (included in the term ''Distributor''). Any Distributor will comply with the terms and conditions of the Order.

### Applicants' Requested Exemptive Relief

4. Applicants seek the requested Order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act. The requested Order would permit applicants to offer exchange-traded managed funds. Because the relief requested is the same as the relief granted by the Commission under the Reference Order and because the Adviser has entered into, or anticipates entering into, a licensing agreement with Eaton Vance Management, or an affiliate thereof in order to offer exchange-traded managed funds,[2] the Order would incorporate by reference the terms and conditions of the Reference Order.

5. Applicants request that the Order apply to the Initial Funds and to any

[9] 17 CFR 200.30–3(a)(12).

[1] Eaton Vance Management, *et al.,* Investment Company Act Rel. Nos. 31333 (Nov. 6, 2014) (notice) and 31361 (Dec. 2, 2014) (order).

[2] Eaton Vance Management has obtained patents with respect to certain aspects of the Funds' method of operation as exchange-traded managed funds.

other existing or future open-end management investment company or series thereof that: (a) Is advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser (any such entity included in the term ''Adviser''); and (b) operates as an exchange-traded managed fund as described in the Reference Order; and (c) complies with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein (each such company or series and Initial Fund, a ''Fund'').[3]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general purposes 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.

7. Applicants submit that for the reasons stated in the Reference Order: (1) With respect to the relief requested pursuant to section 6(c) of the Act, the relief is 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; (2) with respect to the relief request pursuant to section 17(b) of the Act, the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, are consistent with the policies of each registered investment company concerned and consistent with the general purposes of the Act; and (3) with respect to the relief requested pursuant to section 12(d)(1)(J) of the Act, the relief is consistent with the public interest and the protection of investors.

By the Division of Investment Management, pursuant to delegated authority.

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18029 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

[3] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein.

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–75479; File No. SR–EDGX–2015–33]**

## Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rules 11.6, 11.8, 11.9, 11.10 and 11.11 to Align With Similar Rules of the BATS Exchange, Inc.

July 17, 2015.

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 July 8, 2015, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 amend certain rules to better align Exchange rules and system functionality with that currently offered by BATS Exchange, Inc. (''BZX''). These changes are described in detail below and include amending: (i) Rule 11.6, Definitions; (ii) Rule 11.8, Order Types; (iii) Rule 11.9, Priority of Orders; (iv) Rule 11.10, Order Execution; and (v) Rule 11.11, Routing to Away Trading Centers. The Exchange does not propose to implement new or unique functionality that has not been previously filed with the Commission or is not available on BZX. The Exchange notes that the proposed rule text is based on BZX rules and is different only to the extent necessary to conform to the Exchange's current rules.

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.

### 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

In early 2014, the Exchange and its affiliate, EDGA Exchange, Inc. (''EDGA'') received approval to effect a merger (the ''Merger'') of the Exchange's parent company, Direct Edge Holdings LLC, with BATS Global Markets, Inc., the parent of BZX and the BATS Y-Exchange, Inc. (''BYX'', together with BZX, EDGA and EDGX, the ''BGM Affiliated Exchanges'').[5] In order to provide consistent rules and system functionality amongst the Exchange and BZX, the Exchange proposes to amend: (i) Rule 11.6, Definitions; (ii) Rule 11.8, Order Types; (iii) Rule 11.9, Priority of Orders; (iv) Rule 11.10, Order Execution; and (v) Rule 11.11, Routing to Away Trading Centers.

The proposed amendments are intended to better align certain Exchange rules and system functionality with that currently offered by BZX in order to provide a consistent functionality across the Exchange and BZX. Consistent functionality between the Exchange and BZX is designed to

[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). The Exchange notes that it originally filed the proposed rule change on July 2, 2015, under File Number SR–EDGX–2015–30. On July 8, 2015, the Exchange withdrew SR–EDGX–2015–30 and re-filed the proposed rule change under File Number SR–EDGX–2015–33.

[5] *See* Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR–EDGX–2013–43; SR–EDGA–2013–34).

reduce complexity and streamline duplicative functionality, thereby resulting in simpler technology implementation, changes and maintenance by Users [6] of the Exchange that are also participants on BZX. Unless otherwise noted, the proposed rule text is based on BZX rules and is different only to the extent necessary to conform to the Exchange's current rules.[7] The proposed amendments do not propose to implement new or unique functionality that has not been previously filed with the Commission or is not available on BZX.

Rule 11.6, Definitions

Rule 11.6, Definitions, sets forth in one rule current defined terms and order instructions that are utilized in Chapter XI. Rule 11.6 also includes additional defined terms and instructions to aid in describing System [8] functionality and the operation of the Exchange's order types. The Exchange proposes to amend Rule 11.6 to align certain sections with BZX functionality and rules, including additional specificity regarding the operation of Exchange functionality. These changes are described below and include: (i) Amending paragraph (d) regarding Discretionary Range; (ii) deleting subparagraph (j)(3) regarding the re-pricing of orders with a Pegged instruction priced more aggressively than the midpoint of the national best bid or offer (''NBBO''); (iii) amending subparagraph (l)(1)(A) regarding the Price Adjust Re-Pricing instruction; (iv) amending subparagraph (l)(1)(B) to replace the Hide Not Slide Re-Pricing instruction with a Display-Price Sliding instruction; (v) amending subparagraph (l)(2) regarding the Short Sale re-pricing instruction; (vi) amending subparagraph (l)(3) regarding the re-pricing of non-displayed orders and orders with an Odd Lot [9] size priced better than the NBBO; (vii) amending subparagraph (n)(1), (2) and (4) regarding the Aggressive, Super Aggressive, and Post Only instructions; and (viii) amending subparagraph (q) regarding Immediate-or-Cancel and Fill-or-Kill Time-In-Force instructions. As stated above, the proposed amendments to Rule 11.6 do not propose to implement new or unique functionality that has not been previously filed with the Commission or is not available on BZX. Each of these amendments are described in more detail below.

Discretionary Range (Rule 11.6(d))

*Current Functionality.* Pursuant to current Rule 11.6(d), Discretionary Range is an instruction the User may attach to an order to buy (sell) a stated amount of a security at a specified, displayed price with discretion to execute up (down) to a specified, non-displayed price. An order with a Discretionary Range instruction resting on the EDGX Book [10] will execute at its least aggressive price when matched for execution against an incoming order that also contains a Discretionary Range instruction, as permitted by the terms of both the incoming and resting order.

*Proposed Functionality.* The Exchange proposes to amend the Discretionary Range instruction under Rule 11.6(d) to align with BZX Rule 11.9(c)(10).[11] As proposed, amended Rule 11.6(d) are substantially similar to BZX Rule 11.9(c)(10). To the extent the amended text of Exchange Rule 11.6(d) differs from BZX Rule 11.9(c)(10), such differences are necessary to conform the rule to existing rule text.

First, the Exchange proposes to add specificity to the Exchange's rule based on BZX Rule 11.9(c)(10) to make clear that although an order with a Discretionary Range instruction may be accompanied by a Displayed [12] instruction, an order with a Discretionary Range instruction may also be accompanied by a Non-Displayed [13] instruction, and if so, will have a non-displayed ranked price as well as a discretionary price. The Exchange further proposes to adopt language from BZX Rule 11.9(c)(10) to specifically state that resting orders with a Discretionary Range instruction will be executed at a price that uses the minimum amount of discretion necessary to execute the order against an incoming order. Neither of these proposed changes represent changes to functionality, but rather, additional specificity in Exchange Rules based on BZX Rule 11.9(c)(10).

Second, the Exchange also proposes to amend its current Rule and functionality by adding language to 11.6(d) discussing how an order with a Discretionary range instruction would interact with an order with a Post Only instruction. Specifically, when an order with a Post Only instruction that is entered at the displayed or non-displayed ranked price of an order with a Discretionary Range instruction that does not remove liquidity on entry pursuant to Rule 11.6(n)(4),[14] the order with a Discretionary Range instruction would be converted to an executable order and will remove liquidity against such incoming order. Similar to the proposed amendments to the Aggressive and Super Aggressive instructions described below, due to the fact that an order with a Discretionary Range instruction contains a more aggressive price at which it is willing to execute, the Exchange proposes to treat orders with a Discretionary Range instruction as aggressive orders that would prefer to execute at their displayed or non-displayed ranked price than to forgo an execution due to applicable fees or rebates. Accordingly, in order to facilitate transactions consistent with the instructions of its Users, the Exchange proposes to execute resting orders with a Discretionary Range instruction (and certain orders with an Aggressive or Super Aggressive instruction, as described below) against incoming orders, when such incoming orders would otherwise forego an execution. The Exchange notes that the determination of whether an order should execute on entry against resting interest, including against a resting order with a Discretionary Range instruction, is made prior to determining whether the price of such an incoming order should be adjusted pursuant to the Exchange's price sliding functionality pursuant to Rule 11.6(l). In other words, an execution would have

[6] The term ''User'' is defined as ''any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.'' *See* Exchange Rule 1.5(ee).

[7] To the extent a proposed rule change is based on an existing BATS Rule, the language of the BATS and Exchange Rules may differ to extent necessary to conform with existing Exchange rule text or to account for details or descriptions included in the Exchange Rules but not currently included in BATS rules based on the current structure of such rules.

[8] The term ''System'' is defined as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.'' *See* Exchange Rule 1.5(cc).

[9] An ''Odd Lot'' is defined as ''any amount less than a Round Lot.'' *See* Exchange Rule 11.8(s)(2).

[10] The ''EDGX Book'' is defined as ''System's electronic file of orders.'' *See* Exchange Rule 1.5(d).

[11] *See* Securities Exchange Act Release No. 74738 (April 16, 2015), 80 FR 22600 (April 22, 2015) (SR–BATS–2015–09) (Order Granting Approval of a Proposed Rule Change to Amend Rules 11.9, 11.12, and 11.13).

[12] *See* Exchange Rule 11.6(e)(1).

[13] *See* Exchange Rule 11.6(e)(2).

[14] Under Rule 11.6(n)(4), an order with a Post Only instruction or Price Adjust instruction will remove contra-side liquidity from the EDGX Book if the order is an order to buy or sell a security priced below $1.00 or if the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. To determine at the time of a potential execution whether the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, the Exchange will use the highest possible rebate paid and highest possible fee charged for such executions on the Exchange.

already occurred as set forth above before the Exchange would consider whether an order could be displayed and/or posted to the EDGX Book, and if so, at what price.

Examples—Order With a Discretionary Range Instruction Executes Against an Order With a Post Only Instruction

Assume that the NBBO is $10.00 by $10.05, and the Exchange's BBO is $9.99 by $10.06. Assume that the Exchange receives a non-routable order to buy 100 shares at $10.00 per share designated with discretion to pay up to an additional $0.05 per share.

- Assume that the next order received by the Exchange is an order with a Post Only instruction to sell 100 shares of the security priced at $10.03 per share. The order with a Post Only instruction would not remove any liquidity upon entry pursuant to the Exchange's economic best interest functionality, and would post to the EDGX Book at $10.03. This would, in turn, trigger the discretion of the resting buy order with a Discretionary Range instruction and an execution would occur at $10.03. The order with a Post Only instruction to sell would be treated as the adder of liquidity and the buy order with discretion would be treated as the remover of liquidity.
- Assume the same facts as above, but that the incoming order with a Post Only instruction is priced at $10.00 instead of $10.03. As is true in the example above, the order with a Post Only instruction would not remove any liquidity upon entry pursuant to the Exchange's economic best interest functionality. Rather than cancelling the incoming order with a Post Only instruction to sell back to the User, particularly when the resting order with a Discretionary Range instruction is willing to buy the security for up to $10.05 per share, the Exchange proposes to execute at $10.00 the order with a Post Only instruction against the resting buy order with a Discretionary Range instruction. As is also true in the example above, the order with a Post Only instruction to sell would be treated as the liquidity adder and the buy order with discretion would be treated as the liquidity remover. As set forth in more detail below, if the incoming order was not an order with a Post Only instruction to sell, the incoming order could be executed at the ranked price of the order with a Discretionary Range instruction without restriction and would therefore be treated as the liquidity remover.

Third, the Exchange proposes to modify the process by which it handles incoming orders that interact with Discretionary Orders. The Exchange proposes to specify in Rule 11.6(d) its proposed handling of a contra-side order that executes against a resting Discretionary Order at its displayed or non-displayed ranked price or that contains a time-in-force of IOC or FOK and a price in the discretionary range by stating that such an incoming order will remove liquidity against the Discretionary Order. The Exchange also proposes to specify in Rule 11.6(d) its handling of orders that are intended to post to the EDGX Book at a price within the discretionary range of an order with a Discretionary Range instruction. This includes, but is not limited to, an order with a Post Only instruction. Specifically, the Exchange proposes to specify in Rule 11.6(d) that any contra-side order with a time-in-force other than IOC or FOK and a price within the discretionary range but not at the displayed or non-displayed ranked price of an order with a Discretionary Range instruction will be posted to the EDGX Book and then the order with a Discretionary Range instruction would remove liquidity against such posted order.

Examples—Order With a Discretionary Instruction Executes Against an Order Without a Post Only Instruction

Assume that the NBBO is $10.00 by $10.05, and the Exchange's BBO is $9.99 by $10.06. Assume that the Exchange receives an order to buy 100 shares of a security at $10.00 per share designated with discretion to pay up to an additional $0.05 per share.

- Assume that the next order received by the Exchange is an order with a Book Only instruction [15] to sell 100 shares of the security with a TIF other than IOC or FOK priced at $10.03 per share. The order with a Book Only instruction would not remove any liquidity upon entry and would post to the EDGX Book at $10.03. This would, in turn, trigger the discretion of the resting buy order and an execution would occur at $10.03. The order with a Book Only instruction to sell would be treated as the adder of liquidity and the buy order with discretion would be treated as the remover of liquidity.
- Assume the same facts as above, but that the incoming order with a Book Only instruction is priced at $10.00 instead of $10.03. The order with a Book Only instruction would remove liquidity upon entry at $10.00 per share pursuant to the Exchange's order execution rule.[16] Contrary to the examples set forth above, the order with a Book Only instruction to sell would be treated as the liquidity remover and the resting buy order with discretion would be treated as the liquidity adder. The Exchange notes that this example operates the same whether an order contains a TIF of IOC, FOK or any other TIF.

Finally, because orders with a Discretionary Range instruction have both a price at which they will be ranked and an additional discretionary price, the Exchange proposes to expressly state how the Exchange handles a routable order with a Discretionary Range instruction by stating that such an order will be routed away from the Exchange at its full discretionary price. As an example, assume the NBBO is $10.00 by $10.05 and the Exchange's BBO is $9.99 by $10.06. If the Exchange receives a routable order with a Discretionary Range instruction to buy at $10.00 with discretion to pay up to an additional $0.05 per share, the Exchange would route the order as a limit order to buy at $10.05. Any unexecuted portion of the order would be posted to the EDGX Book with a ranked price of $10.00 and discretion to pay up to $10.05.

The Exchange notes that it has historically treated orders with a Discretionary Range instruction as relatively passive orders and as orders that, once posted to the EDGX Book, would in all cases be treated as the liquidity provider. The changes proposed above will change the handling of orders with a Discretionary Range instruction such that such orders are more aggressive and, thus, such orders will execute on the Exchange in additional circumstances than they do currently without regard to such orders' status as resting orders. In turn, orders with a Discretionary Range instruction resting on the EDGX Book may be treated as liquidity removers under certain circumstances, as outlined above.

Pegged (Rule 11.6(j))

*Current Functionality.* In sum, an order with a Pegged instruction enables a User to specify that the order's price will peg to a price a certain amount away from the NBB or NBO (offset). If an order with a Pegged instruction displayed on the Exchange would lock the market, the price of the order will be automatically adjusted by the System to one Minimum Price Variation [17]

[15] The term ''Book Only'' is defined as an ''order instruction stating that an order will be matched against an order on the EDGX Book or posted to the EDGX Book, but will not route to an away Trading Center.'' *See* Exchange Rule 11.6(n)(3).

[16] *See* Exchange Rule 11.10.

[17] The term ''Minimum Price Variation'' is defined in Exchange Rule 11.6(i).

below the current NBO (for bids) or to one Minimum Price Variation above the current NBB (for offers). A new time stamp is created for the order each time it is automatically adjusted and orders with a Pegged instruction are not eligible for routing pursuant to Rule 11.11. For purposes of the Pegged instruction, the System's calculation of the NBBO does not take into account any orders with Pegged instructions that are resting on the EDGX Book. An order with a Pegged instruction is cancelled if an NBB or NBO, as applicable, is no longer available.

An order with a Pegged instruction may be a Market Peg or Primary Peg. An order that includes a Primary Peg instruction will have its price pegged by the System to the NBB, for a buy order, or the NBO for a sell order. In contrast, an order that includes a Market Peg instruction will have its price pegged by the System to the NBB, for a sell order, or the NBO, for a buy order.

*Proposed Functionality.* The Exchange proposes to amend the Pegged instruction under Rule 11.6(j) by deleting subparagraph (3) to further align the operation of orders that include a Pegged instruction with the operation of Pegged Orders [18] on BZX. As amended, Rule 11.6(j) would no longer provide for the re-pricing orders with a Pegged and Non-Displayed instruction where such orders include an offset, the amount of which causes them to be priced more aggressive than the midpoint of the NBBO. Under current subparagraph (3) of Rule 11.6(j), an order with a Pegged and Non-Displayed instruction that includes an offset that causes the order to be priced more aggressive than the midpoint of the NBBO is ranked at the midpoint of the NBBO pursuant to the re-pricing instruction under Rule 11.6(l)(3) with discretion to execute to the price established by the offset, or the NBB (NBO) where the offset for an order to sell (buy) is equal to or exceeds the NBB (NBO). The Exchange proposes to remove this functionality and instead to handle such orders in accordance with Rule 11.6(j) generally.

For example, assume the NBBO is $10.00 by $10.05. A Limit Order is entered into the System to buy 500 shares with a Non-Displayed and Market Peg instruction and offset of −$0.02. Because the order's offset causes it to be priced more aggressively than the midpoint of the NBBO, under current functionality it would be ranked at $10.025, the midpoint of the NBBO, with discretion to execute to $10.03, the price established by the offset.[19] As proposed, the order with a Non-Displayed and Market Peg instruction and offset of −$0.02 will ranked at $10.03, the price established by the offset and not the midpoint of the NBBO, as is currently the case.

Re-Pricing (Rule 11.6(l))

The Exchange currently offers re-pricing instructions which, in all cases, result in the ranking and/or display of an order at a price other than its limit price in order to comply with applicable securities laws and Exchange Rules. Specifically, the Exchange currently offers re-pricing instructions to ensure compliance with Regulation NMS and Regulation SHO. The re-pricing instructions currently offered by the Exchange re-price and display an order upon entry and in certain cases again re-price and re-display an order at a more aggressive price based on changes in the NBBO. Rule 11.6(l) sets forth the re-pricing instructions currently available to Users with regard to Regulation NMS compliance—Price Adjust, and Hide Not Slide, as well as a separate re-pricing process with regard to Regulation SHO compliance. As described below, the Exchange now proposes to amend its re-pricing instructions to align and streamline Exchange functionality with that of BZX.

Re-Pricing Instructions To Comply With Rule 610(d) of Regulation NMS

The Exchange proposes to amend its re-pricing instructions to comply with Rule 610(d) of Regulation NMS as follows: (i) Amend the Price Adjust instruction under Rule 11.6(l)(1)(A) to: (A) divide the rule into subparagraphs (i), (ii), and (iii); (B) clarify the order must be a Locking Quotation [20] or Crossing Quotation [21] of an external market; and (C) propose new subparagraph (iv) described below; and (ii) replace the Hide Not Slide instruction under Rule 11.6(l)(1)(B) with Display-Price Sliding, which would operate in a similar fashion to the display-price sliding process currently available on BZX as described under BZX Rule 11.9(g)(1).

*Price Adjust Re-Pricing (Rule 11.6(l)(1)(A)).* Under the Price Adjust instruction, where a buy (sell) order would be a Locking Quotation or Crossing Quotation if displayed by the System on the EDGX Book at the time of entry, the order will be displayed and ranked [22] at a price that is one Minimum Price Variation lower (higher) than the Locking Price.[23] The Exchange proposes to modify the operation of the Price Adjust instruction such that an order must be a Locking Quotation or Crossing Quotation of an external market, not the EDGX Book, in order be eligible for the re-pricing. This change will provide additional specificity within the Exchange's rules regarding the applicability of the Price Adjust instruction as well as align the description with BZX's Price Adjust process described under BZX Rule 11.9(g)(2).[24] This change is also consistent with display-price sliding on BZX and Display-Price Sliding discussed below, under which orders are only re-priced where they are a Locking Quotation or Crossing Quotation of an external market, and not the BZX order book or EDGX Book, as applicable. Other than as described above, these provisions will remain unchanged and be set forth under subparagraph (i), so that the Exchange may renumber the following provisions of Rule 11.6(l)(1)(A) as set forth below.

The Exchange proposes to restructure the provisions of the current Rule by

[18] *See* BZX Rule 11.9(c)(8).

[19] In such cases, the order will be given a new time stamp each time it is re-priced by the System in response to changes in the midpoint of the NBBO.

[20] The term ''Locking Quotation'' is defined as ''[t]he display of a bid for an NMS stock at a price that equals the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock at a price that equals the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan in violation of Rule 610(d) of Regulation NMS.'' *See* Exchange Rule 11.6(g).

[21] The term ''Crossing Quotation'' is defined as ''[t]he display of a bid (offer) for an NMS stock at a price that is higher (lower) than the price of an offer (bid) for such NMS stock previously disseminated pursuant to an effective national market system plan in violation of Rule 610(d) of Regulation NMS.'' *See* Exchange Rule 11.6(c).

[22] For purposes of the description of the re-pricing instructions under proposed Rule 11.6(l), the terms ''ranked'' and ''priced'' are synonymous and used interchangeably.

[23] The term ''Locking Price'' is defined as ''[t]he price at which an order to buy (sell), that if displayed by the System on the EDGX Book, either upon entry into the System, or upon return to the System after being routed away, would be a Locking Quotation.'' *See* Exchange Rule 11.6(f).

[24] The description of the Price Adjust process under BATS Rule 11.9(g)(2), states that ''[a]n order eligible for display by the Exchange that, at the time of entry, would create a violation of Rule 610(d) of Regulation NMS by locking or crossing a Protected Quotation *of an external market* will be ranked and displayed by the System at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers) . . .'' (*emphasis added*). Thus, an order will only be re-priced pursuant to its Price Adjust process where it locks or crosses a Protected Quotation of an external market, and not BATS. The Exchange notes that this reflects a recent change to BATS Rule 11.9(g)(2). *See* Securities Exchange Act Release No. 75324 (June 29, 2015) (SR–BATS–2015–47) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 11.9 of BATS Exchange, Inc., to Modify its Price Adjust Functionality).

separating rule text and adopting additional subparagraph references, subparagraph (ii) and (iii).

The Exchange also proposes to add new subparagraph (iv) to Rule 11.6(l)(1)(A) which would cover where an order with a Price Adjust instruction and a Post Only instruction would be a Locking Quotation or Crossing Quotation of the Exchange. The proposed amendments to Rule 11.6(l)(1)(A) are based on BZX Rule 11.9(g)(2)(D). To the extent the amended text of Exchange Rule 11.6(l)(1)(A) differs from BZX Rule 11.9(g)(2)(D), such differences are necessary to conform the rule with existing rule text.

As noted above, an order subject to the Price Adjust instruction will only be re-priced where it would be a Locking Quotation of Crossing Quotation of an external market, and not the Exchange. In such case, any display-eligible order with a Price Adjust instruction and a Post Only instruction that would be a Locking Quotation or Crossing Quotation of the Exchange upon entry will be executed as set forth in Rule 11.6(n)(4) [25] or cancelled. For example, assume the NBBO is $10.00 by $10.01 and an order to sell at $10.01 is resting on the EDGX Book. Further assume that no other Trading Center [26] is displaying an order to sell at $10.01. Assume that the Exchange receives an order to buy with a Post Only instruction and Price Adjust instruction at $10.01. The incoming order to buy will be cancelled unless, pursuant to Rule 11.6(n)(4), the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity. The incoming order to buy will not be posted to the EDGX Book and re-priced pursuant to the Price Adjust instruction.

Replacing Hide Not Slide With Display-Price Sliding (Rule 11.6(l)(1)(B))

The Exchange proposes to replace the Hide Not Slide re-pricing instruction under Rule 11.6(l)(1)(B) with Display-Price Sliding, which would operate the same fashion as the Display-Price Sliding process currently available on BZX and described under BZX Rule 11.9(g)(1).[27] The main differences between the current operation of orders with a Hide Not Slide instruction and the proposed Display-Price Sliding instruction are: (i) Orders with a Hide Not Slide instruction are ranked at the midpoint of the NBBO with discretion to the Locking Price while orders with Display-Price Sliding instruction are ranked at the Locking Price; and (ii) orders with the Hide Not Slide and Post Only instructions are re-priced if they would be a Locking Quotation of the EDGX Book, while orders with the Display-Price Sliding and Post Only instructions would be executed in accordance with Rule 11.6(n)(4) [28] or cancelled if they would be a Locking Quotation of the EDGX Book, but re-priced if they would be a Locking Quotation of an external market.

Under the current Hide Not Slide instruction, an order that would be a Locking Quotation or Crossing Quotation if displayed by the System on the EDGX Book at the time of entry, will be displayed at a price that is one Minimum Price Variation lower (higher) than the Locking Price for orders to buy (sell), and ranked at the mid-point of the NBBO with discretion to execute at the Locking Price. However, if a contra-side order that equals the Locking Price is displayed by the System on the EDGX Book, the order subject to the Hide Not Slide instruction will be ranked at the mid-point of the NBBO but its discretion to execute at the Locking Price will be suspended unless and until there is no contra-side displayed order on the EDGX Book that equals the Locking Price. Where the NBBO changes such that the order, if displayed by the System on the EDGX Book at the Locking Price, would not be a Locking Quotation or Crossing Quotation, the System will rank and display such orders at the Locking Price. The order will not be subject to further re-ranking and will be displayed on the EDGX Book at the Locking Price until executed or cancelled by the User. The order will receive a new time stamp when it is ranked at the Locking Price. Pursuant to Rule 11.9, all orders that are re-ranked and re-displayed by the System on the EDGX Book pursuant to the Hide Not Slide instruction retain their priority as compared to each other based upon the time such orders were initially received by the System.

The Exchange proposes to replace the Hide Not Slide instruction under Rule 11.6(l)(1)(B) with the Display-Price Sliding instruction, which would operate in an identical fashion as the Display-Price Sliding process currently available on BZX.[29] Display-Price Sliding would be an order instruction requiring that where an order would be a Locking Quotation or Crossing Quotation of an external market if displayed by the System on the EDGX Book at the time of entry, such order will be ranked at the Locking Price and displayed by the System at one Minimum Price Variation lower (higher) than the Locking Price for orders to buy (sell). A User may elect for the Display-Price Sliding instruction to only apply where their display-eligible order would be a Locking Quotation of an external market upon entry (''Lock Only''). In such cases, the User's display-eligible order would be cancelled if the order would be a Crossing Quotation of an external market upon entry.

For example, assume the Exchange has a posted and displayed bid to buy at $10.10 and a posted and displayed offer to sell $10.13. Assume the NBBO is $10.10 by $10.12. If the Exchange receives an order with a Book Only instruction to buy at $10.12, the Exchange will rank the order to buy at $10.12 and display the order at $10.11 because displaying the bid at $10.12 would cause it to be a Locking Quotation of an external market's Protected Offer to sell for $10.12. If the NBO then moved to $10.13, the Exchange would un-slide the bid to buy and display it at its ranked price (and limit price) of $10.12.

As an example of the Lock-Only option for Display-Price Sliding, assume the Exchange has a posted and displayed bid to buy at $10.10 and a posted and displayed offer to sell at $10.14. Assume the NBBO is $10.10 by $10.12. If the Exchange receives an order with a Book Only instruction to buy 100 shares at $10.13 and the User has elected the Lock-Only option for Display-Price Sliding, the Exchange will cancel the order back to the User. To reiterate a basic example of Display-Price Sliding, if instead the User applied Display-Price Sliding (and not the Lock-Only option for Display-Price Sliding), the Exchange would rank the order to buy at $10.12 and display the order at $10.11 because displaying the bid at $10.13 would cause it to be a Crossing Quotation of an external market's Protected Offer to sell for $10.12. If the NBO then moved to $10.13, the Exchange would un-slide the bid to buy and display it at $10.12.

As proposed, an order subject to the Display-Price Sliding instruction will retain its original limit price irrespective

[25] *See supra* note 14.

[26] The term ''Trading Center'' is defined as ''[o]ther securities exchanges, facilities of securities exchanges, automated trading systems, electronic communications networks or other broker dealers.'' *See* Exchange Rule 11.6(r).

[27] *See also* Securities Exchange Act Release Nos. 64475 (May 12, 2011), 76 FR 28830, 28832 (May 18, 2011) (SR–BATS–2011–015); 67657 (August 14, 2012), 77 FR 50199 (August 20, 2012) (SR–BATS–2012–035); 68791 (January 31, 2013), 78 FR 8617 (February 6, 2013) (SR–BATS–2013–007) (''BATS Display-Price Sliding Releases'').

[28] *See supra* note 14.

[29] *See* BATS Rule 11.9(g)(1). *See also* the BATS Display-Price Sliding Releases, *supra* note 27.

of the prices at which such order is ranked and displayed. An order subject to the Display-Price Sliding instruction will be displayed at the most aggressive price possible and receive a new time stamp should the NBBO change such that the order would no longer be a Locking Quotation or Crossing Quotation of an external market. As is true under the Price Adjust and current Hide Not Slide instructions, all orders that are re-ranked and re-displayed pursuant to the Display-Price Sliding instruction will retain their priority as compared to other orders subject to the Display-Price Sliding instruction based upon the time such orders were initially received by the Exchange. Following the initial ranking and display of an order subject to the Display-Price Sliding instruction, an order will only be re-ranked and re-displayed to the extent it achieves a more aggressive price, provided, however, that the Exchange will re-rank an order at its displayed price in the event such order's displayed price would be a Locking Quotation or Crossing Quotation. Such event will not result in a change in priority for the order at its displayed price. This will avoid the potential of a ranked price that crosses the Protected Quotation displayed by such external market, which could, in turn, lead to a trade through of such Protected Quotation at such ranked price. The Exchange notes that, as described below, when an external market crosses the Exchange's Protected Quotation and the Exchange's Protected Quotation is a displayed order subject to Display-Price Sliding, the Exchange proposes to re-rank such order at the displayed price. Thus, the order displayed by the Exchange will still be ranked and permitted to execute at a price that is consistent with Rule 611(b)(4) of Regulation NMS.[30]

The ranked and displayed prices of an order subject to the Display-Price Sliding instruction may be adjusted once or multiple times depending upon the instructions of a User and changes to the prevailing NBBO. Multiple re-pricing is optional and must be explicitly selected by a User before it will be applied. The Exchange's default Display-Price Sliding instruction will only adjust the ranked and displayed prices of an order upon entry and then the displayed price one time following a change to the prevailing NBBO, provided however, that if such an order's displayed price becomes a Locking Quotation or Crossing Quotation then the Exchange will adjust the ranked price of such order and it will not be further re-ranked or re-displayed at any other price. Orders subject to the optional multiple price sliding process will be further re-ranked and re-displayed as permissible based on changes to the prevailing NBBO.

As an example of the multiple re-pricing option for Display-Price Sliding, assume the Exchange has a posted and displayed bid to buy at $10.10 and a posted and displayed offer to sell at $10.14. Assume the NBBO is $10.10 by $10.12. If the Exchange receives an order with a Book Only instruction to buy at $10.13, the Exchange would rank the order to buy at $10.12 and display the order at $10.11 because displaying the bid at $10.13 would cause it to be a Crossing Quotation of an external market's Protected Offer to sell for $10.12. If the NBO then moved to $10.13, the Exchange would un-slide the bid to buy, rank it at $10.13 and display it at $10.12. Where the User did not elect the multiple re-pricing option for Display-Price Sliding, the Exchange would not further adjust the ranked or displayed price following this un-slide. However, under the multiple re-pricing option, if the NBO then moved to $10.14, the Exchange would un-slide the bid to buy and display it at its full limit price of $10.13.

Pursuant to proposed Rule 11.6(l)(1)(B)(iv), any display-eligible order with a Post Only instruction that would be a Locking Quotation or Crossing Quotation of the Exchange upon entry will be executed as set forth in Rule 11.6(n)(4) or cancelled. Consistent with the principle of not re-pricing orders to avoid executions, in the event the NBBO changes such that an order with a Post Only instruction subject to Display-Price Sliding instruction would be ranked at a price at which it could remove displayed liquidity from the EDGX Book, the order will be executed as set forth in Rule 11.6(n)(4) or cancelled.[31]

Pursuant to proposed Rule 11.6(l)(1)(B)(v), an order with a Post Only instruction will be permitted to post and be displayed opposite the ranked price of orders subject to Display-Price Sliding instruction. In the event an order subject to the Display-Price Sliding instruction is ranked on the EDGX Book with a price equal to an opposite side order displayed by the Exchange, it will be subject to processing as set forth in Rule 11.10(a)(4), which is described in greater detail below.

For example, assume the Exchange has a posted and displayed bid to buy at $10.10 and a posted and displayed offer to sell at $10.12. Assume the NBBO (including Protected Quotations of other external markets) is also $10.10 by $10.12. If the Exchange receives an order with a Post Only instruction to buy at $10.12 per share, unless executed pursuant to Rule 11.6(n)(4),[32] the Exchange would cancel the order back to the User because absent the order with a Post Only instruction, the order to buy at $10.12 would be able to remove the order to sell $10.12, and, as explained above, the Exchange would no longer offer re-pricing to avoid executions against orders displayed by the Exchange.

If the Exchange did not have a displayed offer to sell at $10.12 in the example above, but instead the best offer on the EDGX Book was $10.13, the Exchange would apply Display-Price Sliding to the incoming order to buy by ranking such order at $10.12 and displaying the order at $10.11. The EDGX Book would now be displayed as $10.11 by $10.13. Assume, however, that after price sliding the incoming order to buy from $10.12 to a display price of $10.11, the Exchange received an order with a Post Only instruction to sell at $10.12, thus joining the NBO. The order with a Post Only instruction would be permitted to post and be displayed opposite the ranked price of orders subject to display-price sliding. Accordingly, the Exchange would allow such incoming order with a Post Only instruction to sell at $10.12 to post and display on the EDGX Book, as described above, with an opposite side order subject to Display-Price Sliding displayed at $10.11. Assume that the next Protected Offer displayed by all external markets other than the Exchange moved to $10.13. In this situation the Exchange would un-slide but then cancel the bid at $10.12 because, as proposed, in the event the NBBO changes such that an order with a Post Only instruction subject to Display-Price Sliding would un-slide and would be ranked at a price at which it could remove displayed liquidity from the EDGX Book (*i.e.,* when the Exchange is at the NBB or NBO) the Exchange proposes to execute [33] or cancel such order.

[30] 17 CFR 242.611(b)(4). *See also* the BATS Display-Price Sliding Releases, *supra* note 27.

[31] As noted above, the Exchange will execute an order with a Post Only instruction in certain circumstances where the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. *See supra* note 14.

[32] *Id.*

[33] *Id.*

Re-Pricing Instructions To Comply With Rule 201 of Regulation SHO

*Current Functionality.* Under Rule 11.6(l)(2), an order to sell with a Short Sale instruction that, at the time of entry, could not be executed or displayed in compliance with Rule 201 of Regulation SHO will be re-priced by the System at the Permitted Price.[34] The default short sale re-pricing process will only re-price an order upon entry and one additional time to reflect a decline in the NBB. Depending upon the instructions of a User, to reflect declines in the NBB the System will continue to re-price and re-display a short sale order at the Permitted Price down to the order's limit price. In the event the NBB changes such that the price of an order with a Non-Displayed instruction subject to Rule 201 of Regulation SHO would be a Locking Quotation or Crossing Quotation, the order will receive a new time stamp, and will be re-priced by the System to the mid-point of the NBBO.

Current Rule 11.6(l)(2) states that: (i) When a Short Sale Circuit Breaker is in effect, the System will execute a sell order with a Displayed and Short Sale instruction at the price of the NBB if, at the time of initial display of the sell order with a Short Sale instruction, the order was at a price above the then current NBB; (ii) orders with a Short Exempt instruction will not be subject to re-pricing under amended Rule 11.6(l)(2); and (iii) the re-pricing instructions to comply with Rule 610(d) of Regulation NMS will continue to be ignored for an order to sell with a Short Sale instruction when a Short Sale Circuit Breaker is in effect and the re-pricing instructions to comply with Rule 201 of Regulation SHO under this Rule will apply.

*Proposed Functionality.* The Exchange proposes to make the below changes to align the operation of the Exchange's short sale re-pricing process with that of BZX under BZX Rule 11.9(g)(5). First, the Exchange proposed to amend Rule 11.6(l)(2)(A) to only re-price an order upon entry, and not one additional time to reflect a decline in the NBB. This is consistent with the BZX short sale price sliding process under BZX Rule 11.9(g)(5)(A), which only re-prices an order upon entry. Second, the Exchange's rules currently state that in the event the NBB changes such that the price of an order with a Non-Displayed instruction subject to Rule 201 of Regulation SHO would be a Locking Quotation or Crossing Quotation, the order will receive a new time stamp, and will be re-priced by the System to the mid-point of the NBBO. As proposed, such order will be re-priced to the Permitted Price, and not the mid-point of the NBBO. This is consistent with BZX Rule 11.9(g)(5)(A), which also re-prices order subject to Rule 201 of Regulation SHO to the Permitted Price in such cases.

The Exchange also proposes to delete language from Rule 11.6(l)(2)(A) regarding orders with a Short Sale instruction and Price Adjust instruction being re-priced to the Permitted Price. The Exchange also proposes to delete language from Rule 11.6(l)(2)(A) regarding orders with a Short Sale instruction and a Hide Not Slide instruction being re-priced to the mid-point of the NBBO. This language is proposed to be deleted because, as discussed above, the Hide Not Slide instruction is being replaced by Display-Price Sliding, and because all orders with a Display-Price Sliding or Price Adjust instruction will be subject to the short sale re-pricing process under the Rule.

Lastly, the Exchange proposes to amend Rule 11.6(l)(2)(D) to align with BZX Rule 11.9(g)(6) and state that where an order is subject to either a Display-Price Sliding instruction or a Price Adjust instruction and also contains a Short Sale instruction when a Short Sale Circuit Breaker is in effect, the re-pricing instructions to comply with Rule 201 of Regulation SHO will apply. The Exchange does not propose this change to alter the meaning of Rule 11.6(l)(2)(D), but rather, to align the language with BZX Rule 11.9(g) in order to provide consistent rules across the Exchange and BZX.

Re-Pricing of Orders With a Non-Displayed Instruction and Odd Lot Orders (Rule 11.6(l)(3))

*Current Functionality.* Under Rule 11.6(l)(3), both an order with a Non-Displayed instruction or an order with an Odd Lot size that is priced better than the midpoint of the NBBO will be ranked at the midpoint of the NBBO with discretion to execute to its limit price. For securities priced equal to or greater than $1.00 where the midpoint of the NBBO is in an increment smaller than $0.01, an order buy (sell) with an Odd Lot size and a Displayed instruction priced better than the midpoint of the NBBO will be displayed at the next full penny increment below (above) the midpoint of the NBBO. The price of the order is automatically re-ranked by the System in response to changes in the NBBO until it reaches its limit price. A new time stamp is created for the order each time the midpoint of the NBBO changes. All orders with a Non-Displayed instruction and orders with an Odd Lot size that are re-ranked to the midpoint of the NBBO will retain their priority as compared to other orders with a Non-Displayed instruction and orders with an Odd Lot size, respectively, based upon the time such orders were ranked at the midpoint of the NBBO. While a User may affirmatively elect that a buy (sell) order with a Non-Displayed instruction Cancel Back[35] when the order's limit price is greater (less) than the NBO (NBB), they are unable to do so for an order with an Odd Lot size. In such case, the User may cancel the order.

*Proposed Functionality.* The Exchange proposes to amend Rule 11.6(l)(3) to align with BZX Rule 11.9(g)(4). To the extent the amended text of Exchange Rule 11.6(l)(3) differs from BZX Rule 11.9(g)(4), such differences are necessary to conform the rule to existing rule text. As amended, orders with a Non-Displayed instruction or orders of Odd Lot size priced better than the NBBO will no longer be ranked at the mid-point of the NBBO. Amended Rule 11.6(l)(2) would state that in order to avoid potentially trading through Protected Quotations of external markets, any order with a Non-Displayed instruction that is subject to the Display-Price Sliding or Price Adjust instruction would be ranked at the Locking Price on entry. In the event the NBBO changes such that an order with a Non-Displayed instruction subject to the Display-Price Sliding or Price Adjust instruction would cross a Protected Quotation of an external market, the order will receive a new time stamp, and will be ranked by the System at the Locking Price. In the event an order with a Non-Displayed instruction has been re-priced by the System, such order with a Non-Displayed instruction is not re-priced by the System unless it again would cross a Protected Quotation of an external market. The Rule would no longer make particular reference to orders of Odd Lot size, as those orders would be treated like orders of Round Lot or Mixed Lot size as currently done on BZX. This functionality is equivalent to the handling of displayable orders

[34] The term ''Permitted Price'' is defined as ''[t]he price at which a sell order will be displayed at one Minimum Price Variation above the NBB.'' *See* Exchange Rule 11.6(k).

[35] The term ''Cancel Back'' is defined as ''[a]n instruction the User may attach to an order instructing the System to immediately cancel the order when, if displayed by the System on the EDGX Book at the time of entry, or upon return to the System after being routed away, would create a violation of Rule 610(d) of Regulation NMS or Rule 201 of Regulation SHO, or the order cannot otherwise be executed or posted by the System to the EDGX Book at its limit price.'' *See* Exchange Rule 11.6(b).

pursuant to the Display-Price Sliding instruction except that such orders will not have a displayed price.

Aggressive (Rule 11.6(n)(1))

Aggressive is an order instruction that directs the System to route the order if an away Trading Center crosses the limit price of the order resting on the EDGX Book. Based on BZX Rule 11.13(a)(4)(A), the Exchange proposes to also amend Rule 11.6(n)(1) to state that any routable order with a Non-Displayed instruction that is resting on the EDGX Book and is crossed by an away Trading Center will be automatically routed to the Trading Center displaying the Crossing Quotation. To the extent the amended text of Exchange Rule 11.6(n)(1) differs from BZX Rule 11.13(a)(4)(A), such differences are necessary to conform the rule with existing rule text.

Super Aggressive (Rule 11.6(n)(2))

Super Aggressive is an order instruction that directs the System to route an order when an away Trading Center locks or crosses the limit price of the order resting on the EDGX Book. A User may designate an order as Super Aggressive solely to routable orders posted to the EDGX Book with remaining size of an Odd Lot. Based on BZX Rule 11.13(b)(4)(C),[36] the Exchange proposes to amend Rule 11.6(n)(2) to state that when any order with a Super Aggressive instruction is locked by an incoming order with a Post Only instruction that does not remove liquidity pursuant to Rule 11.6(n)(4),[37] the order with a Super Aggressive instruction would be converted to an executable order and will remove liquidity against such incoming order. Rule 11.6(n)(2) would further state that notwithstanding the foregoing, if an order that does not contain a Super Aggressive instruction maintains higher priority than one or more Super Aggressive eligible orders, the Super Aggressive eligible order(s) with lower priority will not be converted, as described above, and the incoming order with a Post Only instruction will be posted or cancelled in accordance with Rule 11.6(n)(4). To the extent the amended text of Exchange Rule 11.6(n)(2) differs from BZX Rule 11.13(b)(4)(C), such differences are necessary to conform the rule with existing rule text.

The Exchange proposes to apply this logic in order to facilitate executions that would otherwise not occur due to the Post Only instruction requirement to not remove liquidity. Because a Super Aggressive Re-Route eligible order is willing to route to an away Trading Center and remove liquidity (*i.e.,* pay a fee at such Trading Center) when it becomes either a Locking Quotation or Crossing Quotation, the Exchange believes it is reasonable and consistent with the instruction to force an execution between an incoming order with a Post Only instruction and an order that has been posted to the EDGX Book with the Super Aggressive instruction. The Exchange notes that the determination of whether an order should execute on entry against resting interest, including against resting orders with a Super Aggressive instruction, is made prior to determining whether the price of such an incoming order should be adjusted pursuant to the Exchange's re-pricing instructions under Rule 11.6(l). Like BZX Rule 11.13(b)(4)(C), the Exchange has limited the proposed language to orders with a Post Only instruction that would lock the price of an order with a Super Aggressive instruction because orders with a Post Only instruction that cross resting orders will always remove liquidity because it is in their economic best interest to do so.[38] Also like BZX Rule 11.13(b)(4)(C), the Exchange proposes to make clear that although it will execute an order with a Super Aggressive instruction against an order with a Post Only instruction that would create a Locking Quotation, if an order that does not contain a Super Aggressive instruction maintains higher priority than one or more Super Aggressive eligible orders, the Super Aggressive eligible order(s) with lower priority will not be converted, as described above, and the incoming order with a Post Only instruction will be posted or cancelled in accordance with Rule 11.6(n)(4). The Exchange believes it is necessary to avoid applying the Super Aggressive functionality to routable orders that are resting behind orders that are not eligible for routing to avoid violating the Exchange's priority rule, Rule 11.9.

Example—Super Aggressive Re-Route and Orders With a Post Only Instruction

Assume that the Exchange receives an order to buy 300 shares of a security at $10.10 per share designated with a Super Aggressive instruction. Assume further that the NBBO is $10.09 by $10.10 when the order is received, and the Exchange's lowest offer is priced at $10.11. The Exchange will route the order away from the Exchange as a bid to buy 300 shares at $10.10. Assume that the order obtains one 100 share execution through the routing process and then returns to the Exchange. The Exchange will post the order as a bid to buy 200 shares at $10.10. If the Exchange subsequently receives an order with a Post Only instruction to sell priced at $10.09 per share, such order will execute against the posted order to buy with an execution price of $10.10. The posted buy order will be treated as the liquidity provider and the incoming order with a Post Only instruction to sell will be treated as the liquidity remover, based on Exchange Rule 11.6(n)(4) that executes orders with a Post Only instruction upon entry if such execution is in their economic interest.

However, assuming the same facts as above, if the incoming order with a Post Only instruction to sell is priced at $10.10 and thus does not remove liquidity pursuant to the economic best interest functionality, the posted order with a Super Aggressive instruction will execute against such order at $10.10. In this scenario, the posted order to buy will be treated as the liquidity remover and the incoming order with a Post Only instruction to sell will be treated as the liquidity provider.

Finally, assume that the NBBO is $10.10 by $10.11 and that the Exchange has a displayed bid to buy 100 shares of a security at $10.10 and a displayed offer to sell 100 shares of a security at $10.11. Assume that the displayed bid has not been designated with the Super Aggressive instruction. Assume next that the Exchange receives a second displayable bid to buy 100 shares of the same security at $10.10 that has been designated as routable and subject to the Super Aggressive instruction. Because there is no liquidity to which the Exchange can route the order, the second order will post to the EDGX Book as a bid to buy at $10.10 behind the original displayed bid to buy at $10.10. If the Exchange then received an order with a Post Only instruction to sell 100 shares at $10.10 then no execution would occur because the incoming order with a Post Only instruction cannot remove liquidity at $10.10 based on the economic best interest analysis, the first order with priority to buy at $10.10 was not designated with the Super Aggressive instruction and the second booked order to buy at $10.10 is not permitted to bypass the first order as this would

[36] *See supra* note 11.

[37] As noted above, the Exchange will execute an order with a Post Only instruction in certain circumstances where the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. *See supra* note 14.

[38] *See id.*

result in a violation of the Exchange's priority rule, Rule 11.9.

Post Only (Rule 11.6(n)(4))

As discussed above, the Exchange proposes to replace the Hide Not Slide re-pricing instruction with Display-Price Sliding. Therefore, the Exchange also proposes to amend the definition of Post Only under Rule 11.6(n)(4) to replace a reference to the Hide Not Slide instruction with Display-Price Sliding. In sum, Post Only is an instruction that may be attached to an order that is to be ranked and executed on the Exchange pursuant to Rule 11.9 and Rule 11.10(a)(4) or cancelled, as appropriate, without routing away to another trading center except that the order will not remove liquidity from the EDGX Book, except as described below. As amended, an order with a Post Only instruction and a Display-Price Sliding, rather than Hide Not Slide, or Price Adjust instruction will remove contra-side liquidity from the EDGX Book if the order is an order to buy or sell a security priced below $1.00 or if the value of such execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the EDGX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided.

Time-In-Force (''TIF'') (Rule 11.6(q))

The Exchange proposes to amend its TIF instructions to align with BZX Rule 11.9(b). To the extent the amended text of Exchange Rule 11.6(q) differs from BZX Rule 11.9(b), such differences are necessary to conform the rule with existing Exchange rule text.

First, the Exchange proposes to align the definition of Immediate-or-Cancel (''IOC'') under Rule 11.6(q)(1) with BZX Rule 11.9(b)(1) to make clear that an order with an IOC instruction that does not include a Book Only instruction and that cannot be executed in accordance with Rule 11.10(a)(4) on the System when reaching the Exchange will be eligible for routing away pursuant to Rule 11.11.[39] Under current rules, the TIF of IOC indicates that an order is to be executed in whole or in part as soon as such order is received and the portion not executed is to be cancelled. Based on BZX Rule 11.9(b)(1), the Exchange proposes to expand upon the description of IOC to specify that an order with such TIF may be routed away from the Exchange but that in no event will an order with such TIF be posted to the EDGX Book. Also like BZX, the Exchange notes that an order with an IOC instruction routed away from the Exchange are in turn routed with an IOC instruction.

Second, the Exchange proposes to amend the definition of the Fill-or-Kill (''FOK'') under Rule 11.6(q)(3) to align with BZX Rule 11.9(b)(6) to make clear that an order with a TIF instruction of FOK is not eligible for routing away pursuant to Rule 11.11.[40] Although orders with a TIF of FOK are generally treated the same as order with a TIF of IOC, the Exchange does not permit routing of orders with an order with a TIF of FOK because the Exchange is unable to ensure the instruction of FOK (*i.e.,* execution of an order in its entirety) through the routing process.

Rule 11.8, Order Types

The Exchange proposes to amend the description of Limit Orders under Rule 11.8(b) to align its operation with existing BZX Rules and functionality as well as to reflect the relevant proposed changes discussed above. In addition, the Exchange proposes to amend Rule 11.8(d) to replace the MidPoint Match (''MPM'') order type with Market Peg order type, which would operate in the same fashion as identical order types available on EDGA and BZX. Each of these changes are described in more detail below.

*Limit Orders (Rule 11.8(b)).* The Exchange proposes to amend Rules 11.8(b) to: (i) update the description of the inclusion of a Discretionary Range instruction on a Limit Order; (ii) replace references to Hide Not Slide with Display-Price Sliding under subparagraph (10); and (iii) amend subparagraph (12) to update the description of the re-pricing of orders with a Non-Displayed instruction, both of which are intended to reflect proposed changes to this functionality discussed above.

First, the Exchange proposes to re-locate within Rule 11.8(b) and re-word the statement regarding the inclusion of a Discretionary Range on a Limit Order. Current Rule 11.8(b)(8) currently states that a ''User may include a Discretionary Range instruction.'' This ability to include a Discretionary Range instruction on a Limit Order is currently grouped with other functionality that can be elected for Limit Orders that also include a Post Only or Book Only instruction as well as specified time-in-force instructions for orders that can be entered into the System and post to the EDGX Book. However, the System does not allow the combination of a Discretionary Range and a Post Only instruction. Accordingly, the Exchange proposes to re-locate the reference to the Discretionary Range instruction within Rule 11.8(b) so that it is no longer grouped with other orders that can be combined with a Post Only instruction. The Exchange also proposes to state in Rule 11.8(b) that: (i) a Limit Order with a Discretionary Range instruction may also include a Book Only instruction; and (ii) a Limit Order with a Discretionary Range instruction and a Post Only instruction will be rejected. Further, the Exchange proposes to refer to the ability of a Limit Order to include a Discretionary Range instruction, rather than a ''User'' that may include a Discretionary Range instruction.

Second, the Exchange proposes to amend Rule 11.8(b)(10) regarding the application of the re-pricing instructions to comply with Rule 610 of Regulation NMS to Limit Orders. In particular, to align with BZX Rule 11.9(g) and EDGA Rule 11.8(b)(10), the Exchange proposes to amend the default re-pricing option from Price Adjust to Display-Price Sliding, which is the default re-pricing option on BZX and EDGA. As amended, a Limit Order that, if displayed at its limit price at the time of entry into the System, would become a Locking Quotation or Crossing Quotation will be automatically defaulted by the System to the Display-Price Sliding instruction, unless the User affirmatively elects to have the order immediately Cancel Back or affirmatively elects the Price Adjust instruction, rather than the Hide Not Slide instruction, as the Hide Not Slide instruction would no longer be available. This proposed rule change is designed to update Rule 11.8(b)(10) to reflect the proposed replacement of Hide Not Slide with Display-Price Sliding under Rule 11.6(l)(1)(B) discussed above. Moreover, the change to default orders to the Display-Price Sliding instruction, rather than Price Adjust, will enable the Exchange to provide consistent default behavior across EDGX, EDGA and BZX.

Third, the Exchange proposes to amend Rule 11.8(b)(12) regarding the re-pricing of orders with a Non-Displayed instruction and orders of Odd Lot Size. These changes are intended to reflect the proposed amendments to Rule 11.6(l)(3) discussed above. The proposal would remove all references to orders of Odd Lot size within Rule 11.8(b)(12), as orders of Odd Lot size would be treated like orders of Round Lot or Mixed Lot size, as currently done on BZX. The proposal would also amend Rule 11.8(b)(12) to state that a Limit Order with a Non-Displayed instruction which crosses a Protected Quotation of an external market, rather than being priced better than the midpoint of the

[39] *See supra* note 11.

[40] *Id.*

NBBO, will be re-priced in accordance with the Re-Pricing of orders with a Non-Displayed instruction process under Rule 11.6(l)(3). Lastly, the Exchange proposes to state that under Rule 11.6(l)(3), a User may affirmatively elect that a buy (sell) order with a Non-Displayed instruction Cancel Back when the order's limit price would cross a Protected Quotation of an external market, rather than when the order's limit price is greater (less) than the NBO (NBB). These proposed changes are designed to update Rule 11.8(b)(12) to reflect the proposed amendment to the re-pricing of orders with a Non-Displayed instruction under Rule 11.6(l)(3) discussed above.

*Replacing MPM Orders With MidPoint Peg Order Type (Rule 11.8(d)).*

The Exchange proposes amend Rule 11.8(d) to replace MPM Orders with MidPoint Peg Orders to further align the Exchange's System with BZX functionality. The operation of the proposed MidPoint Peg Order will be identical to the operation of Midpoint Peg Orders on BZX [41] and EDGA.[42] In sum, an MPM Order is a non-displayed Market Order or Limit Order with an instruction to execute only at the midpoint of the NBBO. An MPM Order that is entered with a limit price will have its ability to execute at the mid-point of the NBBO bound by such limit price. An MPM Order will not be eligible for execution when an NBBO is not available. In such case, an MPM Order would rest on the EDGX Book and would not be eligible for execution in the System until an NBBO is available. The MPM Order will receive a new time stamp when an NBBO becomes available and a new midpoint of the NBBO is established. In such case, pursuant to Rule 11.9, all MPM Orders that are ranked at the midpoint of the NBBO will retain their priority as compared to each other based upon the time such orders were initially received by the System.

The Exchange proposes to amend Rule 11.8(d) by replacing MPM Orders with MidPoint Peg Orders, the operation of which will be identical to the operation of Midpoint Peg Orders on BZX [43] and EDGA.[44] In addition, the proposed rule text for Rule 11.8(d) would be identical to EDGA Rule 11.8(d). The main differences between the operation of MPM Orders and MidPoint Peg Orders are as follows: (i) Midpoint Peg Order will be able to execute at prices equal to or better than the midpoint of the NBBO, and not just at the midpoint of the NBBO as is currently the case with MPM Orders; and (ii) unlike MPM Orders, MidPoint Peg Orders may be coupled with a Post Only instruction. The Exchange believes replacing MPM Orders with MidPoint Peg Orders would increase liquidity at the midpoint of the NBBO on EDGX, thereby increasing the potential for price improvement and improving execution quality on the Exchange.

Exchange Rule 11.8(d) would define a MidPoint Peg Order as a non-displayed Market Order or Limit Order with an instruction to execute at the midpoint of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order. A MidPoint Peg Order will be ranked at the midpoint of the NBBO where its limit price is equal to or more aggressive than the midpoint of the NBBO. Like an MPM Order, a MidPoint Peg Order will not be eligible for execution when an NBBO is not available. In such case, a MidPoint Peg Order would rest on the EDGX Book and would not be eligible for execution in the System until an NBBO is available. The MidPoint Peg Order will receive a new time stamp when an NBBO becomes available and a new midpoint of the NBBO is established. In such case, pursuant to Rule 11.9, all MidPoint Peg Orders that are ranked at the midpoint of the NBBO will retain their priority as compared to each other based upon the time such orders were initially received by the System. A MidPoint Peg Order will be ranked at its limit price where its limit price is less aggressive than the midpoint of the NBBO. A MidPoint Peg Limit Order may contain the following TIF instructions: Day, FOK, IOC, RHO, GTX, or GTD. Any unexecuted portion of a MidPoint Peg Limit Order with a TIF instruction of Day, GTX, or GTD that is resting on the EDGX Book will receive a new time stamp each time it is re-priced in response to changes in the midpoint of the NBBO.

As proposed, a MidPoint Peg Order may include a limit price that would specify the highest or lowest prices at which the MidPoint Peg Order to buy or sell would be eligible to be executed. Specifically, a MidPoint Peg Order with a limit price that is more aggressive than the midpoint of the NBBO will execute at the midpoint of the NBBO or better subject to its limit price.[45] For example, assume the NBBO is $10.10 by $10.18, resulting in a midpoint of $10.14, and there are no orders resting on the EDGX Book. An order with a Non-Displayed instruction to sell is entered with a limit price of $10.12 and is posted non-displayed on the EDGX Book. A MidPoint Peg Order to buy with a limit price of $10.15 is then entered and executes against the order to sell at $10.12, a price better than the midpoint of the NBBO because the MidPoint Peg Order is able to receive price improvement subject to its limit price. A MidPoint Peg Order will be ranked at the midpoint of the NBBO where its limit price is equal to or more aggressive than the midpoint of the NBBO.

A MidPoint Peg Order may execute at its limit price or better where its limit price is less aggressive than the midpoint of the NBBO. For example, assume the NBBO is $10.01 by $10.02, resulting in a midpoint of $10.015, and there are no orders resting on the EDGX Book. A MidPoint Peg Order to buy is entered with a limit price of $10.01 and posted non-displayed on the EDGX Book at $10.01, its limit price, because its limit price precludes it from being posted at $10.015, the midpoint of the NBBO. An order to sell at $10.01 is then entered and executes against the MidPoint Peg Order to buy at $10.01. A MidPoint Peg Order will be ranked at its limit price where its limit price is less aggressive than the midpoint of the NBBO.

Like an MPM Order, Proposed Rule 11.8(d) would also state that a MidPoint Peg Order may only be entered as an Odd Lot, Round Lot or a Mixed Lot. A User may include a Minimum Execution Quantity instruction on a MidPoint Peg Order. However, a Minimum Execution Quantity instruction will be ignored by the System during Opening Process.[46] MidPoint Peg Orders are not eligible for routing pursuant to Rule 11.11, unless routed utilizing the RMPT routing strategy as defined in proposed renumbered Rule 11.11(g)(13). Unlike MPM Orders, MidPoint Peg Orders may be coupled with a Post Only instruction,[47] in addition to a Book Only instruction.

Unless otherwise instructed by the User, a MidPoint Peg Order is not eligible for execution when a Locking Quotation exists. All Midpoint Peg Orders are not eligible for execution when a Crossing Quotation exists. In such cases, a MidPoint Peg Order would

[41] *See* BZX Rule 11.9(c)(9).

[42] *See* EDGA Rule 11.8(d).

[43] *See* BZX Rule 11.9(c)(9).

[44] *See* EDGA Rule 11.8(d).

[45] A MidPoint Peg Order will execute at prices better than the midpoint of the NBBO where it is able to receive price improvement subject to its limit price either upon entry or re-pricing.

[46] *See* Exchange Rule 11.7.

[47] The Exchange notes that the execution of an incoming MidPoint Peg order with a Post Only instruction will be subject to the economic best interest analysis set forth under Rule 11.6(n)(4).

rest on the EDGX Book and would not be eligible for execution in the System until a Locking Quotation or Crossing Quotation no longer exists. This behavior is consistent with operation of Mid-Point Peg on BZX under BZX Rule 11.9(c)(9).

MidPoint Peg orders are defaulted by the System to a Non-Displayed instruction. MidPoint Peg orders are not eligible to include a Displayed instruction. MidPoint Peg Orders may only be executed during the Pre-Opening Session, Regular Trading Hours, and the Post-Closing Session. Like MPM Orders, MidPoint Peg Orders will not trade with any other orders at a price above the Upper Price Band or below the Lower Price Band.

Rule 11.9, Priority of Orders

With respect to the Exchange's priority and execution algorithm, the Exchange is proposing various minor and structural to changes based on BZX Rule 11.12 that are intended to emphasize the processes by which orders are accepted, priced, ranked, displayed and executed, as well as a new provision related to the ability of orders to rest at the Locking Price and the Exchange's handling of orders in such a circumstance. In addition to the changes proposed with respect to Rule 11.9, discussed immediately below, these changes also relate to Rules 11.10 and 11.11.

The Exchange proposes modifications to Rule 11.9, Priority of Orders, to make clear that the ranking of orders described in such rule is in turn dependent on Exchange rules related to the execution of orders, primarily Rule 11.10. The Exchange believes that this has always been the case under Exchange rules but there was not previously a description of the cross-reference to Rule 11.10 within such rules. Accordingly, the Exchange proposes to add reference to the execution process in addition to the numeric cross-reference to Rule 11.10.[48] The Exchange also proposes to change certain references within Rule 11.9 to refer to ranking rather than executing equally priced trading interest, as the Rule as a whole is intended to describe the manner in which resting orders are ranked and maintained, specifically in price and time priority, while awaiting execution against incoming orders. The Exchange does not believe that the proposed modifications substantively modify the operation of the rules but the Exchange believes that it is important to make clear that the ranking of orders is a separate process from the execution of orders. The Exchange also proposes changes to Rule 11.9(a)(4) and (a)(5) to specify that orders retain and lose ''time'' priority under certain circumstances as opposed to priority generally because retaining or losing price priority does not require the same descriptions, as price priority will always be retained unless the price of an order changes. Each change proposed above was recently approved with respect to analogous rules of BZX and BYX, specifically amendments to Rule 11.12.[49]

As described below, the Exchange also proposes to amend Rule 11.9 to align with BZX functionality and BZX Rule 11.12 regarding how orders with certain instructions are to be ranked by the System: (i) At the midpoint of the NBBO under subparagraph (a)(2)(B); and (ii) where buy (sell) orders utilize instructions that cause them to be ranked by the System upon clearance of a Locking Quotation under subparagraph (a)(2)(C).[50] The Exchange does not propose to amend the ranking of orders at a price other than the midpoint of the NBBO under Rule 11.9(a)(2)(A).

*At the Midpoint of the NBBO.* Rule 11.9(a)(2)(B) currently states that the System will execute trading interest priced at the midpoint of the NBBO within the System in time priority in the following order: (i) Limit Orders to which the Hide Not Slide instruction has been applied; (ii) MPM Orders; (iii) Limit Orders with a Non-Displayed instruction; (iv) Orders with a Pegged instruction; (v) Reserve Quantity of Limit Orders; and (vi) Limit Orders executed within their Discretionary Range. As amended, the System will rank equally priced trading interest in such circumstances in the following order: (i) Limit Orders to which the Display-Price Sliding instruction has been applied; (ii) Limit Orders with a Non-Displayed instruction; (iii) Orders with a Pegged instruction; (iv) MidPoint Peg Orders; (v) Reserve Quantity of Limit Orders; and (vi) Limit Orders executed within their Discretionary Range.

Thus, orders will be substantially ranked in same order except that, as amended, the rule would be updated to reflect replacing of: (i) Hide Not Slide with Display-Price Sliding; and (ii) MPM Order with MidPoint Peg orders, which will be placed behind orders with a Pegged instruction. The proposed ranking of orders is identical to that set forth under BZX Rule 11.12(a)(2), which covers the ranking of orders generally, including at the midpoint of the NBBO. The Exchange notes that, pursuant to proposed Rule 11.10(a)(4)(D) governing the price at which non-displayed locking interest is executable and discussed in detail below, the Exchange will execute the incoming order to sell (buy) at one-half minimum price variation less (more) than the price of the order displayed on the EDGX Book. In such case, an order with a Display-Price Sliding instruction resting on the EDGX Book could execute against a contra-side order at the midpoint of NBBO and such order would be ranked ahead of all other orders ranked at the midpoint of the NBBO. The Exchange believes it is reasonable and appropriate to grant first priority to Limit Orders subject to the Display-Price Sliding instruction because they are displayed on the EDGX Book one Minimum Price Variation away from the Locking Price, while other orders at the mid-point of the NBBO remain non-displayed.[51] In equity markets generally, displayed orders are traditionally given first priority over non-displayed orders due to their contribution to the price discovery process.

In addition, the Exchange believes it is reasonable and appropriate to grant MidPoint Peg Orders priority behind Limit Orders with a Non-Displayed instruction and orders with a Pegged instruction because these order types can provide liquidity on the EDGX Book that is priced more aggressively than the NBBO. The Exchange notes that both Limit Orders with a Non-Displayed instruction and orders with a Pegged instruction are posted to the EDGX Book at a specified price (*i.e.,* a limit price or pegged price) that may be more aggressive than the NBBO, including bids at the same price as the NBO or offers at the same price as the NBB (*i.e.,* fully crossing the spread). Meanwhile, a MidPoint Peg Order is posted to the EDGX Book at a non-displayed price, and while providing price improving liquidity at the midpoint of the NBBO,

[48] The Exchange notes that it recently filed an immediately effective proposal containing marking errors with respect to the rule text proposed for sub-paragraphs (a)(2), (a)(2)(A) and (a)(2)(B). *See* Securities Exchange Act Release No. 74023 (January 9, 2015), 80 FR 2163 (January 15, 2015) (SR–EDGX–2015–03). Accordingly, the Exchange has correctly marked the change in connection with this proposal.

[49] *See supra* note 11.

[50] For purposes of priority under proposed Rule 11.9(a)(2)(A), (B) and (C), the Exchange notes that orders of Odd Lot, Round Lot, or Mixed Lot size are treated equally.

[51] Under the proposed amendment to Rule 11.6(l)(1)(B), buy (sell) orders subject to the Display-Price Sliding instruction will be displayed at a price that is one Minimum Price Variation lower (higher) than the Locking Price, will be ranked at the Locking Price.

may not be posted to the EDGX Book at a price level that is more aggressive than the NBBO. Thus, MidPoint Peg Orders are guaranteed to execute at prices equal to or less aggressive than the midpoint of the NBBO. In contrast, Limit Orders with a Non-Displayed instruction and orders with a Pegged instruction do not have this same guarantee. Therefore, the Exchange believes it is reasonable and appropriate to grant MidPoint Peg Orders priority behind Limit Orders with a Non-Displayed instruction and orders with a Pegged instruction.

*Orders Re-Ranked upon Clearance of a Locking Quotation.* The Exchange does not propose to make any changes to the ranking of orders that are re-ranked upon clearance of a Locking Quotation other than to replace a reference to Hide Not Slide with Display-Price Sliding to reflect the Exchange proposal to amend Rule 11.6(l)(1)(B) by replacing the Hide Not Slide re-pricing instruction with the Display-Price Sliding instruction, as described above. The Exchange believes that granting second priority to Limit Orders subject to the Display-Price Sliding instruction, as is currently provided for orders with a Hide Not Slide instruction, is appropriate because prior to the Locking Quotation or Crossing Quotation existing, these orders were eligible to be executed, Non-Displayed, at the Locking Price. In addition, like Hide Not Slide, Limit Orders subject to the Display-Price Sliding instruction are more aggressively priced when a Locking Quotation or Crossing Quotation does not exist than orders subject to the Price Adjust instruction.

Rule 11.10, Order Execution

The Exchange proposes to adopt paragraph (C) of Rule 11.10(a)(4), which would be identical to BZX Rule 11.13(a)(4)(C).[52] Proposed paragraph (C) would provide further clarity regarding the situations where orders are not executable, which although covered in other rules proposed above and in current rules,[53] would focus on the incoming order on the same side of an order displayed on the EDGX Book rather than the resting order that is rendered not executable at a specified price because it is opposite such order displayed on the EDGX Book. Proposed paragraph (C) would state that, subject to proposed paragraph (D), described below, if an incoming order is on the same side of the market as an order displayed on the EDGX Book and upon entry would execute against contra-side interest at the same price as such displayed order, such incoming order will be cancelled or posted to the EDGX Book and ranked in accordance with Rule 11.9. The Exchange notes that pursuant to the Exchange's current rules, the Exchange suspends the discretion of an order subject to the Hide Not Slide instruction for so long as a contra-side order that equals the Locking Price is displayed by the System on the EDGX Book. The Exchange suspends this discretion to avoid an apparent priority issue. In particular, in such a situation the Exchange believes a User representing an order that is displayed on the Exchange might believe that an incoming order was received by the Exchange and then bypassed such displayed order, removing some other non-displayed liquidity on the same side of the market as such displayed order. Although the Exchange has proposed to eliminate the Hide Not Slide instruction and replace it with the Display-Price Sliding instruction, as described above, the Exchange will continue to suspend the ability of any order to execute at the price of a contra-side order with a Displayed instruction, as described above.

The Exchange also proposes to adopt Rule 11.10(a)(4)(D), which would be identical to BZX Rule 11.13(a)(4)(D).[54] Proposed Rule 11.10(a)(4)(D) would govern the price at which an order is executable when it is not displayed on the Exchange and there is a contra-side displayed order at such price. Specifically, for bids or offers equal to or greater than $1.00 per share, in the event that an incoming order is a Market Order or is a Limit Order priced more aggressively than an order displayed on the Exchange, the Exchange will execute the incoming order at, in the case of an incoming sell order, one-half minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one-half minimum price variation more than the price of the displayed order. As is true under existing functionality, this order handling is inapplicable for bids or offers under $1.00 per share.

To demonstrate the operation of this provision, again assume the NBBO is $10.10 by $10.11. Assume the Exchange has a posted and displayed bid to buy 100 shares of a security priced at $10.10 per share and a resting non-displayed bid to buy 100 shares of a security priced at $10.11 per share.

- Assume that the next order received by the Exchange is an order with a Post Only instruction to sell 100 shares of the security priced at $10.11 per share. The order with a Post Only instruction would not remove any liquidity upon entry pursuant to the Exchange's economic best interest functionality, would post to the EDGX Book and would be displayed at $10.11. The display of this order would, in turn, make the resting non-displayed bid not executable at $10.11.
- If an incoming offer to sell 100 shares at $10.10 is entered into the EDGX Book, the resting non-displayed bid originally priced at $10.11 will be executed at $10.105 per share, thus providing a half-penny of price improvement as compared to the order's limit price of $10.11. The execution at $10.105 per share also provides the incoming offer with a half-penny of price improvement as compared to its limit price of $10.10. The result would be the same for an incoming market order to sell or any other incoming limit order offer priced at $10.10 or below, which would execute against the non-displayed bid at a price of $10.105 per share. As above, an offer at the full price of the resting and displayed $10.11 offer would not execute against the resting non-displayed bid, but would instead either cancel or post to the EDGX Book behind the original $10.11 offer in priority.

The Exchange notes that, in addition to the changes described above, it is proposing to add descriptive titles to paragraphs (A) and (B) of Rule 11.10(a)(4), which describe the process by which executable orders are matched within the System. Specifically, so long as it is otherwise executable, an incoming order to buy will be automatically executed to the extent that it is priced at an amount that equals or exceeds any order to sell in the EDGX Book and an incoming order to sell will be automatically executed to the extent that it is priced at an amount that equals or is less than any other order to buy in the EDGX Book. These rules further state that an order to buy shall be executed at the price(s) of the lowest order(s) to sell having priority in the EDGX Book and an order to sell shall be executed at the price(s) of the highest order(s) to buy having priority in the EDGX Book. The Exchange emphasizes these current rules only insofar as to highlight the interconnected nature of the priority rule. The Exchange also proposes to move language contained

[52] *See supra* note 11.

[53] The Exchange notes that consistent with the proposed changes to Rules 11.6 and 11.8 described above, based on User instructions certain orders are permitted to post and rest on the EDGX Book at prices that lock contra-side liquidity, provided, however, that the System will never display a Locking Quotation. Similar behavior is also in place with respect to the Hide Not Slide instruction under current rules, which the Exchange is proposing to replace with the Display Price Sliding instruction.

[54] *See supra* note 11.

within Rule 11.10(a)(2) to paragraph (a) of the rule such that the language is more generally applicable to the rules governing execution contained in Rule 11.10(a)(1) through (5). Specifically, the Exchange proposes to relocate language stating that any order falling within the parameters of the paragraph shall be referred to as ''executable'' and that an order will be cancelled back to the User, if based on market conditions, User instructions, applicable Exchange Rules and/or the Act and the rules and regulations thereunder, such order is not executable, cannot be routed to another Trading Center pursuant to Rule 11.11 or cannot be posted to the EDGX Book. Each change proposed above was recently approved with respect to analogous rules of BZX, specifically amendments to Rule 11.13.[55]

Rule 11.11, Routing to Away Trading Centers

The Exchange also proposes to modify paragraph (h) of Rule 11.11 to clarify the Exchange's rule regarding the priority of routed orders. Paragraph (h) currently sets forth the proposition that a routed order does not retain priority on the Exchange while it is being routed to other markets. The Exchange believes that its proposed clarification to paragraph (h) is appropriate because it more clearly states that a routed order is not ranked and maintained in the EDGX Book pursuant to Rule 11.9(a), and therefore is not available to execute against incoming orders pursuant to Rule 11.10. The change proposed above was recently approved with respect to the analogous rule of BZX, specifically Rule 11.13, as amended.[56]

Implementation Date

The Exchange intends to implement the proposed rule change immediately.[57]

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with Section 6(b) of the Act[58] and further the objectives of Section 6(b)(5) of the Act[59] because they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[60] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets.

The proposed rule changes are generally intended to better align certain Exchange rules and system functionality with that currently offered by BZX in order to provide a consistent functionality across the Exchange and BZX. Consistent functionality between the Exchange and BZX will reduce complexity and streamline duplicative functionality, thereby resulting in simpler technology implementation, changes and maintenance by Users of the Exchange that are also participants on BZX. The proposed rule changes do not propose to implement new or unique functionality that has not been previously filed with the Commission or is not available on BZX. The Exchange notes that the proposed rule text is based on applicable BZX or EDGA rules; the proposed language of the Exchange's Rules differs only to extent necessary to conform to existing Exchange rule text or to account for details or descriptions included in the Exchange's Rules but not in the applicable BZX rule. The Exchange believes it is consistent with the Act to maintain its current structure and such detail, rather than removing such details simply to conform to the structure or format of BZX rules, again because the Exchange believes this will increase the understanding of the Exchange's operations for all Members of the Exchange. Where possible, the Exchange has mirrored BZX rules, because consistent rules will simplify the regulatory requirements and increase the understanding of the Exchange's operations for Members of the Exchange that are also participants on BZX. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

In addition to the specific rules discussed below, the Exchange also believes that the proposed amendments to clarify and re-structure the Exchange's priority, execution and routing rules will contribute to the protection of investors and the public interest by making the Exchange's rules easier to understand.

*Definitions (Rule 11.6).* The modifications related to Discretionary Range, Pegged instructions, Re-Pricing, Aggressive, Super Aggressive, Post Only, as well as TIFs of IOC and FOK, are each designed to better align certain Exchange rules and system functionality with that currently offered by BZX in order to provide a consistent functionality across the Exchange and BZX. Specifically, the Exchange believes that the proposed rule changes will provide additional clarity and specificity regarding the functionality of the System and provide Users with consistent rules across the Exchange and BZX, and thus would promote just and equitable principles of trade and remove impediments to a free and open market.

In particular, the Exchange believes it is consistent with the Act to execute orders with a Discretionary Range instruction and orders with a Super Aggressive instruction against marketable liquidity (*i.e.,* order with a Post Only instruction) when an execution would not otherwise occur is consistent with both: (i) the Act, by facilitating executions, removing impediments and perfecting the mechanism of a free and open market and national market system; and (ii) a User's instructions, which have evidenced a willingness by the User to pay applicable execution fees and/or execute at more aggressive prices than they are currently ranked in favor of an execution.

The Exchange also believes that the proposed changes to Rule 11.6(l) are consistent with Section 6(b)(5) of the Act,[61] as well as Rule 610 of Regulation NMS[62] and Rule 201 of Regulation SHO.[63] Rule 610(d) requires exchanges to establish, maintain, and enforce rules that require members reasonably to avoid ''[d]isplaying quotations that lock or cross any protected quotation in an NMS stock.''[64] Such rules must be ''reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock,'' and must ''prohibit . . . members from engaging in a pattern or practice of displaying quotations that lock or cross any quotation in an NMS stock.''[65] This change will provide additional specificity within the Exchange's rules regarding the availability of the Price Adjust instruction as well as align the description with BZX's Price Adjust process described under BZX Rule

[55] *See supra* note 11.

[56] *Id.*

[57] Implementation of the proposed rule change immediately is contingent upon the Commission granting a waiver of the 30-day operative delay. 17 CFR 240.19b–4(f)(6)(iii).

[58] 15 U.S.C. 78f(b).

[59] 15 U.S.C. 78f(b)(5).

[60] 15 U.S.C. 78k–1(a)(1).

[61] 15 U.S.C. 78f(b)(5).

[62] 17 CFR 242.610.

[63] 17 CFR 242.201.

[64] 17 CFR 242.610(d).

[65] *Id.*

11.9(g)(2) and display price sliding process described under BZX Rule 11.9(g)(1).

In addition, Rule 201 of Regulation SHO [66] requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a price at or below the current NBB under certain circumstances. The proposed amendments to the Re-Pricing Instructions to Comply with Rule 201 of Regulation SHO are similar to approved BZX rules and will provide Users with a consistent handling of their orders in such circumstances across the Exchange and BZX.

The Exchange believes that the proposed replacement of the Hide Not Slide instruction with the Display-Price Sliding instruction is consistent with Section 6(b)(5) of the Act,[67] as well as Rule 610 of Regulation NMS.[68] The proposed Display-Price Sliding instruction would operate in an identical fashion to the Display-Price Sliding process currently available on BZX and described under BZX Rule 11.9(g)(1).[69] As mentioned above, Rule 610(d) of Regulation NMS requires exchanges to establish, maintain, and enforce rules that require members reasonably to avoid ''[d]isplaying quotations that lock or cross any protected quotation in an NMS stock.'' [70] Such rules must be ''reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock,'' and must ''prohibit . . . members from engaging in a pattern or practice of displaying quotations that lock or cross any quotation in an NMS stock.'' [71] Thus, the Display-Price Sliding instruction proposed to be offered by the Exchange will assists Users by displaying orders at permissible prices, thereby promoting just and equitable principles of trade, removing impediments to, and perfects the mechanism of, a free and open market and a national market system.

The Exchange believes that the proposed changes to its re-pricing of orders with a Non-Displayed instruction or of Odd Lot size is consistent with Section 6(b)(5) of the Act.[72] The proposed changes to Rule 11.6(l)(3) are based on BZX Rule 11.9(g)(4) and will provide Users with consistent handing of their orders in such circumstances across the Exchange and BZX. The Exchange also believes it is reasonable to remove references to orders of Odd Lot size from the Exchange's Rules regarding re-pricing, as those orders would no longer be re-priced like orders with a Non-Displayed instruction and will be treated like orders of Round Lot or Mixed Lot size, as currently done on BZX. Therefore, the Exchange believes the proposed changes to the re-pricing of order with a Non-Displayed instruction will continue to promote just and equitable principles of trade, removes impediments to, and perfects the mechanism of, a free and open market and a national market system.

*Order Types (Rule 11.8).* The Exchange believes that the proposed changes to its order types under Rule 11.8 are consistent with Section 6(b)(5) of the Act,[73] because they are intended to align their operation with the operation of identical order types on BZX, thereby fostering cooperation and coordination with persons engaged in facilitating transactions in securities and removing impediments to and perfecting the mechanism of a free and open market and a national market system.

The Exchange believes its proposed amendments to the description of Limit Orders under Rule 11.8(b) is reasonable because it aligns their operation with existing BZX rules and functionality as well as to reflect the relevant proposed changes discussed above. The Exchange also believes it is reasonable to default orders to the Display-Price Sliding instruction, rather than Price Adjust, as it would enable the Exchange to provide consistent default behavior across EDGX, EDGA and BZX. On EDGA and BZX, orders also default to the respective display-price sliding processes, which operate in an identical manner as the proposed Display-Price Sliding instruction. Therefore, the proposed rule change promotes just and equitable principles of trade because it will avoid investor confusion by providing the identical default behavior across the Exchange, EDGA and BZX.

In addition, the Exchange believes its proposal to amend Rule 11.8(d) to replace the MPM order type with Market Peg order type is consistent with the Act because the MidPoint Peg Order would operate in the same fashion as identical order types available on EDGA and BZX, thereby further aligning functionality across the BGM Affiliated Exchanges. The Exchange believes replacing MPM Orders with MidPoint Peg Orders would increase liquidity at the midpoint of the NBBO on EDGX, thereby improving both the potential for price improvement and execution quality on the Exchange. For the reasons set forth above, the Exchange believes the proposal to replace MPM Order with MidPoint Peg Orders 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.

*Priority (Rule 11.9).* The Exchange believes its proposed amendments to Rule 11.9 regarding the priority of orders promotes just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system by providing Members, Users, and the investing public with greater transparency regarding how the System operates. The Exchange proposes to amend Rule 11.9 to align with BZX functionality and BZX Rules 11.12 regarding how orders with certain instructions are to be ranked by the System: (i) At the midpoint of the NBBO; and (ii) where orders utilize instructions that cause them to be ranked by the System upon clearance of a Locking Quotation providing valuable, clear information to Members, Users, and the investing public on how their orders would be executed. As amended, orders will be substantially ranked in same order at the midpoint of the NBBO as under current rules except that the rule would be updated to reflect replacing of: (i) Hide Not Slide with Display-Price Sliding; and (ii) MPM Order with MidPoint Peg Orders, which will be placed behind orders with a Pegged instruction. The Exchange believes it is reasonable and appropriate to grant first priority to Limit Orders subject to the Display-Price Sliding instruction because they are displayed on the EDGX Book one Minimum Price Variation away from the Locking Price, while other orders at the mid-point of the NBBO remain non-displayed.[74] In equity markets generally, displayed orders are traditionally given first priority over non-displayed orders due to their contribution to the price discovery process.

The Exchange notes that it does not propose to make any changes to the ranking of orders that are re-ranked upon clearance of a Locking Quotation other than to replace a reference to Hide Not Slide with Display-Price Sliding. This change is necessary to reflect the

[66] 17 CFR 242.201.

[67] 15 U.S.C. 78f(b)(5).

[68] 17 CFR 242.610.

[69] *See* the BATS Display-Price Sliding Releases, *supra note* 27.

[70] 17 CFR 242.610(d).

[71] *Id.*

[72] 15 U.S.C. 78f(b)(5).

[73] 15 U.S.C. 78f(b)(5).

[74] Under the proposed amendment to Rule 11.6(l)(1)(B), buy (sell) orders subject to the Display-Price Sliding instruction will be displayed at a price that is one Minimum Price Variation lower (higher) than the Locking Price, will be ranked at the Locking Price.

Exchange's proposal to replace the Hide Not Slide re-pricing instruction with the Display-Price Sliding instruction under Rule 11.6(l)(1)(B), as described above. The Exchange believes that granting second priority to Limit Orders subject to the Display-Price Sliding instruction, like as is currently provided for orders with a Hide Not Slide instruction, is appropriate because prior to the Locking Quotation or Crossing Quotation existing, these orders were eligible to be executed, Non-Displayed, at the Locking Price. In addition, like Hide Not Slide, Limit Orders subject to the Display-Price Sliding instruction are more aggressively priced when a Locking Quotation or Crossing Quotation does not exist than orders subject to the Price Adjust instruction. These changes are made to align Exchange Rule 11.9 with the functionality set forth in BATS Rule 11.12, as described above. The Exchange believes that the proposed rule changes regarding order priority will continue to provide greater transparency and further clarity on how the various order types will be assigned priority under various scenarios, thereby assisting Members, Users and the investing public in understanding the manner in which the System may execute their orders.

*Order Execution (Rule 11.10).* Proposed Rule 11.10(a)(4)(C), which would be identical to BZX Rule 11.13(a)(4)(C),[75] is consistent with Rules 11.6 and 11.8, as proposed to be amended, and reflects the fact that the Exchange will suspend the ability of an order to execute at the Locking Price when there is a contra-side order with a Displayed instruction in order to avoid an apparent priority issue. In turn, the Exchange believes that adopting Rule 11.10(a)(4)(C) promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, and removes impediments to, and perfects the mechanism of, a free and open market and a national market system, both with respect to the functionality that prevents executions in such a circumstance and with respect to the addition of the rule text, because it makes clear to Users the operation of the Exchange in conjunction with the proposed changes to the System. The Exchange also believes its proposal to adopt Rule 11.10(a)(4)(D), which would be identical to BZX Rule 11.13(a)(4)(D),[76] promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, and removes impediments to, and perfects the mechanism of, a free and open market and a national market system. The proposed change is based on BZX Rule 11.13(a)(4)(D) and sets forth how marketable orders that would otherwise not be executed under specific scenarios will be executed, thereby improving execution quality for participants sending orders to the Exchange. Further, the proposed change will help to provide price improvement to market participants, again, in scenarios that at times, such participants would potentially not receive executions on the Exchange. Thus, the Exchange believes that its proposed order handling process in the scenario described in this filing will benefit market participants and their customers by allowing them greater flexibility in their efforts to fill orders and minimize trading costs. The proposed rule change will also provide consistent handling for orders in such scenarios across the Exchange and BZX, thereby avoiding investor confusion and promoting just and equitable principles of trade.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange 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 Exchange notes that the proposal will provide consistent functionality between the Exchange and BZX, thereby reducing complexity and streamlining duplicative functionality, resulting in simpler technology implementation, changes and maintenance by Users of the Exchange that are also participants on BZX. Thus, the Exchange believes this proposed rule change is necessary to permit fair competition among national securities exchanges. In addition, the Exchange believes the proposed rule change will benefit Exchange participants in that it is designed to achieve a consistent technology offering by the BGM Affiliated Exchanges.

*(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 written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.[77]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. Waiver of the 30-day operative delay would permit the Exchange to harmonize its rules across BZX and the Exchange in a timely manner, thereby simplifying the rules available to Members of the Exchange that are also participants on BZX. The Exchange has alerted Members of the technology changes as well as its anticipated time line so that Members may make the requisite system changes. In addition, the Exchange has conducted several testing opportunities for Members to ensure both the Member's and the Exchange's systems will operate in accordance with the proposed rule change. Based on the foregoing, the Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest.[78] The Commission hereby grants the waiver and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings

[75] *See supra* note 11.

[76] *Id.*

[77] 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.

[78] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–EDGX–2015–33 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–EDGX–2015–33. 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 will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2015–33 and should be submitted on or before August 13, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[79]

**Robert W. Errett.**

*Deputy Secretary.*

[FR Doc. 2015–18034 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 31717; 812–14503]**

## Broms Asset Management NextShares Trust, et al.; Notice of Application

July 16, 2015.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

*Applicants:* Broms Asset Management NextShares Trust (''Trust''), Broms Asset Management LLC (''Manager''), and Foreside Fund Services, LLC (''Distributor'').

*Summary of Application:* Applicants request an order (''Order'') that permits: (a) Actively managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at the next-determined net asset value plus or minus a market-determined premium or discount that may vary during the trading day; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares; and (f) certain series to create and redeem Shares in kind in a master-feeder structure. The Order would incorporate by reference terms and conditions of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

**DATES:** *Filing Dates:* The application was filed on June 30, 2015.

*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 August 12, 2015, 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:** The Commission: Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: Broms Asset Management NextShares Trust and Broms Asset Management LLC, 40 Wall Street, 35th Floor, New York, NY 10005 and Foreside Fund Services, LLC, Three Canal Plaza, Suite 100, Portland, ME 04101.

**FOR FURTHER INFORMATION CONTACT:** Jean E. Minarick, Senior Counsel, or Dalia Osman Blass, 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.

**Applicants**

1. The Trust will be registered as an open-end management investment company under the Act and is a statutory trust organized under the laws of Delaware. Applicants seek relief with respect to four Funds (as defined below, and those Funds, the ''Initial Funds''). Each Fund's portfolio positions will

[79] 17 CFR 200.30–3(a)(12).

[1] Eaton Vance Management, *et al.,* Investment Company Act Rel. Nos. 31333 (Nov. 6, 2014) (notice) and 31361 (Dec. 2, 2014) (order).

consist of securities and other assets selected and managed by its Manager or Subadviser (as defined below) to pursue the Fund's investment objective.

2. The Manager is a Delaware limited liability company and will be the investment manager to the Initial Funds. A Manager (as defined below) will serve as investment manager to each Fund. The Manager is, and any other Manager will be, registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Manager and the Trust may retain one or more subadvisers (each a ''Subadviser'') to manage the portfolios of the Funds. Any Subadviser will be registered, or not subject to registration, under the Advisers Act.

3. The Distributor is a Delaware limited liability company and a broker-dealer registered under the Securities Exchange Act of 1934 and will act as the principal underwriter of Shares of the Funds. Applicants request that the requested relief apply to any distributor of Shares, whether affiliated or unaffiliated with the Manager (included in the term ''Distributor''). Any Distributor will comply with the terms and conditions of the Order.

**Applicants' Requested Exemptive Relief**

4. Applicants seek the requested Order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act. The requested Order would permit applicants to offer exchange-traded managed funds. Because the relief requested is the same as the relief granted by the Commission under the Reference Order and because the Manager has entered into, or anticipates entering into, a licensing agreement with Eaton Vance Management, or an affiliate thereof in order to offer exchange-traded managed funds,[2] the Order would incorporate by reference the terms and conditions of the Reference Order.

5. Applicants request that the Order apply to the Initial Funds and to any other existing or future open-end management investment company or series thereof that: (a) Is advised by the Manager or any entity controlling, controlled by, or under common control with the Manager (any such entity included in the term ''Manager''); and (b) operates as an exchange-traded managed fund as described in the Reference Order; and (c) complies with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein (each such company or series and Initial Fund, a ''Fund'').[3]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general purposes 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.

7. Applicants submit that for the reasons stated in the Reference Order: (1) With respect to the relief requested pursuant to section 6(c) of the Act, the relief is 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; (2) with respect to the relief request pursuant to section 17(b) of the Act, the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, are consistent with the policies of each registered investment company concerned and consistent with the general purposes of the Act; and (3) with respect to the relief requested pursuant to section 12(d)(1)(J) of the Act, the relief is consistent with the public interest and the protection of investors.

[2] Eaton Vance Management has obtained patents with respect to certain aspects of the Funds' method of operation as exchange-traded managed funds.

[3] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference herein.

By the Division of Investment Management, pursuant to delegated authority.

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18030 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–75481; File No. SR–ISEGemini-2015–13]**

## Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Price Improvement Mechanism Pilot Program

July 17, 2015.

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 July 16, 2015, ISE Gemini, LLC (the ''Exchange'' or ''ISE Gemini'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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

ISE Gemini proposes to extend two pilot programs related to its Price Improvement Mechanism (''PIM''). The text of the proposed rule change is available on the Exchange's Web site *www.ise.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 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange currently has two pilot programs related to its PIM (collectively, the ''PIM Pilot Programs'' or ''Pilot Programs'').[3] The current Pilot Period provided in paragraphs .03 and .05 of the Supplementary Material to Rule 723 is set to expire on July 17, 2015.[4] Paragraph .03 provides that there is no minimum size requirement for orders to be eligible for the Price Improvement Mechanism. Paragraph .05 concerns the termination of the exposure period by unrelated orders. The Exchange has continually submitted certain data in support of extending the current Pilot Programs. The Exchange proposes to extend these Pilot Programs in their present form, through July 18, 2016, to give the Exchange and the Commission additional time to evaluate the effects of these Pilot Programs before the Exchange requests permanent approval of the rules. To aid the Commission in its evaluation of the PIM Functionality, ISE Gemini represents that it will provide certain additional data requested by the Commission regarding trading in the PIM for the six (6) month period from January 1, 2015 through June 30, 2015. The Exchange agrees to provide this data by January 18, 2016 and to make the summary of the data provided to the Commission publicly available.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the Pilot Programs are consistent with the Exchange Act because they provide opportunity for price improvement for all orders executed in the Exchange's Price Improvement Mechanism. The proposed extension would allow the Pilot Programs to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption to the pilot. Further, the Exchange believes that the data demonstrates that there is sufficient investor interest and demand to extend the Pilot Programs for an additional twelve months. The Exchange further believes it is appropriate to extend the Pilot Programs to provide the Exchange and Commission more data upon which to evaluate the rules. With this data, the Commission can evaluate whether the new data shows there is meaningful competition for all size orders within the PIM, whether there is significant price improvement for all orders executed through the PIM, and whether there is an active and liquid market functioning on the Exchange outside of the PIM.

*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 Exchange Act. Specifically, the Exchange believes that, by extending the expiration of the Pilot Programs, the proposed rule change will allow for further analysis of the PIM. In doing so, the proposed rule change will also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

*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: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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 and Rule 19b–4(f)(6) thereunder.[5]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[6] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[7] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period because the Pilot Programs are set to expire on July 17, 2015. The Exchange noted that such waiver will allow the Pilot Programs to continue uninterrupted.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Pilot Programs to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption in the Pilot Programs. For this reason, the Commission designates the proposed rule change to be operative on July 17, 2015.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[3] *See* Securities Exchange Act Release No. 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).

[4] *See* Exchange Act Release Nos. 70636 (October 9, 2013), 78 FR 62838 (October 22, 2013) (SR–TOPAZ–2013–05) and 72466 (June 25, 2014), 79 FR 37378 (July 1, 2014) (SR–ISE Gemini-2014–17).

[5] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its 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.

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISEGemini-2015–13 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–ISEGemini-2015–13. 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–ISEGemini-2015–13, and should be submitted on or before August 13, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2015–18032 Filed 7–22–15; 8:45 am]

**BILLING CODE 8011–01–P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No: SSA–2015–0046]**

### Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and reinstatements of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2015–0046].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than September 21, 2015. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. *Authorization for the Social Security Administration to Obtain Account Records from a Financial Institution—20 CFR 416.200 and 416.203—0960–0293.* SSA collects and verifies financial information from individuals applying for Supplemental Security Income (SSI) payments to determine if the applicant meets the SSI resource eligibility requirements. If the SSI claimants provide incomplete, unavailable, or seemingly altered records, SSA contacts their financial institutions to verify the existence, ownership, and value of accounts owned. Financial institutions require individuals to sign Form SSA–4641–F4, or complete the e4641 electronic application, to authorize them to disclose records to SSA. The respondents are SSI applicants, recipients, and their deemors.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–4641 (paper) | 252,500 | 1 | 6 | 25,250 |
| e4641 (electronic) | 15,747,500 | 1 | 2 | 524,917 |
| Totals | 16,000,000 | | | 550,167 |

2. *Site Review Questionnaire for Volume and Fee-for-Service Payees and Beneficiary Interview Form—20 CFR 404.2035, 404.2065, 416.665, 416.701, and 416.708—0960–0633.* SSA asks organizational representative payees to complete Form SSA–637, the Site Review Questionnaire for Volume and Fee-for-Service Payees, to provide information on how they carry out their responsibilities, including how they manage beneficiary funds. SSA then obtains information from the beneficiaries these organizations represent via Form SSA–639, Beneficiary Interview Form, to corroborate the payees' statements. Due to the sensitivity of the information, SSA employees always complete the forms based on the answers respondents give during the interview. The respondents are individuals, State and local governments, non-profit and for-profit organizations serving as representative payees, and the beneficiaries they serve.

*Type of Request:* Revision of an OMB-approved information collection.

[9] 17 CFR 200.30–3(a)(12).

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–637 | 1,999 | 1 | 120 | 3,998 |
| SSA–639 | 8,293 | 1 | 10 | 1,382 |
| Totals | 10,292 | | | 5,380 |

3. *Notification of a Social Security Number (SSN) To An Employer for Wage Reporting—20 CFR 422.103(a)—0960–0778. Individuals* applying for employment must provide a Social Security number (SSN), or indicate they have applied for one. However, when an individual applies for an initial SSN, there is a delay between the assignment of the number and the delivery of the SSN card. At an individual's request, SSA uses Form SSA–132 to send the individual's SSN to an employer. Mailing this information to the employer: (1) ensures the employer has the correct SSN for the individual; (2) allows SSA to receive correct earnings information for wage reporting purposes; and (3) reduces the delay in the initial SSN assignment and delivery of the SSN information directly to the employer. It also enables SSA to verify the employer as a safeguard for the applicant's personally identifiable information. The majority of individuals who take advantage of this option are in the United States with exchange visitor and student visas; however, we allow any applicant for an SSN to use the SSA–132. The respondents are individuals applying for an initial SSN who ask SSA to mail confirmation of their application or the SSN to their employers.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–132 | 298,953 | 1 | 2 | 9,965 |

4. *Important Information About Your Appeal, Waiver Rights, and Repayment Options—20 CFR 404.502–521—0960–0779.* When SSA accidentally overpays beneficiaries, the agency informs them of the following rights: (1) The right to reconsideration of the overpayment determination; (2) the right to request a waiver of recovery and the automatic scheduling of a personal conference if SSA cannot approve a request for waiver; and (3) the availability of a different rate of withholding when SSA proposes the full withholding rate. SSA uses Form SSA–3105, Important Information About Your Appeal, Waiver Rights, and Repayment Options, to explain these rights to overpaid individuals and allow them to notify SSA of their decision(s) regarding these rights. The respondents are overpaid claimants requesting a waiver of recovery for the overpayment; reconsideration of the fact of the overpayment; or a lesser rate of withholding of the overpayment.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–3105 | 80,000 | 1 | 15 | 20,000 |

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than August 24, 2015. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. *Statement of Funds You Provided to Another and Statement of Funds You Received—20 CFR 404.1520(b), 404.1571–404.1576, 404.1584–404.1593 and 416.971–416.976—0960–0059.* SSA uses Form SSA–821–BK to collect recipient employment information to determine whether recipients worked after becoming disabled and, if so, whether the work is substantial gainful activity. SSA's field offices use Form SSA–821–BK to obtain work information during the initial claims process, the continuing disability review process, and for SSI claims involving work issues. SSA's processing centers and the Office of Disability and International Operations use the form to obtain post-adjudicative work issue from recipients. SSA reviews and evaluates the data to determine if the applicant or recipient meets the disability requirements of the law. The respondents are applicants and recipients of Title II Social Security and Title XVI SSI disability payments.

*Type of Request:* Reinstatement with change of a previous OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–821–BK | 300,000 | 1 | 30 | 150,000 |

2. *Credit Card Payment Form—0960–0648.* SSA uses Form SSA–1414 to process: (1) Credit card payments from former employees and vendors with outstanding debts to the agency; (2) advance payments for reimbursable agreements; and (3) credit card payments for all Freedom of Information Act (FOIA) requests requiring payment. The respondents are former employees and vendors who have outstanding debts to the agency, entities who have reimbursable agreements with SSA, and individuals who request information through FOIA.

*Type of Request:* Reinstatement without change of a previous OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–1414 | 6,000 | 1 | 2 | 200 |

Date: July 19, 2015.

**Faye I. Lipsky,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2015–18040 Filed 7–22–15; 8:45 am]

**BILLING CODE 4191–02–P**

## DEPARTMENT OF STATE

**[Public Notice 9199]**

### 60-Day Notice of Proposed Information Collection: Iraqi Citizens and Nationals Employed by Federal Contractors and Grantees

**ACTION:** Notice of request for public comment.

**SUMMARY:** The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

**DATES:** The Department will accept comments from the public up to September 21, 2015.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Web:* Persons with access to the Internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2015–0031'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: GaoY1@State.gov.*
- *Regular Mail:* Send written comments to: Sophie Yan Gao, PRM/Admissions, 2025 E Street NW., SA–9, 8th Floor, Washington, DC 20522–0908.
- *Fax:* (202) 453–9393.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Sophie Yan Gao, PRM/Admissions, 2025 E Street NW., SA–9, 8th Floor, Washington, DC 20522–0908, who may be reached on (202) 453–9255 or at *GaoY1@state.gov.*

**SUPPLEMENTARY INFORMATION:**

- *Title of Information Collection:* Iraqi Citizens and Nationals Employed by Federal Contractors and Grantees.
- *OMB Control Number:* 1405–0184.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Population, Refugees, and Migration, Office of Admissions, PRM/A.
- *Form Number:* N/A.
- *Respondents:* Refugee applicants for the U.S. Refugee Admissions Program.
- *Estimated Number of Respondents:* 50 Department of State contractors, grantees, and cooperative agreement partners.
- *Estimated Number of Responses:* 200.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 100 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

**Abstract of Proposed Collection**

The information requested will be used to verify the employment of Iraqi citizens and nationals for the processing and adjudication of other refugee, asylum, special immigrant visa, and other immigration claims and applications.

**Methodology**

The method for the collection of information will be via electronic submission. The format for compiling the information will be the Department of State's eForms application which is currently used by over 36,000 Department users worldwide. Contracting Officers and Grants Officers will distribute by email to the contractors, grantees and cooperative agreement partners under their

authority the DS–7655 form file and Cerenade e-Form filler installation instructions. Respondents, using the Cerenade filler, will complete the form and email the form file to their Contracting Officers or Grants Officer.

Dated: July 13, 2015.

**Larry Bartlett,**

*Director, Office of Admissions, Bureau of Population, Refugees, and Migration, Department of State.*

[FR Doc. 2015–18078 Filed 7–22–15; 8:45 am]

**BILLING CODE 4710–33–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Waiver of Aeronautical Land-Use Assurance: Kansas City International Airport (MCI), Kansas City, MO

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

**ACTION:** Notice of Intent of Waiver with respect to land.

**SUMMARY:** The Federal Aviation Administration (FAA) is considering a proposal from the Kansas City Aviation Department (sponsor), Kansas City, MO, to release a 14.94 ± acre parcel of land from the federal obligation dedicating it to aeronautical use and to authorize this parcel to be used for revenue-producing, non-aeronautical purposes.

**DATES:** Comments must be received on or before August 24, 2015.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: Mark VanLoh, Director of Aviation Department, Kansas City International Airport, P.O. Box 20047, 601 Brasilia Ave., Kansas City, MO 64153–2054, (816) 243–3031.

**FOR FURTHER INFORMATION CONTACT:** Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106, Telephone number (816) 329–2644, Fax number (816) 329–2611, email address: *lynn.martin@faa.gov.*

**SUPPLEMENTARY INFORMATION:** The FAA invites public comment on the request to change approximately 14.94± acres of airport property at the Kansas City International Airport (MCI) from aeronautical use to non-aeronautical for revenue producing use. The parcel of land is located along NW. Prairie View Drive. This parcel will be used for construction and operation of the Kansas City Police North Patrol Station.

No airport landside or airside facilities are presently located on this parcel, nor are airport developments contemplated in the future. The current use is agricultural and grass fields. The parcel will serve as a revenue producing lot with the proposed change from aeronautical to non-aeronautical. The request submitted by the Sponsor meets the procedural requirements of the Federal Aviation Administration and the change to non-aeronautical status of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this Notice.

The following is a brief overview of the request:

The Kansas City International Airport (MCI) is proposing the release of one parcel, of 14.94± acres, from aeronautical to non-aeronautical. The release of land is necessary to comply with Federal Aviation Administration Grant Assurances that do not allow federally acquired airport property to be used for non-aviation purposes. The rental of the subject property will result in the land at the Kansas City International Airport (MCI) being changed from aeronautical to nonaeronautical use and release the lands from the conditions of the Airport Improvement Program Grant Agreement Grant Assurances. In accordance with 49 U.S.C. 47107(c)(2)(B)(i) and (iii), the airport will receive fair market rental value for the property. The annual income from rent payments will generate a long-term, revenue-producing stream that will further the Sponsor's obligation under FAA Grant Assurance number 24, to make the Kansas City International Airport as financially self-sufficient as possible.

Following is a legal description of the subject airport property at the Kansas City International Airport (MCI):

All that part of the Northeast Quarter of Section 26, Township 52, Range 34, Kansas City, Platte County, Missouri, more particularly described as follows: Commencing at the Southwest Corner of the Northeast quarter of said section 26; thence North 00°08′46″ East, along the West line of said Northeast quarter, 631.67 feet; thence South 89°44′24″ East, 20.61 feet to the point of beginning; thence North 00°15′36″ East, 824.98 feet; thence in a Northeasterly direction along a curve to the right tangent to the last described course, having a radius of 15.00 feet through a central angle of 104°01′35″, an arc distance of 27.23 feet to a point of reverse curve; thence in an Easterly direction along a curve to the left, having a radius of 613.66 feet through a central angle of 44°26′27″, an arc distance of 475.98 feet to a point of reverse curve; thence in an Easterly direction along a curve to the right, having a radius of 15.00 feet through a central angle of 90°39′40″, an arc distance of 23.73 feet to the Westerly right-of-way line of Interstate Highway Route No. 29 as described in Book 1 at Page 93; thence along the Westerly right-of-way line of said Interstate Highway Route No. 29 the following courses and distances: South 29°29′37″ East 670.83 feet to a point 40 feet opposite center line station 74+50; thence South 60°30′23″ West, 5.00 feet to a point 45 feet opposite center line station 74+50; thence South 29°29′37″ East, 350.00 feet to a point 45 feet opposite center line station 78+00; thence North 60°30′23″ East, 5.00 feet to a point 40 feet opposite center line station 78+00; thence South 29°29′37″ East, 16.05 feet; thence leaving the Easterly right-of-way line of said Interstate Highway Route No. 29, North 89°44′24″ West, 1013.23 feet to the point of beginning, containing 14.94 acres, more or less.

Any person may inspect, by appointment, the request in person at the FAA office listed above **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon appointment and request, inspect the application, notice and other documents determined by the FAA to be related to the application in person at the Kansas City International Airport.

Issued in Kansas City, MO on July 16, 2015.

**Jim A. Johnson,**

*Manager, Airports Division.*

[FR Doc. 2015–18011 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2015–3001]**

**RIN 2120–AA64**

### Notice of Relocation; Change of Physical Address for the Federal Aviation Administration Southwest Regional Office

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

**ACTION:** Notice.

**SUMMARY:** The Federal Aviation Administration (FAA) is publishing this notice to announce that the physical address of the FAA Southwest Regional Office, which is specified in airworthiness directives (ADs) issued by the Rotorcraft Directorate, is changing due to a relocation.

**DATES:** This notice is effective July 23, 2015.

**FOR FURTHER INFORMATION CONTACT:** Jim Grigg, Manager, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy., Fort Worth, Texas 76177; telephone (817) 222–5110; email *jim.grigg@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

## Discussion

The FAA Southwest Regional Office is relocating from 2601 Meacham Blvd., Fort Worth, Texas 76137, to 10101 Hillwood Parkway, Fort Worth, Texas 76177. The Office of the Regional Counsel and the Rotorcraft Directorate are located in the FAA Southwest Regional Office. Service information related to ADs that cannot be placed in the AD docket is made reasonably available for review in the Office of the Regional Counsel. Rotorcraft Directorate personnel provide further information about ADs and approve AMOCs for ADs. The Office of the Regional Counsel is relocating effective July 20, 2015. The Rotorcraft Directorate is relocating effective July 27, 2015.

## Conclusion

Effective July 20, 2015, you may review service information related to ADs issued by the Rotorcraft Directorate at the FAA, Office of the Regional Counsel, 10101 Hillwood Pkwy., Fort Worth, Texas 76177.

Effective July 27, 2015, mail correspondence regarding additional information about ADs issued by the Rotorcraft Directorate to: Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177.

Issued in Fort Worth, Texas, on July 17, 2015.

**Bruce E. Cain,**

*Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 2015–18047 Filed 7–22–15; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### FTA Supplemental Fiscal Year (FY) 2015 Apportionments, Allocations, and Program Information

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice.

**SUMMARY:** The Federal Transit Administration (FTA) annually publishes one or more notices to apportion funds appropriated by law. If less than a full year of funds is available, FTA may publish multiple partial apportionment notices. This notice is the second notice announcing a partial apportionment for programs funded with Fiscal Year (FY) 2015 contract authority.

**FOR FURTHER INFORMATION CONTACT:** For general information about this notice contact Kimberly Sledge, Acting Director, Office of Transit Programs, at (202) 366–2053. Please contact the appropriate FTA regional office for any specific requests for information or technical assistance. A list of FTA regional offices and contact information is available on the FTA Web site at *http://www.fta.dot.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Overview

FTA's public transportation assistance program authorization, the Moving Ahead for Progress in the 21st Century Act (MAP–21), expired September 30, 2014. Since that time, Congress has enacted short-term extensions allowing FTA to continue its current programs. The most recent extension, the Highway and Transportation Funding Act of 2015, Public Law 114–21, (May 29, 2015) continues FTA's transit assistance programs through July 31, 2015.

More specifically, it extends contract authority for the Formula and Bus Grants programs at approximately 83 percent of the FY 2015 levels until July 31, 2015.

FTA's full-year appropriations, the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235 (Dec. 16, 2014), hereinafter ''Appropriations Act, 2015'' was enacted in December, 2014, giving FTA appropriated resources for all of FY 2015 for Administrative Expenses, Capital Investment Grants, Research programs, and grants to the Washington Metropolitan Area Transportation Authority. The Appropriations Act, 2015 also provides a full fiscal year obligation limitation on contract authority made available to FTA programs funded from the Mass Transit Account of the Highway Trust Fund during this fiscal year.

On February 9, 2015, FTA published an apportionments notice that apportioned approximately 8/12ths of the FY 2015 authorized contract authority among potential program recipients based on contract authority that was available from October 1, 2015 through May 31, 2015 (80 FR 7254). That notice also provided relevant information about the FY 2015 funding available, program requirements, period of availability, prior year unobligated balances, and other related program information and highlights. A copy of that notice and accompanying tables can be found on the FTA Web site at *http://www.fta.dot.gov/apportionments.*

This document provides notice to stakeholders that FTA is apportioning the available FY 2015 authorized contract authority—October 1, 2014 through July 31, 2015—among potential program recipients according to statutory formulas in 49 U.S.C. Chapter 53. This document also allocates the remainder of Capital Investment Grant funding to projects. FTA has posted tables displaying the funds available to eligible states and urbanized areas on FTA's Web site at *http://www.fta.dot.gov/apportionments.* FTA will issue a supplemental notice at a later date when additional contract authority becomes available.

The formula apportionment tables that allocate approximately 83 percent of FY 2015 appropriated funds can be found at *http://www.fta.dot.gov/apportionments.* In addition, the National Transit Database (NTD) and Census Data used in the funding formulas can be found at *http://www.fta.dot.gov/apportionments.* FTA's tables include the following revisions to incorporate updated NTD data or to correct for errors incurred in the tables published on February 9, 2015:

A. The Small Transit Intensive Cities (STIC) calculations include updated NTD data that includes an additional STIC factor for the Flagstaff Urbanized Area.

B. The Tribal Transit Formula calculations include updated NTD data that has a revised vehicle revenue miles amount for the Southern Ute tribe.

C. The Section 5307 Urbanized Area Formula calculations have been updated to correct for STIC funding allocated to urbanized areas spanning multiple states where STIC funds were incorrectly attributed to the respective states.

D. The Section 5337 State of Good Repair High Intensity Fixed Guideway Tier calculations have been updated to

correct for an error in the NTD data used in the February 9 table. That table used data on Directional Route Miles (DRM) that was used in the FY 2014 apportionment calculations. NTD data is updated annually and the supplemental apportionment table uses the DRM associated with the FY 2015 apportionments.

Stakeholders with questions or those who are seeking additional information on these corrections can contact David Schneider with FTA's Division of Grants Management at 202–493–0175.

**II. Grant Management and Application Procedures**

A. The Transportation Electronic Awards Management (TEAM) system will close on Friday, September 25, 2015. Grants and cooperative agreements must have all applicable assurances and certifications completed so that funds can be awarded by the deadline. Funding that has not been awarded in an application by September 25, 2015 will not be migrated into the new FTA financial system, TrAMS. Instead, these applications will need to be re-created when TrAMS deploys in FY 2016. This applies to new applications as well as amendments to existing awards.

B. In an effort to streamline grant processing, assuming the full year 2015 budget level will become available, grantees may now create an application using an estimated full FY 2015 amount with the appropriate scopes and activity line items when developing project budgets. The project budget should reflect the precise activities for which the grant funds will be used. FTA will then send grants to the Department of Labor (DOL) for certification of the use of the estimated full year funds. FTA will then make a grant based on the funding currently available. Subsequently, when additional funding becomes available, grantees can amend grants and FTA will send the amended grants to DOL for information only, since the grantee previously will have received a certification. For additional grant application procedures please see section V.F. of the FY 2015 Apportionments notice published in the **Federal Register** at *http://www.fta.dot.gov/apportionments.*

C. Recipients of open American Recovery and Reinvestment Act (ARRA) grants should be aware that, as a matter of law, all remaining ARRA funds MUST be disbursed from grants by the end of the 5th fiscal year (FY) after funds were required to be obligated. (SEE 31 U.S.C. 1552.) For FTA ARRA projects, that requirement takes affect at the end of FY 2015. Accordingly, once FTA's ECHO grant payment system closes for disbursements on September 25, 2015, all remaining funds within FTA ARRA funded grants will no longer be available to the grantee and will be deobligated from the grant and returned to the U.S. Treasury. Even if a grantee has incurred costs or disbursed funds prior to the close of ECHO, if the grantee has not actually drawn down the funds by 2:00 p.m. EDT on September 25, 2015 FTA would be unable to reimburse the grantee. Therefore, grantees with open ARRA grants must ensure project activities are completed and all funds are drawdown before by 2:00 p.m. EDT on September 25, 2015. For ARRA TIGER 1 projects, the same requirement will be in effect for the end of FY 2016.

**Therese McMillan,**

*Acting Administrator.*

[FR Doc. 2015–18062 Filed 7–22–15; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. FD 35944]**

### Akron Barberton Cluster Railway Company—Lease and Operation Exemption—Metro Regional Transit Authority

Akron Barberton Cluster Railway Company (ABC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to amend its lease with Metro Regional Transit Authority (Metro), and continue to lease the freight rail easement on the Akron-Krumroy Line between approximately milepost 40.42 in Akron, Ohio, and approximately milepost 33.70 in Krumroy, Ohio (the Line), a distance of approximately 6.72 miles in Summit County, Ohio.[1]

ABC states it will continue to provide rail freight service between the industries on the Line and the connecting line-haul carriers, Wheeling & Lake Erie Railway Company and CSX Transportation, Inc., in Akron/Barberton, Ohio. ABC further states that Metro, as the owner and lessor of the freight easement, will retain a residual common carrier obligation on the Line but will not operate any rail freight service on the Line.

ABC certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class II or Class I rail carrier and will not exceed $5 million. According to ABC, the lease agreement does not contain any provision that would limit ABC's ability to interchange traffic with a third-party connecting carrier.

ABC states that it intends to consummate the transaction on or shortly after August 6, 2015, the effective date of this transaction (30 days after the exemption was filed). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than July 30, 2015 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35944, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Michael J. Barron, Jr., Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606–2832.

Board decisions and notices are available on our Web site at *WWW.STB.DOT.GOV*.

Decided: July 20, 2015.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

**Brendetta S. Jones,**

*Clearance Clerk.*

[FR Doc. 2015–18143 Filed 7–22–15; 8:45 am]

**BILLING CODE 4915–01–P**

[1] ABC obtained authority to lease and operate the subject rail line in *Akron Barberton Cluster Railway—Lease & Operation Exemption—Metro Regional Transit Authority,* FD 34362 (STB served July 11, 2003).

## DEPARTMENT OF THE TREASURY

### United States Mint

### Notification of Citizens Coinage Advisory Committee August 10, 2015, Public Meeting

**ACTION:** Notification of Citizens Coinage Advisory Committee August 10, 2015, Public Meeting.

**SUMMARY:** Pursuant to United States Code, Title 31, section 5135(b)(8)(C), the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) public meeting scheduled for August 10, 2015.

*Date:* August 10, 2015.

*Time:* 1:00 p.m. to 2:00 p.m. EDT.

*Location:* This meeting will occur *via teleconference.* Interested members of the public may dial in to listen to the meeting at (866) 564–9287/Access Code: 62956028.

*Subject:* Review and consideration of additional candidate designs for the First Spouse Gold Coin honoring Nancy Reagan.

Interested persons should call the CCAC HOTLINE at (202) 354–7502 for the latest update on meeting time and room location.

In accordance with 31 U.S.C. 5135, the CCAC:

- Advises the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals.
- Advises the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.
- Makes recommendations with respect to the mintage level for any commemorative coin recommended.

**FOR FURTHER INFORMATION CONTACT:** William Norton, United States Mint Liaison to the CCAC; 801 9th Street NW., Washington, DC 20220; or call 202–354–7200.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6525.

**Authority:** 31 U.S.C. 5135(b)(8)(C).

Dated: July 17, 2015.

**David Motl,**

*Chief Financial Officer, United States Mint.*

[FR Doc. 2015–18013 Filed 7–22–15; 8:45 am]

**BILLING CODE P**


# FEDERAL REGISTER

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Part II

## Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 196 and 198
Pipeline Safety: Pipeline Damage Prevention Programs; Final Rule

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 196 and 198**

**[Docket No. PHMSA–2009–0192; Amdt. No. 196–1; 198–7]**

**RIN 2137–AE43**

# Pipeline Safety: Pipeline Damage Prevention Programs

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006, this final rule establishes review criteria for State excavation damage prevention law enforcement programs as a prerequisite for PHMSA to conduct an enforcement proceeding against an excavator in the absence of an adequate enforcement program in the State where a pipeline damage prevention violation occurs. This final rule amends the pipeline safety regulations to establish the following: Criteria and procedures for determining the adequacy of State pipeline excavation damage prevention law enforcement programs; an administrative process for making State adequacy determinations; the Federal requirements PHMSA will enforce in States with inadequate excavation damage prevention law enforcement programs; and the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. The development of the review criteria and the subsequent determination of the adequacy of State excavation damage prevention law enforcement programs is intended to encourage States to develop effective excavation damage prevention law enforcement programs to protect the public from the risk of pipeline ruptures caused by excavation damage and allow for Federal administrative enforcement action in States with inadequate enforcement programs.

**DATES:** This final rule is effective January 1, 2016.

**FOR FURTHER INFORMATION CONTACT:** Sam Hall, Program Manager, PHMSA, by email at *sam.hall@dot.gov* or by telephone at 804–556–4678, or Larry White, Attorney Advisor, PHMSA, by email at *lawrence.white@dot.gov* or by telephone at 202–366–9093.

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary

### *A. Purpose of the Regulatory Action*

The purpose of this final rule is to reduce pipeline accidents and failures resulting from excavation damage by strengthening the enforcement of pipeline damage prevention requirements. Based on incident data PHMSA has received from pipeline operators, excavation damage is a leading cause of natural gas and hazardous liquid pipeline failure incidents.[1] Excavation damage means any excavation activity that results in the need to repair or replace a pipeline due to a weakening, or the partial or complete destruction, of the pipeline, including, but not limited to, the pipe, appurtenances to the pipe, protective coatings, support, cathodic protection or the housing for the line device or facility. Better, more effective enforcement of State excavation damage prevention laws, such as the requirement to ''call before you dig,'' is a key to reducing pipeline excavation damage incidents. Though all States have a damage prevention program, some States may not adequately enforce their State damage prevention laws. Under section 2(a)(1) of the PIPES Act (Pub. L. 109–468), PHMSA developed criteria and procedures for determining whether a State's enforcement of its excavation damage prevention laws is adequate. Under the PIPES Act, such a determination is a prerequisite for PHMSA if the agency finds it necessary to conduct an administrative enforcement proceeding against an excavator for violating Federal excavation standards.

### *B. Summary of the Major Provisions of the Regulatory Action*

Pursuant to the PIPES Act of 2006, this final rule amends the Federal pipeline safety regulations to establish the following: (1) Criteria and procedures PHMSA will use to determine the adequacy of State pipeline excavation damage prevention law enforcement programs; (2) an administrative process for States to contest notices of inadequacy from PHMSA should they elect to do so; (3) the Federal requirements PHMSA will enforce against excavators for violations in States with inadequate excavation damage prevention law enforcement programs; and (4) the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. The establishment of regulations specifying the criteria that PHMSA will use to evaluate a State's excavation damage prevention law enforcement program is a prerequisite for PHMSA to conduct an enforcement proceeding against an excavator in the absence of an adequate enforcement program in a State where a damage prevention violation occurs.

### *C. Costs and Benefits*

The total first year costs of this rulemaking action is estimated to be $658,145. The following years, the costs are estimated to be approximately $183,145 per year. The total cost of this alternative over 10 years, with a 3% discount rate is $2,084,132 and at a 7% percent discount rate is $1,720,214. The average annual benefits of this alternative range from $4,642,829 to $14,739,141. Evaluating just the lower range of benefits over 10 years results in a total benefit of over $38,000,000, with a 3% discount rate, and over $31,000,000, with a 7% discount rate. Therefore, the estimated benefits of this alternative far outweigh the relatively minor costs, both annually and over ten years.

## II. Background

### *A. Pipeline Incidents Caused by Excavation Damage*

Excavation damage is a leading cause of natural gas and hazardous liquid pipeline failure incidents. From 1988 to 2012, 188 fatalities, 723 injuries, 1,678 incidents, and $474,759,544 in estimated property damages were reported as being caused by excavation damage on all PHMSA regulated pipeline systems in the United States, including onshore and offshore hazardous liquid, gas transmission, and gas distribution lines.[2]

While excavation damage is the cause of a significant number of all pipeline failure incidents, it is cited as the cause of a relatively higher number of natural gas distribution incidents. In 2005, PHMSA initiated and sponsored an investigation of the risks and threats to gas distribution systems. This investigation was conducted through the efforts of four joint work/study

[1] Data from the U.S. Department of Transportation, PHMSA Office of Pipeline Safety, Incident and Accident Reports of Gas Distribution, Gas Transmission & Gathering and Hazardous Liquid Pipeline Systems. Pipeline incident and accident summaries are available on PHMSA Stakeholders Communication Web site at: *http://primis.phmsa.dot.gov/comm/Index.htm?nocache=3320.*

[2] Data from the U.S. Department of Transportation, PHMSA Office of Pipeline Safety, Incident and Accident Reports of Gas Distribution, Gas Transmission & Gathering and Hazardous Liquid Pipeline Systems. Pipeline incident and accident summaries are available on PHMSA Stakeholders Communication Web site at: *http://primis.phmsa.dot.gov/comm/Index.htm?nocache=3320.*

groups, each of which included representatives of the stakeholder public, the gas distribution pipeline industry, State pipeline safety representatives, and PHMSA. The areas of their investigations included excavation damage prevention. The *Integrity Management for Gas Distribution, Report of Phase I Investigations* (DIMP Report) was issued in December 2005.[3] As noted in the DIMP Report, the Excavation Damage Prevention work/study group reached four key conclusions:

- Excavation damage poses by far the single greatest threat to distribution system safety, reliability, and integrity; therefore, excavation damage prevention presents the most significant opportunity for improving distribution pipeline safety.
- States with comprehensive damage prevention programs that include effective enforcement have a substantially lower probability of excavation damage to pipeline facilities than States that do not. The lower probability of excavation damage translates to a substantially lower risk of serious incidents and consequences resulting from excavation damage to pipelines.
- A comprehensive damage prevention program requires nine important elements to be present and functional for the program to be effective. All stakeholders must participate in the excavation damage prevention process. The elements are:

1. Enhanced communication between operators and excavators.
2. Fostering support and partnership of all stakeholders in all phases (enforcement, system improvement, etc.) of the program.
3. Operator's use of performance measures for persons performing locating of pipelines and pipeline construction.
4. Partnership in employee training.
5. Partnership in public education.
6. Enforcement agencies' role as partner and facilitator to help resolve issues.
7. Fair and consistent enforcement of the law.
8. Use of technology to improve all parts of the process.
9. Analysis of data to continually evaluate/improve program effectiveness.

- Federal action is needed to support the development and implementation of damage prevention programs that includes effective enforcement as a part of the State's pipeline safety program. This is consistent with a State's pipeline safety program's objectives, which are to ensure the safety of the public by addressing threats to the distribution infrastructure. Federal action must include provisions for ongoing funding, such as Federal grants, to support State pipeline safety efforts. This funding is intended to be in addition to, and independent of, existing Federal funding of State pipeline safety programs.

Other studies have indicated that improvements in State damage prevention enforcement can contribute to lowering excavation damage rates. A 2009 Mechanical Damage Final Report, prepared on behalf of PHMSA, concluded that excavation damage continues to be a leading cause of serious pipeline failures and that better one-call enforcement is a key gap in damage prevention.[4] In that regard, the report noted that most jurisdictions have established laws to enforce one-call notification compliance; however, the report noted that many pipeline operators consider lack of enforcement to be degrading the effectiveness of one-call programs. The report cited that in Massachusetts, 3,000 violation notices were issued from 1986 to the mid-1990s, contributing to a decrease of third-party damage incidents on all types of facilities from 1,138 in 1986 to 421 in 1993. The report also cited findings from another study that enforcement of the one-call notification requirement was the most influential factor in reducing the probability of pipeline strikes and that the number of pipeline strikes is proportionate to the degree of enforcement.[5]

With respect to the effectiveness of current regulations, the report stated that an estimated two-thirds of pipeline excavation damage is caused by third parties and found that the problem is compounded if the pipeline damage is not promptly reported to the pipeline operator so that corrective action can be taken. It also noted ''when the oil pipeline industry developed the survey for its voluntary spill reporting system—known as the Pipeline Performance Tracking System—it recognized that damage to pipelines, including that resulting from excavation, digging, and other impacts, is also precipitated by operators (first parties) and their contractors (second parties).''

Finally, the report found that for some pipeline excavation damage data that was evaluated, ''in more than 50 percent of the incidents, one-call associations were not contacted first.'' In addition, ''failure to take responsible care, to respect the instructions of the pipeline personnel, and to wait the proper time accounted for 50 percent of the incidents.''

*B. State Damage Prevention Programs*

States have historically been the primary enforcers of pipeline damage prevention requirements, and while this final rule will allow PHMSA to conduct Federal enforcement where necessary, PHMSA's view is that States should remain the primary enforcers of these requirements to the greatest extent possible. In analyzing the need for Federal enforcement authority, PHMSA notes that there is considerable variability among the States in terms of physical geography, population density, underground infrastructure, excavation activity, and economic activity. For example, South Dakota is a rural, agricultural State with a relatively low population density. In contrast, New Jersey is more densely populated and is host to a greater variety of land uses, denser underground infrastructure, and different patterns of excavation activity. These differences between States equate to differences in the risk of excavation damage to underground infrastructure, including pipelines. Denser population often means denser underground infrastructure; rural and agricultural States have different underground infrastructure densities and excavation patterns than more urbanized States.

There is no single, comprehensive national damage prevention law setting forth requirements for excavators. On the contrary, all 50 States in the United States have a law designed to prevent excavation damage to underground utilities. However, these State laws vary considerably, and no two State laws are identical. Therefore, excavation damage prevention stakeholders in each State are subject to different legal and regulatory requirements. Variances in State laws include excavation notice requirements, damage reporting requirements, exemptions from the requirements of the laws for excavators and/or utility operators, provisions for enforcement of the laws, and many others. PHMSA has developed a tool to better understand the variability in these State laws at *http://primis.phmsa.dot.gov/comm/DamagePreventionSummary.htm.*

*C. PHMSA Damage Prevention Efforts*

Prior to developing this final rule, PHMSA has made extensive efforts over many years to improve excavation damage prevention as it relates to

[3] This report is available in the rulemaking docket.

[4] Mechanical Damage Final Report, Michael Baker Jr., Inc., April 2009.

[5] Effectiveness of Prevention Methods for Excavation Damage, Chen, Q. and Chebaro, M., C FER Report L110, June 2006.

pipeline safety. These efforts have included outreach, grants, and funding of cooperative agreements with a wide spectrum of excavation damage prevention stakeholders including:

- Public and community organizations
- Excavators and property developers
- Emergency responders
- Local, State, and Federal government agencies
- Pipeline and other underground facility operators
- Industry trade associations
- Consensus standards organizations
- Environmental organizations

These initiatives are described in detail in the Advance Notice of Proposed Rulemaking (ANPRM) on this subject that PHMSA published in the **Federal Register** on October 29, 2009 (74 FR 55797).

*D. The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006.*

On December 29, 2006, PHMSA's pipeline safety program was reauthorized by the enactment of the PIPES Act. The PIPES Act provides for enhanced safety and environmental protection in pipeline transportation, enhanced reliability in the transportation of the Nation's energy products by pipeline, and other purposes. Major portions of the PIPES Act focus on damage prevention, including additional resources in the form of State damage prevention grants, clear program guidelines as well as additional enforcement authority to encourage States to develop and sustain effective excavation damage prevention programs. The PIPES Act identifies nine elements that effective damage prevention programs should include. These are essentially identical to the nine elements noted in the DIMP Report discussed in the previous subsection.

The PIPES Act gave PHMSA limited authority to conduct administrative civil enforcement proceedings against excavators who damage pipelines in a State that has failed to adequately enforce its excavation damage prevention laws. Specifically, Section 2 of the PIPES Act provides that the Secretary of Transportation may take civil enforcement action against excavators who:

1. Fail to use the one-call notification system in a State that has adopted a one-call notification system before engaging in demolition, excavation, tunneling, or construction activity to establish the location of underground facilities in the demolition, excavation, tunneling, or construction area;

2. Disregard location information or markings established by a pipeline facility operator while engaging in demolition, excavation, tunneling, or construction activity; and

3. Fail to report excavation damage to a pipeline facility to the owner or operator of the facility promptly, and report to other appropriate authorities by calling the 911 emergency telephone number if the damage results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property.

Section 2 of the PIPES Act limited the Secretary's ability to take civil enforcement action against these excavators unless the Secretary determined that the State's enforcement of its damage prevention laws is inadequate to protect safety.

*E. Advance Notice of Proposed Rulemaking*

On October 29, 2009, PHMSA published an ANPRM (74 FR 55797) to seek feedback and comments regarding the development of criteria and procedures for determining whether States are adequately enforcing their excavation damage prevention laws and for conducting Federal administrative enforcement, if necessary. The ANPRM also outlined PHMSA's excavation damage prevention initiatives and described the requirements of the PIPES Act, which authorizes PHMSA to conduct this rulemaking action. The comments received on the ANPRM were generally supportive of the need for this rulemaking.

*F. Notice of Proposed Rulemaking*

On April 2, 2012, PHMSA published a Notice of Proposed Rulemaking (NPRM) (77 FR 19800) that reflected the comments and input received in connection with the ANPRM. The NPRM proposed to respond to the congressional mandate specified in Section 2 of the PIPES Act and included proposed amendments to Title 49, Code of Federal Regulations (CFR) to establish the following:

1. Criteria and procedures PHMSA would use to determine the adequacy of State pipeline excavation damage prevention law enforcement programs. PHMSA would first need to determine that the State's enforcement program is inadequate before conducting an administrative enforcement proceeding against an excavator for violating Federal requirements;

2. An administrative process for States to contest notices of inadequacy from PHMSA should the States elect to do so;

3. The Federal requirements PHMSA would enforce in States with inadequate excavation damage prevention law enforcement programs; and

4. The adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised.

**III. Advisory Committees Meeting**

On December 12, 2012, the Gas Pipeline Advisory Committee [6] and the Liquids Pipeline Advisory Committee [7] met jointly in Alexandria, Virginia. The Committees are statutorily mandated advisory committees that advise PHMSA on proposed safety standards, risk assessments, and safety policies for natural gas and hazardous liquids pipelines. Both committees were established under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 1) and the pipeline safety laws (49 U.S.C. 60115). Each committee consists of 15 members, with membership evenly divided among the Federal and State governments, the regulated industry, and the public. The Committees advise PHMSA on the technical feasibility, practicability, and cost-effectiveness of each proposed pipeline safety standard.

During the meeting, the Committees considered the NPRM to establish excavation damage prevention enforcement actions applicable to third-party excavators. To assist the Committees in their deliberations, PHMSA presented a description and summary of the major issues for comment. These issues are (1) the criteria for evaluating State enforcement programs, (2) the Federal excavation standard, and (3) the incentives for States to implement adequate enforcement programs.

After discussion, both Committees separately voted to recommend that PHMSA implement the NPRM with certain changes. Specifically, the Committees recommended as follows:

(1) The Liquids Advisory Committee voted unanimously, and the gas advisory committee voted 10-to-1 that the Notice of Proposed Rulemaking as published in the **Federal Register**, in terms of the criteria for evaluating State enforcement programs, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

- PHMSA develops a policy, incorporated into the preamble of the final rule, that clarifies the scope and applicability of the State evaluation criteria. The policy will address the

[6] Officially designated as the Technical Pipeline Safety Standards Committee.

[7] Officially designated as the Technical Hazardous Liquid Pipeline Safety Standards Committee.

relative importance and intent of each of the criteria and the three items identified in paragraph 9 of a document provided by member Pierson.[8]

The three items of paragraph 9 are:

• PHMSA should look beyond enforcement actions in evaluating a State damage prevention program. PHMSA should consider using a broad range of factors, such as a State's investigation processes, standards for excavators, excavator education efforts, and commitment to continued improvement.

• The criteria to determine whether a State damage prevention program is deemed adequate should also include consideration of whether the State's one-call centers are required to provide a mandatory positive response to locate requests. A mandatory positive response will ensure that an excavator is aware of whether owners/operators have marked the requested area prior to the beginning of an excavation, consistent with Common Ground Alliance (CGA) Best Practice 4–9.

• To engage stakeholders in the process of determining the adequacy of a State's program, the administrative process for States should be amended to include public comment. PHMSA should accept public comment on the adequacy of a State's damage prevention program.

The Liquids Advisory Committee voted unanimously and the Gas Advisory Committee voted 10-to-1 to recommend that PHMSA implement the NPRM with the changes reflected.

(2) Both Committees unanimously voted that the NPRM as published in the **Federal Register**, in terms of the proposed Federal excavation standard, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

• Eliminate the homeowner exemption.

• PHMSA develops a policy, incorporated into the preamble of the final rule that clarifies the scope and applicability of the Federal excavation standard. The policy will address triggers for Federal enforcement, how PHMSA will consider State exemptions in enforcement decisions, and how the Federal excavation standard will be applied in States with inadequate enforcement programs.

• In addition, the items 2 through 5 and 7 as provided by member Pierson, should be considered for incorporation into the final rule (including the policy as appropriate).

The items are:

196.109—Discretion to Dispatch 911 Emergency Personnel

• PHMSA's proposed § 196.109 states that, ''Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site.'' PHMSA should eliminate the discretion of the excavator in determining whether emergency personnel should be dispatched.

196.103—Excavator Responsibilities

• To foreclose ignorance as a reason for noncompliance, PHMSA should edit § 196.103, which lists an excavator's obligations to protect underground pipelines from excavation-related damage. Section 196.103 should be revised to read ''Prior to commencing excavation activity the excavator must:''

196.107 & 196.109—Stop Work Provisions

• A ''stop work'' provision should be incorporated into the regulations, which would require excavators to stop work if a pipeline is damaged in any way by excavation activity until the operator of the pipeline has had an opportunity to assess the damage. Consistent with CGA Best Practice 5–25, PHMSA should also require the excavator to take reasonable measures to protect those in immediate danger, the general public, property, and the environment until the facility owner/operator or emergency responders have arrived and completed their assessment of the situation.

196.107—Backfilling Locations

• PHMSA should include a requirement that an excavator may not backfill a site where damage or a near miss has occurred until the operator has been provided an opportunity to inspect the site.

Reporting Time Frame

• PHSMA should not include an upper time frame for reporting emergency release of hazardous products to appropriate authorities by calling 911. Excavators should ''promptly'' report incidents.

(3) The liquids advisory committee voted 8-to-1, and the gas advisory committee voted 8-to-3, that the NPRM as published in the **Federal Register**, in terms of the incentives for States to implement adequate enforcement programs, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

• Retain the potential penalty to base grants but consider lowering the percentage that may be affected.

• Develop a policy, incorporated into the preamble of the final rule that clarifies how base grants will be calculated by including the State program evaluation criteria defined in the final rule.

• Reduce the grace period (§ 198.53) from 5 years to 3 years.

• Ensure the Governors of States with inadequate enforcement are directly informed of PHMSA's findings, including potential consequences to base grant funding.

*PHMSA's Response to the Committees' Recommendations*

With respect to Item 1, PHMSA has considered the Committees' recommended changes to the criteria for evaluating State enforcement programs. PHMSA has developed a policy, outlined below in this preamble, which clarifies the scope and applicability of the State evaluation criteria. The policy addresses the relative importance and intent of each of the criteria.

PHMSA has also considered the three items identified in paragraph 9 of the document provided by member Pierson. With regard to the first item, which addresses the factors PHMSA should consider when evaluating State enforcement programs, PHMSA believes that the seven criteria listed in section § 198.55 of this final rule are adequate for evaluating the effectiveness of a State damage prevention enforcement program. PHMSA recognizes that there are many factors, such as excavator education and continual improvement, which contribute to effective damage prevention programs; however, this final rule is intended to address damage prevention enforcement and not other program elements.

With regard to the second item offered by member Pierson, the term ''positive response'' refers to communication with the excavator prior to excavation to ensure that all contacted pipeline operators have located and marked their underground facilities. PHMSA agrees that positive response ensures that an excavator is aware of whether operators have marked an area prior to the beginning of excavation. PHMSA supports CGA Best Practice 4–9. However, PHMSA did not propose in the NPRM to review States' use of positive response in determining the adequacy of State enforcement programs, which means that the concept has not been subject to public or stakeholder review. In addition, PHMSA believes that positive response is outside the scope of this rulemaking,

[8] At the Advisory Committees' meeting, member Pierson representing the pipeline industry submitted a written recommendation for the members' consideration.

which is focused on evaluating State enforcement programs. Therefore, PHMSA has not included positive response in the criteria listed in § 198.55 of this final rule.

PHMSA also did not propose in the NPRM to engage stakeholders in the process of determining the adequacy of a State's enforcement program, as suggested in the third item from member Pierson. Like positive response, the concept of stakeholder review of State programs has not been subject to stakeholder and public review. Additionally, PHMSA believes that engaging stakeholders in determining the adequacy of State programs would be overly cumbersome for both PHMSA and the States and would result in significant delays in the determination process.

With respect to Item 2, PHMSA has considered the Committees' recommendation to consider changes to the proposed Federal excavation standard. In response to the Committees' recommendation, PHMSA has eliminated the homeowner exemption originally proposed in § 196.105. PHMSA eliminated the homeowner exemption because homeowners excavating on their own property without first calling 811 poses a significant risk of excavation damage to pipelines. PHMSA has also developed a policy, incorporated into the preamble of this final rule, which clarifies the scope and applicability of the Federal excavation standard. The policy addresses triggers for Federal enforcement, how PHMSA will consider State exemptions in enforcement decisions, and how the Federal excavation standard will be applied in States with inadequate enforcement programs. This policy document will be posted on the agency's Web site.

PHMSA also addressed the other items provided by member Pierson. PHMSA has eliminated the phrase, ''Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site'' from § 196.109 and the phrase, ''where an underground gas or hazardous liquid pipeline may be present'' from § 196.103. With regard to §§ 196.107 and 196.109, PHMSA has not incorporated a ''stop work'' provision into the regulation. This provision was not proposed in the NPRM and has not received review from stakeholders and the public. Likewise, PHMSA has not incorporated requirements consistent with CGA Best Practice 5–25 for the same reason. With regard to § 196.107, PHMSA has not included in the final rule a provision disallowing backfilling because the provision was not proposed in the NPRM and has not received review from stakeholders and the public. With regard to the Reporting Time Frame, PHMSA has modified the proposed § 196.109 to reflect the recommendations.

With regard to Item 3, PHMSA has considered the Committees' recommendation to consider changes to the proposed incentives for States to implement adequate enforcement programs. As suggested, PHMSA has retained the potential penalty to base grants and has lowered the percentage of base grants that may be affected from 10 percent to four percent. However, PHMSA has not reduced the grace period noted in § 198.53 from 5 years to 3 years. PHMSA believes that some States may need a full 5 years to successfully update their State damage prevention laws to implement an adequate enforcement program. PHMSA has also developed a policy, incorporated into this preamble, which clarifies how base grants will be calculated by including the State program evaluation criteria defined in § 198.55. The policy also addresses PHMSA's process for notifying Governors of States with inadequate programs, including potential consequences to base grant funding. PHMSA reserves the right to modify these policies in the future, if necessary.

*Policies*

PHMSA will prepare stand-alone documents and post them on the agency's Web site for the following two policies: State Enforcement Program Evaluation Criteria, and Federal Enforcement Policy.

State Enforcement Program Evaluation Criteria

The criteria PHMSA will use to evaluate the adequacy of State damage prevention law enforcement programs are listed in § 198.55 of this final rule. The criteria are:

- Does the State have the authority to enforce its State excavation damage prevention law using civil penalties and other appropriate sanctions for violations?
- Has the State designated a State agency or other body as the authority responsible for enforcement of the State excavation damage prevention law?
- Is the State assessing civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance and is the State making publicly available information that demonstrates the effectiveness of the State's enforcement program?
- Does the enforcement authority (if one exists) have a reliable mechanism (*e.g.,* mandatory reporting, complaint-driven reporting) for learning about excavation damage to underground facilities?
- Does the State employ excavation damage investigation practices that are adequate to determine the responsible party or parties when excavation damage to underground facilities occurs?
- At a minimum, do the State's excavation damage prevention requirements include the following:

a. Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.

b. Excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator.

c. An excavator who causes damage to a pipeline facility:

i. Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and

ii. If the damage results in the escape of any PHMSA regulated natural and other gas or hazardous liquid, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

- Does the State limit exemptions for excavators from its excavation damage prevention law? A State must provide to PHMSA a written justification for any exemptions for excavators from State damage prevention requirements. PHMSA will make the written justifications available to the public.

The evaluation will involve all of the criteria, and the final determination will be based on the totality of the review. The following policy describes the manner in which PHMSA intends to apply the criteria. As experience with adequacy reviews is gained, PHMSA may modify this approach as necessary.

Criteria 1 and 2 guidance:

- Criteria 1 and 2 are pass/fail.
- If the answer to either of the questions posed in criteria 1 or 2 is ''no,'' the State excavation damage prevention law enforcement program will likely be deemed inadequate.

Criterion 3 guidance:

- PHMSA will seek records that demonstrate that the State enforcement agency is using its enforcement authority and imposing appropriate sanctions for violations. If a State cannot demonstrate use of its enforcement authority, the State enforcement

program will likely be deemed inadequate.

• PHMSA expects States to maintain records that demonstrate whether the rate of excavation damage incidents is being reduced as a result of enforcement. The result of PHMSA's review of a State's records in this regard will not, by itself, render a State enforcement program inadequate.

• PHMSA expects State enforcement programs to generally make damage prevention law enforcement information and statistics available to the public via a Web site. PHMSA does not expect States to violate any State laws, jeopardize any ongoing enforcement case, or post information that would violate the privacy of individuals as defined by State or Federal law. The result of PHMSA's review of the public availability of a State's information and statistics will not, by itself, render a State enforcement program inadequate.

Criterion 4 guidance:

• PHMSA will review how State enforcement programs learn about excavation damage to underground pipelines. In particular, PHMSA will be looking for reporting mechanisms that encourage parity in the application of enforcement resources. For example, does the reporting mechanism identify potential violations of law by both excavators and pipeline operators? If the State enforcement program learns of violations via road patrols that specifically target excavators without valid excavation tickets, how does the State also learn about violations of other provisions of State damage prevention laws, such as operators' failure to locate and mark pipelines? Also, PHMSA will review the State's methods for making stakeholders aware of the process and requirements for reporting damage incidents to the enforcement authority.

• The result of PHMSA's review of a State's program under criterion 4 will not, by itself, render a State enforcement program inadequate.

Criterion 5 guidance:

• PHMSA expects State enforcement programs to be balanced with regard to how they apply enforcement authority.

• PHMSA expects enforcement programs to be focused on the responsibilities of not only excavators, but also of utility owners and operators.

• PHMSA seeks patterns of enforcement activity that demonstrate that penalties are applied to the responsible party or parties in excavation damage incidents and not consistently to only one stakeholder group.

• The result of PHMSA's review of a State's program under criterion 5 will not, by itself, render a State enforcement program inadequate.

Criterion 6 guidance:

• PHMSA will review State requirements to ensure they address the basic Federal requirements in the PIPES Act for excavators, such as using an available one-call system.

• The result of PHMSA's review of a State's requirements will not, by itself, render the State's enforcement program inadequate.

Criterion 7 guidance:

• PHMSA expects States to document the exemptions provided in State damage prevention laws for excavators and one-call membership, and any such exemptions should not be too broad. Documentation should include the types of exemptions included in State law and any reason for the exemptions, such as data or other evidence that justifies the exemptions.

• The result of PHMSA's review of a State's program under criterion 7 will not, by itself, render a State enforcement program inadequate.

The criteria are listed in order of greatest to least importance. That is, criteria 1 and 2 and a portion of criterion 3 are pass/fail, while criteria 4 through 7 are not pass/fail. PHMSA may declare a State enforcement program inadequate if the State's program does not satisfy a combination of the criteria as described above. PHMSA will notify in writing the Governor's office or other appropriate State authority of a State deemed to have an inadequate enforcement program.

States that PHMSA deems to have inadequate enforcement programs may be subject to reductions in pipeline safety grant funding as described in § 198.53 of this final rule. PHMSA will use the existing process for calculating base grants but is considering a policy that would incorporate and/or substitute the evaluation criteria in § 198.55 for the criteria that are currently used for evaluating State damage prevention programs. PHMSA may modify its policies, as necessary, for determining how inadequate enforcement programs may impact pipeline safety grant funding.

Federal Enforcement Policy

PHMSA may enforce the Federal excavation standard defined in 49 CFR part 196, as established by this final rule, in States that PHMSA has deemed to have inadequate damage prevention law enforcement programs. The following policy describes the scope and applicability of the Federal excavation standard.

PHMSA may use its enforcement authority, as limited by the law and this final rule, in any excavation damage case involving a violation of this standard in a State where a finding of inadequacy has been made. PHMSA generally will focus its limited resources on serious violations that have the potential to directly impact safety.

PHMSA will determine if Federal enforcement action is warranted on a case-by-case basis. PHMSA will seek to use its enforcement authority in cases where PHMSA believes Federal enforcement against an excavator is appropriate and will deter future infractions (PHMSA already exercises its enforcement authority against pipeline operators who commit violations).

PHMSA is flexible with regard to how it learns about excavation damage incidents that may warrant Federal enforcement action. PHMSA may learn about incidents through complaints from stakeholders, incident reports, the media, and other mechanisms.

PHMSA acknowledges that most State damage prevention laws and regulations are more specific than the Federal excavation standard defined in this final rule. The Federal excavation standard forms the ''floor'' and sets forth the basic requirements for excavators so that its application can be fair and consistent even in States with very different requirements. When determining whether to take Federal enforcement action for an alleged violation of the Federal excavation standard, PHMSA will be cognizant of the damage prevention practices of the State in which the alleged violation occurred. For example, PHMSA will be sensitive to exemptions, waiting periods, tolerance zones, and other specific requirements that States could have applied to excavators in the State prior to the determination of inadequacy.

## IV. Summary and Response to Comments

PHMSA received 40 comments from pipeline trade associations, excavation and construction trade associations, the National Association of Pipeline Safety Representatives (NAPSR), PHMSA State partners, the CGA, State one-call organizations and one-call service providers, utility locating trade associations, the American Farm Bureau Federation (AFBF), the Association of American Railroads (AAR), the Gas Processors Association (GPA), pipeline operators, utility locating companies, pipeline safety consultants, and citizens.

List of Commenters:

1. American Farm Bureau Federation (AFBF)
2. American Gas Association (AGA)

3. American Public Gas Association (APGA)
4. Association of Oil Pipe Lines (AOPL) and American Petroleum Institute (API)
5. Associated General Contractors of America (AGC)
6. Association of American Railroads (AAR)
7. Black Hills Corporation
8. Bob Fenton
9. Center Point Energy (CenterPoint)
10. Common Ground Alliance (CGA)
11. Distribution Contractors Association (DCA)
12. Emily Krafjack (2 separate comments)
13. Emma K.
14. Gas Processors Association (GPA)
15. Industry Perspective (AGA, AGC, AOPL, API, DCA, NUCA, and NULCA)
16. Interstate natural Gas Association of America (INGAA)
17. Iowa Association of Municipal Utilities (IAMU)
18. Iowa One Call
19. Iowa Utilities Board (IUB)
20. Kansas Corporation Commission (KCC)
21. Kern River
22. MidAmerican Energy Company (MidAmerican)
23. Missouri Public Service Commission (Missouri PSC)
24. National Association of Pipeline Safety Representatives (NAPSR)
25. National Grid
26. National Utility Contractors Association of Ohio (NUCA of Ohio)
27. National Utility Contractors Association (NUCA)
28. National Utility Locating Contractors Association (NULCA)
29. New York State Department of Public Service (NPDPS)
30. Northern Natural Gas
31. National Utility Contractors Association of Pennsylvania (NUCA of Pennsylvania)
32. Ohio Gas Association (OGA)
33. Oleksa and Associates, Inc. (Oleksa)
34. Paiute Pipeline Company (Paiute)
35. Pennsylvania One Call System, Inc. (Pennsylvania One Call)
36. Qualified One Call Systems (Oleksa comments repeated)
37. Southwest Gas Corporation (Southwest)
38. Tennessee Regulatory Authority (TRA)
39. Texas Pipeline Association (TPA)
40. Texas Pipeline Safety Coalition

*General Comments*

Most of the comments were supportive of the NPRM. PHMSA's State partners have concerns regarding the potential reduction of State base grant funding to States with inadequate excavation damage prevention law enforcement programs. A few State partners questioned the authority given to PHMSA by the PIPES Act to take enforcement action in States with inadequate excavation damage prevention law enforcement programs. A few comments were out of the scope of this rulemaking, either because the comments were on a specific State's excavation damage program or because the comments were regarding pipeline safety more generally.

*Comments Requesting PHMSA To Include All Nine Elements*

Associated General Contractors of America (AGC), Distribution Contractors Association (DCA), National Utility Locating Contractors Association (NULCA), National Utility Contractors Association of Ohio (NUCA of Ohio), and Southwest Gas Corporation (Southwest) commented that not only enforcement but also all other elements should be considered when evaluating the effectiveness of State excavation damage prevention programs.

AGC and DCA suggested that PHMSA take into account all nine elements (as defined in the PIPES Act of 2006) when evaluating the effectiveness of State damage prevention programs and take a holistic and comprehensive approach to reviewing current State damage prevention measures. AGC stated that the proposed standards place too much emphasis on enforcement and the excavator, and too little emphasis on the owner/operator and locators' responsibilities for timely and accurate locates. The AGC is supportive of PHMSA taking a position to evaluate States' overall damage prevention programs but suggests that PHMSA make its intentions clearer in the final rule. NULCA and NUCA stated that because the nine elements are supported by a broad range of stakeholders, including the CGA, they should be the sole basis for the evaluation of State programs.

Response

PHMSA agrees that the overall effectiveness of State damage prevention programs can be assessed by evaluating States' commitment to and implementation of the nine elements. To that end, PHMSA has worked with State partners to conduct regular reviews of State damage prevention programs by characterizing States' level of implementation of the nine elements. The results of these reviews are available on PHMSA's Web site at *http://primis.phmsa.dot.gov/comm/SDPPCDiscussion.htm.* However, the scope of this rulemaking pertains to the enforcement of State excavation damage prevention laws. Section 2 of the PIPES Act states that PHMSA may not conduct an enforcement proceeding unless the State's enforcement program is determined to be inadequate to protect safety. While other aspects of State damage prevention programs are essential to the effectiveness of those programs, the scope of this rulemaking is limited to the enforcement of State damage prevention laws.

With regard to the comment from AGC pertaining to the proposed standards placing too much emphasis on enforcement and the excavator and too little on the owner/operator and locators' responsibilities for timely and accurate locates, PHMSA believes that the final rule appropriately addresses the intent of Congress. PHMSA and its State partners have long had the authority to enforce the existing damage prevention regulations that are applicable to pipeline operators. These existing regulations (49 CFR 192.614 and 195.442) require pipeline operators to develop and implement damage prevention programs and to locate their facilities in an accurate and timely manner when in receipt of an excavation notice. In the context of this final rule, if PHMSA conducts an enforcement proceeding in a State with an inadequate enforcement program, PHMSA will ensure that enforcement is applied to the responsible party, whether it is an excavator or a pipeline operator. PHMSA also actively encourages its State partners to enforce the existing damage prevention regulations that are applicable to pipeline operators.

*Comments Recommending That PHMSA Hold Public Meetings/Provide Education*

DCA, NUCA, and NUCA of Ohio suggested that PHMSA hold additional public meetings before the agency issues a final rule. DCA and NUCA of Ohio believe the proposed criteria for determining the adequacy of a State damage prevention enforcement program are sufficient, but recommend that, prior to moving forward with its enforcement authority in a given State, PHMSA should invite all government and industry stakeholders to a discussion about the alleged problems with the State's enforcement practices. They recommended that in order to meet Element 2 of the PIPES Act, which calls for participation by operators, excavators, and other stakeholders, PHMSA should ensure that all interested stakeholders are invited to

the table. NUCA stated that the final rule would result in significant impacts to PHMSA's regulated community; therefore, significant outreach and education is needed for stakeholders that will be impacted by this rulemaking action.

The Pennsylvania One Call System, Inc. (Pennsylvania One Call) stated that enforcement should be used as a means of modifying behavior. Pennsylvania One Call advised PHMSA to be mindful of States' different methods to achieve the same end of damage prevention. For example, Pennsylvania's Underground Utility Line Protection Act provides for a range of enforcement tools that include warning letters, administrative sanctions, fines, and criminal penalties to encourage proper behavior by covered parties.

Response

PHMSA gathered considerable stakeholder input that informed the development of the final rule and provided opportunity for public participation and comment. PHMSA published an ANPRM on this topic in 2009 to gather stakeholder input prior to publishing the NPRM. PHMSA also developed a video, made available on the PHMSA Web site, which summarized the NPRM and invited comments.

In the context of this final rule, PHMSA does not intend to invite all government and industry stakeholders to a discussion about the alleged problems with a State's enforcement practices prior to proceeding with enforcement action in a given State. However, PHMSA does welcome the opportunity to participate in those discussions as a matter of course. PHMSA agrees that this rulemaking will require considerable outreach and education for stakeholders impacted by this final rule.

PHMSA is mindful of States' various enforcement methods as described by Pennsylvania One Call. These enforcement methods are effective in many States. PHMSA believes that the ability of a State to enforce its damage prevention law, specifically with civil penalties, is essential to an effective enforcement program because it deters noncompliance and ensures a level playing field for businesses that adhere to the requirements.

*Comments Requesting Cost Recovery for Excavators' Downtime*

NUCA requested that PHMSA include cost consideration for excavators' downtime when excavation damage is due to pipeline operators' failure to locate and mark pipelines properly. NUCA stated that pipeline owners or operators are often not subject to the same types of penalties that excavators are, are not required to reimburse excavators for any of their expenses, and are often subject to significantly lower fines. NUCA stated that in some States, for example, excavators that damage pipelines must reimburse owners or operators up to three times the expenses, can be prevented from bidding on certain projects, and can be fined up to $10,000. NUCA suggested PHMSA include in the final rule that ''where a pipeline is hit because of the failure to locate and mark the pipeline accurately in a timely fashion and the excavator is not at fault, owners or operators and/or their contractors (including locators) should be required to reimburse excavators for their costs.'' NUCA stated that this should include any damages to the excavator's equipment or property and any downtime incurred by the excavator while the true location of the pipeline is determined. NUCA stated that because these losses could be significant when an excavator is required to shut down a project due to the pipeline being not marked or marked inaccurately, this problem must be addressed by PHMSA.

Response

This final rule does not infringe upon any party's right or ability to pursue cost recovery related to downtime. As NUCA itself pointed out, downtime is a compensatory liability matter and has nothing to do with damage prevention. It would be an inappropriate use of Federal regulations to entitle any specific group to downtime compensation. Since PHMSA did not propose in the NPRM to include the language suggested by NUCA, the language has not been made available for public comment and cannot be included in the final rule. PHMSA believes downtime is not within the scope of this rulemaking.

*Comments Supporting the Proposed Rule*

Association of Oil Pipe Lines (AOPL) and American Petroleum Institute (API) are in strong support of the final rule and urge PHMSA to issue and implement a final rule expeditiously to help advance the ultimate goal of zero pipeline incidents. AOPL and API support PHMSA's proposed criteria for evaluating State excavation damage prevention law enforcement programs for minimum adequacy. The Ohio Gas Association (OGA) stated that it endorses PHMSA's efforts to bring national uniformity to the enforcement of pipeline damage prevention laws. The Texas Pipeline Association (TPA) stated that it is supportive of the proposed Federal damage prevention and enforcement requirements as well as the proposed regulations on State program evaluation. TPA recommended that these regulations be adopted in order to encourage effective enforcement.

Ms. Emily Krafjack recommended that PHMSA adopt all proposed regulatory language and noted that all gathering line classes could benefit from the NPRM. Ms. Emma K. commented in general support of pipeline safety.

Response

PHMSA appreciates the comments in support of promulgating a final rule expeditiously.

*Comments Opposing the Proposed Rule*

The Iowa Utilities Board (IUB), the Kansas Corporation Commission (KCC), and the Tennessee Regulatory Authority (TRA) are not in support of the NPRM. The IUB believes the notification standards in the final rule would conflict with the law of the State in which excavation is to be performed if the State's law includes the definitions used to determine when notice of excavation is required. The IUB agrees with PHMSA that there is no authority for or expectation of PHMSA enforcement of any provision of State law that goes above and beyond what PHMSA is authorized to enforce in 49 U.S.C. 60114(d). The IUB stated that PHMSA must still recognize the system established by State law when considering enforcement of Part 196.

The IUB further indicated that PHMSA does not have authority over excavators except as provided in 49 U.S.C. 60114(d). Nor would 49 CFR part 196 apply to persons other than excavators. The IUB stated that the proposed language of this final rule exceeds the scope of the specific law on which it is based and asserts broader authority than Federal law permits. The IUB stated that if the intent of the proposed § 196.205 is to make the point that PHMSA can take civil penalty action against excavators who violate 49 CFR part 196 provided the conditions of 49 U.S.C. 60114(f) have been met, then the final rule should be clarified. The IUB stated that 49 U.S.C. 60114(f) says PHMSA may find State enforcement is inadequate only if it does not (in PHMSA's estimation) adequately enforce that State's damage prevention laws. The IUB believes that PHMSA does not have the power to challenge a State law due to perceived inadequacies in areas other than adequate enforcement of that State law.

KCC believes PHMSA taking direct enforcement action against excavators will likely cause confusion and uncertainty in the excavator community. State damage prevention laws regulate many types of underground utilities in addition to protecting underground pipelines subject to regulation by PHMSA and subject to the standards established by PHMSA under 49 U.S.C. 60114(d). KCC stated that currently, 49 CFR part 198 requires States to address underground utility damage prevention on their own terms, taking into account the State's demographics and political process to structure laws and regulations best suited for the operations of its regulated community. However, under PHMSA's proposal, KCC believes that the potential exists that on-going attempts to tweak the State law in order to meet PHMSA's evolving ''adequacy'' requirements may upset the delicate legislative balance established in the Kansas Underground Utility Damage Prevention Act and potentially lead to a double standard: One set of rules for excavators working in the vicinity of natural gas and hazardous liquid pipelines, and another set of rules for all other excavators.

KCC stated that PHMSA proposes to establish its own Federal standards in those States where PHMSA deems the State's enforcement efforts ''inadequate'' and questioned why PHMSA would not merely enforce the State standards. KCC stated that PHMSA's NPRM does not include any exemptions, whereas the State program includes State-specific exemptions from the requirements of the State program for certain categories of ''excavators.'' In doing so, PHMSA goes well beyond stepping in to enforce State standards where a determination has been made that the State's enforcement programs are inadequate. KCC stated its view that 49 U.S.C. 60114(f) does not authorize such action.

TRA stated that it is concerned that the approach PHMSA proposes in the NPRM to penalize States that implement and operate pipeline excavation damage prevention law enforcement programs that do not meet what the TRA considers to be potentially ambiguous Federal standards is not sound policy. Rather than using the penalty of withholding funding, the TRA advises PHMSA that an incentive, like increased funding or more flexibility in use of existing funding, is more appropriate for States that implement sufficient pipeline excavation damage prevention law enforcement programs. If PHMSA finds that a State pipeline excavation damage prevention law enforcement program is inadequate, the TRA is concerned that such a finding may be misinterpreted as a finding about a State's efforts to promote pipeline safety through inspections.

TRA commented that review of State excavation damage prevention law enforcement programs is part of PHMSA's annual review of a State's overall pipeline safety program. Therefore, to avoid such misunderstanding by the public, the TRA recommends that if PHMSA finds a State excavation damage prevention enforcement program deficient, PHMSA should clearly state that the finding does not imply that a State's pipeline safety program is inadequate in protecting the public. Also, Texas Pipeline Safety Coalition provided red line edits to the proposed regulatory language.

Response

PHMSA recognizes that the proposed Federal excavation standard is less specific than many existing State damage prevention laws. In particular, State laws are often more specific than the proposed Federal rule in the areas of what constitutes excavation, exemptions established by State laws, notification standards, and what specifically is enforceable. This final rule is intended, in part, to establish Federal ''backstop'' enforcement authority in States with inadequate damage prevention law enforcement programs. As has been explained at length in the ANPRM and the NPRM, the Federal authority will only be used when the State has not been adequately enforcing its law. This position is clarified in the enforcement policy in the preamble of this final rule. Additionally, in response to the TRA's comments, it is important to note that incentives and grant funding have been made available to build State damage prevention programs. It is only the States that truly fail at damage prevention enforcement where excavators will be subject to Federal authority. Finally, if PHMSA finds a State's damage prevention enforcement program inadequate, that is not the same as PHMSA finding the State's entire pipeline safety program inadequate.

PHMSA disagrees with the IUB's comment that the NPRM asserts broader authority than the law permits. One aspect of a State's damage prevention authority is the extent to which the appropriate State authority is able to execute and enforce it. Whether a given State's law does not provide enforcement mechanisms or a State has such enforcement mechanisms but is not exercising its enforcement authority, the PIPES Act provides authority for PHMSA to establish and exercise Federal authority to ensure effective enforcement.

A major goal of this final rule is to encourage States to adopt and sustain adequate damage prevention law enforcement programs. However, PHMSA has limited ability to encourage States to do so. In addition to incentivizing States with grant funds, one way PHMSA can encourage States is by making a portion of a State's base grant funding dependent upon that State having an adequate damage prevention law enforcement program. PHMSA currently makes base grant funding dependent upon the adequacy of some aspects of States' damage prevention programs. This position, which defines how the State program evaluation criteria will be applied, is clarified in the policy in the preamble of this final rule.

*On PHMSA's Request for Comment on Its View That State and Federal Requirements Will Not Be Enforced Simultaneously; the Existence of a Federal Requirement Should Not Present Any Conflicts With Existing State Requirements for Excavators*

KCC stated that it believes that the final rule could result in simultaneous Federal and State enforcement actions. KCC also stated its belief that PHMSA has not rejected the possibility of taking Federal enforcement action on an incident that occurred before the State program was ruled inadequate. KCC stated that it believes significant due process considerations exist that, if ignored by PHMSA, may later undermine PHMSA's own ability to take appropriate enforcement actions when PHMSA's enforcement actions are subject to judicial scrutiny. KCC seeks a definitive recognition from PHMSA on the limitations imposed on PHMSA's authority to take such an enforcement action.

New York State Department of Public Service (NYDPS) believes that PHMSA has not fully considered the potential for Federal regulations and State laws to be enforced at the same time. NYDPS stated that it needs to be fundamental to all State excavation damage prevention programs that a call to 811 will notify all utilities of the excavator's intent to excavate at a particular work site and that there is one set of rules that applies to the State damage prevention program. Even if PHMSA deems a State program inadequate, the State law will not be repealed by this action and would remain in effect. The regulations proposed contemplate this because they assume a one-call system is actively operating in the State. NYDPS is

concerned that the imposition of a Federal program may have the deleterious effect of causing confusion among one-call laws and systems. This may be particularly true in instances where a State's law goes beyond Federal regulations in its application or requirements. While there may only be 1 one-call center that takes notices of intent to excavate under both the Federal and State programs, it would be up to the excavators and operators to ensure that their employees understand the different requirements in States that have been deemed inadequate. NYDPS believes PHMSA should fully consider these impacts. Also Missouri Public Service Commission (Missouri PSC) stated that the proposed Federal regulations are the minimal standard. It is not clear, however, whether a determination that a State's damage prevention program is inadequate would preclude that State from pursuing violations of the State damage prevention laws.

Response

PHMSA can assure these commenters that it will not pursue Federal enforcement action if a State has an adequate enforcement program in accordance with this final rule. Likewise, PHMSA will not take enforcement action on incidents that occurred in a State before that State's enforcement program was deemed inadequate. Additionally, PHMSA will not enforce State standards, but will instead enforce the minimum Federal standards defined in this final rule. When conducting enforcement, PHMSA will be considerate of State practices and exemptions in the application of the minimal standard defined in this final rule.

As we have stated repeatedly in the ANPRM and the NPRM, PHMSA has no intention of taking over the damage prevention responsibilities of States. PHMSA's enforcement authority is intended to backstop State's enforcement authority. This final rule only impacts States deemed to have inadequate enforcement programs. If a State is exercising its damage prevention enforcement authority, there is no reason to believe there will be any need for Federal enforcement. If a State has not been exercising its authority, and PHMSA exercises Federal authority, PHMSA would not expect that State to suddenly start exercising its authority on the very same violation that was the subject of a Federal enforcement action. A State that decides to begin exercising its authority should petition to have the finding of inadequacy lifted and begin enforcement once it is lifted and should not ''overfile'' on a Federal case.

If PHMSA determines a State's excavation enforcement program is inadequate, it is unlikely that the State is conducting enforcement. Conversely, if a State is enforcing its damage prevention law, it is unlikely that PHMSA would deem that State's enforcement program inadequate. Therefore, it is unlikely that Federal and State enforcement would be applied simultaneously. If instances arise where Federal and State enforcement could potentially be applied simultaneously, PHMSA will work cooperatively with the State enforcement agency to ensure that enforcement is applied fairly and consistently. PHMSA strongly encourages States to enforce their own damage prevention laws.

*On PHMSA's Request for Comments on Ways or Mechanisms That PHMSA Can Utilize To Become Aware of Excavation Damage Incidents*

Missouri PSC stated that the lack of a mechanism to notify PHMSA of excavation damages to pipelines is an obvious weakness in the NPRM. Under Missouri statute, damages are required to be reported to the Missouri One Call System (MOCS). Operator data compiled by the Missouri PSC indicates, on average, operators are aware of about 200 excavation damages to intrastate natural gas pipelines each month; yet, the MOCS is not receiving nearly that many reports. If a State is found to have an inadequate damage prevention program, PHMSA would have to require operators to report damages to their facilities or institute a complaint-driven mechanism to become aware of damages.

Response

As stated in previous responses to other comments, PHMSA's goal is to act as a Federal backstop enforcement authority to States. PHMSA does not intend to conduct enforcement for all excavation damages in States with inadequate enforcement programs. On the contrary, PHMSA's limited Federal enforcement resources will likely only be applied in limited cases. To that end, PHMSA will learn about violations of this final rule through existing channels (*i.e.,* PHMSA-required incident reports, National Response Center reports, and the media), and the final rule does not require Federal reporting at this time.

*On Whether the Evaluation Criteria Should Be Weighted*

KCC believes the adequacy of State enforcement of State safety programs must be evaluated on a holistic basis that would necessarily include weighting the criteria. It is important to KCC to have a law in place and the ability to administer the law with appropriate performance metrics. How the laws are administered—and at what level fines are imposed—is less important to KCC if the desired results of damage prevention are being achieved. The KCC suggested that the seven proposed criteria should be ordered as follows in importance: 1, 2, 6, 4, 5, 7, and 3. The KCC asked PHMSA to note the additional criteria found in 49 CFR 198.55(b), which allow PHMSA to take unilateral action based on an individual State enforcement action, should not be considered in the evaluation of an effective program.

Missouri PSC agrees with PHMSA that weighting the criteria would be difficult. On the other hand, Missouri PSC recommends PHMSA provide clarification as to whether each of the criteria items in 6(a), 6(b), 6(c)(i), and 6(c)(ii) carry the same ''weight'' as the other criteria items—*i.e.,* whether there are seven items in the criteria or 10—including the four issues in item 6. In giving a ''weight'' or point value to each of the criteria, the Missouri PSC recommends PHMSA provide additional clarification as to whether there is an expectation or quantification of the criteria a State would have to achieve to be considered ''adequate.'' Finally, the Missouri PSC recommends PHMSA provide additional clarification as to whether certain criteria are considered critical and/or essential for a program to be evaluated as adequate.

Response

PHMSA believes that some of the criteria for evaluating State enforcement programs, as proposed in the NPRM, should be considered more important than others because some criteria are more critical and/or essential than others. For example, if a State does not have enforcement authority provided by State law, then that State's enforcement program should be automatically considered inadequate. However, the matter of exemptions, while important, is less critical. PHMSA has included a policy in the preamble of this final rule that defines how the criteria will be applied when evaluating State enforcement programs. In addition, PHMSA will post a policy document on the agency's Web site. The adequacy determination involves a complex judgment based on multiple factors, and we will not attempt to discuss definitive or deterministic outcomes in all possible scenarios here.

In order to use Federal enforcement authority in a State, PHMSA must first

declare the State's damage prevention law enforcement program inadequate. PHMSA will not take unilateral Federal enforcement action in a State that has an adequate enforcement program. However, PHMSA may evaluate individual State enforcement actions in assessing the adequacy of enforcement programs. No determination of State enforcement program adequacy will be based solely upon a single State enforcement action. Instead, PHMSA may evaluate the overall program, including past enforcement cases, to gain a better understanding of the adequacy of the State enforcement program within the context of the criteria listed in § 198.55 of this final rule.

*On PHMSA's Request for Comment on Whether the Criteria for Evaluating the Adequacy of State Excavation Damage Prevention Law Enforcement Programs Are Clear, Well-Defined, Consistent, and as Simple as Possible*

KCC responded that consistent application of the criteria would be difficult, at best, because of what it considers to be the lack of well-defined terms, phrases, and procedures on how the criteria will be applied. KCC suggested that PHMSA include additional guidance in the final rule on how the agency will define and apply such phrases as ''sufficient levels,'' ''demonstrates effectiveness,'' and ''consider individual enforcement actions.''

Response

PHMSA agrees that additional guidance is necessary regarding the application of the criteria that will be used to evaluate the adequacy of State damage prevention law enforcement programs. PHMSA has included a policy that defines this guidance in the preamble of this final rule and will post a policy document on the agency's Web site.

*On PHMSA's Request for Comments Regarding Using a Determination of State Enforcement Program Adequacy To Be a Factor in Determining State Pipeline Safety Grant Funding Levels*

Missouri PSC stated it recognizes that the only incentive or disincentive that PHMSA has to make States comply with the damage prevention criteria is to reduce grant funding if the State does not have and/or enforce what are deemed by PHMSA to be adequate damage prevention laws. However, legislative action is required to make changes to Missouri's excavation damage prevention statute, and the legislative actions are outside the control of the Missouri PSC. An adequate damage prevention program is only a portion of a State's overall pipeline safety program. Not having adequate funding for the entire pipeline safety program reduces the effectiveness of Missouri's overall pipeline safety program. The result would be that Missouri could have an inadequate damage prevention program and an inadequate pipeline safety program.

Response

PHMSA does not intend to render State pipeline safety programs inadequate through the reduction of base grant funding. The reduction of base grant funding for States with inadequate enforcement programs is one tool available to PHMSA to incentivize States to implement effective enforcement programs. However, base grant funding is not the only incentive PHMSA can use. PHMSA will provide other incentives for States to implement adequate enforcement programs, including notification to the Governor explaining PHMSA's findings of enforcement program inadequacy and the potential safety and financial consequences for the State, publishing PHMSA's findings of inadequacy on PHMSA's public Web sites, giving grant funding to States for building stakeholder support for improved enforcement programs, and giving ongoing support to stakeholders in their efforts to improve enforcement programs. PHMSA may be able to provide additional support and incentives.

*On 911 Notification by the Excavator*

Missouri PSC stated that the PIPES Act of 2006 requires excavators to promptly call the 911 emergency telephone number if damage results in specific circumstances; however, the Missouri PSC asserts PHMSA's position in the NPRM is unreasonable. The Commission stated that discretion should be allowed as to when a call to 911 is warranted subject to whether (1) there is an emergency and 911 is called to dispatch emergency personnel; or (2) there is not an emergency and emergency personnel are not required. The Missouri PSC stated that the 911 operator should not be notified of damage to a pipeline unless emergency services are needed. The Federal Communications Commission and many communications companies have adopted ''311'' as the non-emergency number. Calling 911 to report damage in a non-emergency situation may obligate the 911 operator to dispatch even though the caller indicates emergency response personnel are not required at the damage site.

Response

The PIPES Act requires excavators to promptly call the 911 emergency telephone number if a damage results in the escape of any flammable, toxic, or corrosive gas or liquid. PHMSA believes that a call to 911 in such circumstances is fundamental to public safety.

*Federal One-Call System*

Oleksa suggested that PHMSA review the various one-call systems, determine whether or not they are ''qualified,'' and publish a list of ''qualified'' one-call systems on the PHMSA Web site.

Response

By simply dialing 811, the national call-before-you-dig telephone number, damage prevention stakeholders will be connected to a qualified one-call system as defined in 49 CFR 192.614 and 195.442.

*Comments on the Proposed Regulatory Language*

## PART 196—PROTECTION OF UNDERGROUND PIPELINES FROM EXCAVATION ACTIVITY

### Subpart A—General

#### § 196.1 What is the purpose and scope of this part?

AGA suggested that the new part 196 should include requirements for excavators to follow a tolerance zone, which explicitly states the forms of ''softer excavation'' that are allowed in the immediate area of the marked location of the pipeline that would include hand-digging and vacuum excavation. AGA stated that these concepts are consistent with the excavation best practices in Chapter 5 of the Common Ground Alliance Best Practices 9.0. Part 196 should include language about the excavator having to take steps to protect and even expose the pipeline using soft excavation methods to confirm accuracy of the markings. Also, AGA recommended a maximum of a 1-hour time limit for excavators to report damage to the pipeline operator. In addition, AGA requested that proposed § 196.107 be amended to state that an excavator may not backfill a site where damage has occurred until the operator has been provided an opportunity to inspect the pipeline at the excavation site.

AOPL and API stated that the minimum threshold requirements for a State damage prevention program should include an incident notification requirement. They believe, however,

that a 2-hour notification ceiling, as suggested in the NPRM, appears unnecessarily prescriptive. They recommended that the standard for excavators to ''promptly'' report incidents to operators should remain effective without a mandated notification period. On the other hand, Missouri PSC stated that its regulations require notification of 2 hours following discovery by the operator, or as soon as practical if emergency efforts to protect life and property would be hindered. Missouri PCS stated that no issues have been identified with this time frame and recommended a 2-hour time limit for excavators to report damages.

Paiute and Southwest recommended that PHMSA require immediate notification of any damage to the pipeline operator. They stated that an excavator does not have the knowledge to determine the severity of a dent or gouge and/or whether or not the damage requires immediate repair.

PHMSA affirms the Common Ground Alliance Best Practices regarding soft excavation methods. However, PHMSA has not included tolerance zone and/or soft excavation requirements in this final rule. Tolerance zone and soft excavation requirements are very specific requirements and should be left to the States. Federal imposition of these requirements would establish double standards in States with similar requirements. PHMSA reiterates that one of the purposes of this final rule is to provide backstop damage prevention law enforcement authority in States with inadequate enforcement programs; the purpose is not to dictate overly specific requirements of safe excavation. PHMSA believes that the purpose of the Federal enforcement program is to provide a minimum standard. Further, as stated in the enforcement policy in the preamble of this final rule, PHMSA intends to consider the requirements of State damage prevention laws when conducting Federal enforcement proceedings, including State requirements regarding tolerance zones and soft excavation practices.

PHMSA agrees with API and AOPL regarding the requirements that excavators ''promptly'' report excavation damages to pipeline operators. PHMSA does not intend to create more specific standards than States that already define damage reporting timeframes. PHMSA will consider State requirements for reporting timeframes in instances of Federal enforcement.

**§ 196.3 Definitions.**

*Excavation/Exemptions*

The AFBF believes that, based on the current definition in the NPRM, normal agricultural and farm tillage practices would be considered excavation. AFBF believes the failure to exempt farmers and ranchers from the requirements of one-call laws prior to ''excavation'' is impractical and not workable for today's agricultural producers. AFBF requested that an explicit exemption for normal agricultural practices be given.

AAR believes that the NPRM's definition of ''excavation'' is unclear from the perspective of railroad maintenance-of-way activities. AAR stated that if railroads were subject to one-call requirements for their maintenance-of-way activities, there would be hundreds, if not thousands, of calls daily. AAR believes routine maintenance-of-way activities should not be subject to one-call notification requirements.

The Interstate Natural Gas Association of America (INGAA) stated that it opposes the last sentence of the proposed definition of excavation because it excludes homeowners excavating on their own property with hand tools. However, INGAA stated that it has no objection to the homeowner exemption to homeowners or occupants using only hand tools, rather than mechanized excavating equipment, including power augers, on their own property and digging no deeper than 12 inches below natural grade.

TPA stated that, with the growing use of plastic pipe in distribution, transmission, and gathering pipelines, the risk to pipeline infrastructure from hand digging increases. Plastic pipe can be punctured or severed by common digging tools used by homeowners. Beyond the damage to the pipeline infrastructure, excavation damage to plastic pipes would pose a risk to the homeowner. Rather than granting a blanket exemption to homeowners, TPA recommends that PHMSA limit the exemption to homeowner excavations by hand digging to depths of no more than 16 inches. TPA stated that, while the homeowner exemption should be limited, PHMSA should add an exclusion to the definition that would permit probing by an operator.

TPA also stated that the proposed definition of ''Excavation,'' in § 196.3 introduces ambiguity by the phrase ''below existing grade.'' It is not uncommon for the grade of the land above a pipeline to vary at different points along the pipeline. TPA stated that because the proposed regulations do not contain any further guidance on these matters, it would, at least initially, fall to individual excavators to determine if they are engaging in ''excavation'' and whether they are subject to the regulations. TPA also stated that once a pipeline is installed, erosion and prior land grading would impact the amount of cover for the pipeline. TPA stated that there is no reason to take these risks when the alternative is to make a phone call and wait a couple of days for a pipeline to be marked. Therefore, TPA urges PHMSA to remove the phrase ''below existing grade'' from the definition of excavation.

AGC stated that the term ''excavator,'' and thus the focus of Federal enforcement proceedings where the excavator is at fault, should refer to all parties doing digging work including, but not limited to, State agencies, municipal entities, agricultural entities, and railroads. State excavation damage prevention laws and enforcement should also apply equally to pipeline operators and their contract excavators and locators. However, AGC agrees that some exemptions can be justified with data, and these exemptions can only be determined at the State level, while many of the existing ones should be carefully scrutinized by PHMSA and eliminated if they present a danger to buried facilities.

The Black Hills Corporation opposes the exemption to homeowners using hand tools from requiring the use of a ''Call Before You Dig'' one-call system as well as from any Federal administrative enforcement action because it goes against the public safety educational drive for ''Call Before You Dig'' messages. Also, the Iowa Association of Municipal Utilities (IAMU) stated that exemptions to homeowners using hand tools are in direct conflict with most one-call laws across the country.

Iowa One Call believes that the proposed excavation definition would specifically exclude homeowners excavating on their own property with hand tools. The Iowa One Call stated that this exclusion is inconsistent with Iowa law and directly conflicts with the State's damage prevention public awareness and outreach communications campaign and program initiatives; however, Iowa One Call believes that some Iowa exceptions, such as opening a grave in a cemetery, normal residential gardening, operations in a solid waste disposal site which has planned for underground facilities, and normal farming operations, are judicious. To exclude these types of well-developed State exceptions would be impractical and possibly unrealistic.

NAPSR stated that the proposed definition of excavation only covers operations performed below existing grades, which may lead to confusion, especially in cases where excavation activities are performed, backfilled, and graded on multiple occasions over a period of time. The proposed definition of excavation specifically excludes homeowners excavating on their own property with hand tools and would directly conflict with many State laws and with State and national awareness initiatives. NAPSR stated that any person performing excavation activities, including homeowners, should be encouraged to call for utility locates and wait the required time allowed for marking before excavation begins, pursuant to State regulations and requirements. Therefore, NAPSR stated that the definition of excavation should not exclude hand digging by homeowners, and the sentence ''This does not include homeowners excavating on their own property with hand tools'' should be removed from the definition of ''excavation'' in § 196.3.

The IUB stated that 49 U.S.C. 60114(d)(1) requires excavators to use the one-call notification system of the State; therefore, the definition of excavation in the NPRM should defer to the definition of the State in which the excavation is proposed. The IUB stated the homeowner exclusion would directly conflict with many State laws and with State and national awareness initiatives to encourage landowners to call for utility locates before digging, and therefore, hand digging by homeowners should not be excluded. However, the IUB stated that excluding farm operations is impractical and unrealistic. Also, NUCA requested that the ''excavator'' definition should include examples such as excavator, contractor excavator, in-house excavators, municipalities, etc.

Northern Natural Gas supports the reduction of exemptions to one-call damage prevention laws. Northern suggested no exemptions. As for farming operations, Northern recommended a requirement for one-call notification whenever the farming operation penetrates the soil to a depth of 12 inches or greater. Northern stated that examples requiring a one-call notification for farm work would include mechanical soil sampling, drain tiling, chisel plowing, sub-soiling, ripping, terracing, and waterway or post installation. Also, OGA stated that there should not be a homeowner exemption because there must be the universal acceptance of the requirement to ''Call Before You Dig.''

Response

Most of the comments regarding the definition of excavation are focused on how the definition of the term will be interpreted in light of existing exemptions from the requirements of State damage prevention laws. The definition of excavation in this final rule is intentionally broad and inclusive. However, PHMSA recognizes that the definition of excavation in this final rule is broader and more generic than many of the definitions of excavation in State damage prevention laws. State laws are specific about which classes of excavators and/or which types of excavation are or are not exempt from State law. In conducting Federal enforcement, PHMSA will be considerate of the definitions of excavation, including exemptions applicable to excavators, in State damage prevention laws. However, PHMSA may choose to pursue Federal enforcement actions against excavators who egregiously and/or negligently damage pipelines in disregard of safety, regardless of whether those excavators are exempt from State law. PHMSA's enforcement policy is defined in the preamble to this final rule.

PHMSA agrees with the comments from INGAA, TPA, IAMU, the Black Hills Corporation, Iowa One Call, and NAPSR that oppose an exemption for homeowners excavating on their own property with hand tools. The exemption for homeowners has been removed from this final rule. PHMSA has not included any exemptions for excavations in this final rule. Exemptions in this final rule could create confusion regarding the applicability of State and Federal standards. Instead, PHMSA will be considerate of State exemptions in exercising Federal enforcement authority.

PHMSA has not clarified the types of excavators to whom the final rule applies, as suggested by NUCA. The definition of the term ''excavation'' is broad enough to encompass all types of excavators regardless of their relationships to other entities.

PHMSA agrees with TPA regarding the need to eliminate the phrase ''below existing grade'' from the definition of ''excavation.'' The definition of ''excavation'' has been updated accordingly.

*Damage/Excavation Damage*

AOPL and API believe revising the definition of damage or excavation damage in this section would provide greater clarity. They requested that because nicks, coating scrapes, and damage to cathodic protection wiring or appurtenances could affect the integrity of the pipeline, the word ''impact'' in the definition should be replaced with the term ''excavation activity.'' They stated that damage can be caused without physical impact: coating can be worn while pulling up trees or digging out roots in close proximity to a pipe; cathodic protection wiring can be cut, broken, or disconnected as a result of stresses created by heavy loading due to improper backfilling; or external loading itself can create undue stress on the pipe, creating an unsafe condition. Damage can also be caused when the support under the pipeline is taken away. Therefore, they requested a broader definition that would encompass a broad range of activities that impact safety.

*Response*

PHMSA agrees with AOPL and API regarding the need for greater clarity in the definition of damage or excavation damage. The definition of these terms has been modified to address these concerns.

*Pipeline*

NAPSR stated that the proposed definition of ''pipeline'' does not cover all appurtenances of a pipeline structure, only those ''attached or connected to pipe . . .'' This would exclude tracer wire systems or other devices, such as radio frequency identification or other electronic marking system (EMS) devices, used to facilitate proper locating and marking of the operator's infrastructure. NAPSR recommended that the definition of ''pipeline'' be written to include tracer wire and other devices used to facilitate proper locating and marking of the operator's infrastructure. NUCA requested that the pipeline definition should clearly describe the types of pipelines to which the final rule will apply, such as gathering, transmission, and distribution (including gas mains and service lines), as defined in existing laws and regulations, so everyone understands exactly what types of lines are included.

Response

PHMSA agrees with NAPSR about the need for the definition of ''pipeline'' to be expanded to include tracer wire and other devices used to facilitate proper locating and marking of the operator's infrastructure. PHMSA also agrees with NUCA regarding the need to clearly describe the types of pipelines to which the final rule will apply. The definition of ''pipeline'' has been modified accordingly.

*Tolerance Zone*

TPA suggests that PHMSA add a definition of ''tolerance zone'' to § 196.3. TPA stated that such a definition is critical to determining the accuracy of the locate markings and the area where ''proper regard'' must be used by an excavator as required by proposed § 196.103(c). Without the addition of this definition, PHMSA will be repeatedly placed in a difficult enforcement situation if a dispute arises between the excavator and the operator about the accuracy of the marking or the type of excavation practices used near the pipeline. Although the States have many different standards for a tolerance zone, the least controversial standard to use for a Federal standard would be CGA's Best Practice 5–19, which defines the tolerance zone as the width of the facility plus 18 inches on either side of the outside edge of the underground facility on a horizontal plane. TPA suggested that this definition or a similar definition would facilitate enforcement and enhance the protection of pipeline infrastructure and public safety.

Response

PHMSA has not included a definition of ''tolerance zone'' in this final rule. State laws are often specific about tolerance zones, and PHMSA does not wish to create confusion by establishing an excavation standard that is more specific or more restrictive than some State standards. Instead, when conducting Federal enforcement, PHMSA will be mindful of tolerance zones as defined by the law in the State where PHMSA is conducting enforcement.

## Subpart B—One-Call Damage Prevention Requirements

### § 196.101 What is the purpose and scope of this subpart?

TPA suggested that the title of this Subchapter should be revised by deleting the word ''One-Call'' because the proposed Subpart B includes most of the excavation practice requirements, operator locating requirements, and One-Call process. TPA also urges PHMSA to add a provision to Subpart B requiring excavators and operators to report any damage to pipeline facilities using the CGA Damage Information Reporting Tool (DIRT). TPA stated that this provision should also impose a time limit for reporting so that the relevant data is captured as soon as possible after the damage event occurs.

Response

PHMSA agrees with TPA's suggestion to remove the word ''One-Call'' from the title of this subpart. The title has been changed from ''One-Call Damage Prevention Requirements'' to ''Damage Prevention Requirements.'' PHMSA disagrees with TPA's suggestion to require excavators and operators to report damages to the CGA DIRT database. The CGA DIRT database was developed as a voluntary system. Further, PHMSA does not own or control the CGA DIRT database, and PHMSA believes it would be inappropriate to require the use of CGA DIRT database through regulation.

### § 196.103 What must an excavator do to protect underground pipelines from excavation-related damage?

NAPSR, NYDPS, AGA, INGAA, DCA, NUCA of Ohio, AOPL and API stated that in § 196.103, the language ''where an underground gas or hazardous liquid pipeline may be present'' would directly conflict with many State laws and with State and national awareness initiatives. They stated that the excavator should always call for staking prior to excavating. They stated that there is no way for an excavator to determine if a pipeline may be present without a staking request. Therefore, they recommended that the language ''where an underground gas or hazardous liquid pipeline may be present'' be removed or modified from § 196.103.

NAPSR stated that the language in § 196.103(b), which reads, ''If the underground pipelines exist in the area, wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating,'' fails to define what is meant by ''in the area'' and does not specify the amount of time in which the operator is expected to ''wait for the pipeline operator to arrive'' and ''mark the location.'' NAPSR recommended that the term ''area'' should be better defined, the time between calling for locates and the beginning of excavation should be specified, and actions an excavator is to take when an operator fails to establish and mark the location of its underground facilities should be specified.

TPA stated that to increase the clarity of § 196.103, PHMSA should restructure the section by creating two major subsections, with one addressing activities prior to excavation and the other addressing activities during excavation. Also, TPA suggested that at least 2 business days should be required for the line locate request through a notification center before the planned beginning of an excavation. TRA stated that such a standard is consistent with the CGA Best Practices. TPA suggests revisions similar to CGA Best Practices 5–17 and 5–19 and believes these revisions should not be controversial. TPA provided recommended language to modify the proposed language in § 196.103. TPA stated that if PHMSA does not adopt TPA's recommendations, it suggests that the introductory language to § 196.103 be revised to read, ''Prior to and during excavation activity. . .'' to clarify the complete time period when the requirements of proposed § 196.103 apply.

Pennsylvania One Call suggested that § 196.103(a) should be amended to provide that an excavator must furnish the one-call center with specific location information consistent with State law, regulation, or practice because it believes that the current language does not address this matter.

NUCA suggested that the language in § 196.103(b) should require excavators to wait a prescribed time period (established by State law) for pipeline operators to arrive at the excavation site and mark the location of underground pipeline facilities. AOPL and API requested that the language in § 196.103(b) stating that an excavator shall ''. . . wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating,'' be rephrased to read ''Wait for 48 hours from the time of placing a one-call notification prior to excavation, to permit the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities.'' They suggested that if the call is placed on a weekend, the 48-hour notification period would commence the next business morning, and excavation may proceed if the excavator has received an affirmative response from all underground utility operators as marked or cleared.

NAPSR stated that § 196.103(c) is vague and does not adequately address what ''proper regard'' or ''respecting the marks'' means. NAPSR stated that to clarify the section, PHMSA should add a reference to the CGA best practices for safe excavation around an underground facility.

AGA stated that § 196.103(d) seems unnecessary because a marking request is understood to be required at ''other'' locations. DCA questions the need for § 196.103(d) that would require excavators to ''. . . make additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be

conducted at other locations.'' DCA stated that the requirement seems redundant. Excavators would have to comply with the requirements set forth in § 196.103(a), (b) and (c) for ''additional excavations'' that would be conducted at other locations.

AOPL and API recommended that § 196.103(d) state that, prior to commencing excavation activity where an underground gas or hazardous liquid pipeline may be present, the excavator must ''make additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be conducted at other locations.'' They stated that the language appears to only require the use of one-call for excavations that are to be conducted at other locations. Since some State laws require the additional use of one-call for excavations that continue at the same location, AOPL and API recommended that the clause ''. . . if additional excavations will be conducted at other locations,'' be deleted, and that PHMSA replace the phrase with the language ''. . . or a locate request or markings have expired and a new one-call notification is required per applicable state law'' in its place.

Response

PHMSA agrees with the comments of NAPSR, NYDPS, AGA, INGAA, DCA, NUCA of Ohio, AOPL, and API regarding the need to remove the language ''where an underground gas or hazardous liquid pipeline may be present'' from § 196.103. The section has been updated to reflect the change. In addition, PHMSA has not adopted the recommendation from NAPSR concerning wait times and actions to be taken when an operator fails to mark its facilities. These issues are typically well-defined in State law. PHMSA intends to be considerate of State law when conducting Federal enforcement proceedings.

PHMSA has not restructured the section by creating two major subsections, as suggested by TPA. However, PHMSA has revised the introductory language for the section to read, ''Prior to and during excavation activity . . .'' to clarify the time period when the requirements of the section apply.

PHMSA has not adopted the suggestions from Pennsylvania One Call and NUCA regarding amending the section to require that excavators furnish the one-call center with information and wait the prescribed time required by State law. The enforcement policy in the preamble of this final rule provides that PHMSA will be considerate of State requirements when conducting Federal enforcement proceedings.

PHMSA has not adopted the recommendations of AOPL and API regarding including specific language pertaining to wait times in § 196.103(b). PHMSA does not wish to create Federal requirements that differ vastly from State requirements. Excavators in each State should already be familiar with the wait time requirements of State damage prevention laws. A different Federal wait time requirement may create confusion. PHMSA will be considerate of the requirements of State laws in instances of Federal enforcement.

PHMSA agrees with NAPSR that the proposed § 196.103(c) is generic. PHMSA has clarified the section in the final rule, but the section is left intentionally generic to allow for the variability in State damage prevention laws, which PHMSA will consider in any Federal enforcement case. PHMSA has not made any references to CGA Best Practices in the section.

PHMSA disagrees with the comments of AGA and DCA regarding the redundant nature of the proposed § 196.103(d). PHMSA has not removed this section from the final regulatory language. This language is taken directly from the PIPES Act, and PHMSA considers it essential to preventing excavation damage to pipelines.

PHMSA agrees with the comments from AOPL and API regarding § 196.103(d). However, PHMSA has not replaced the current language with the language they recommended. The language AOPL and API recommended refers specifically to State law, which PHMSA has no authority to enforce. Therefore, the phrase ''. . . if additional excavations will be conducted at other locations'' has been deleted and replaced with the phrase ''. . . to ensure that underground pipelines are not damaged by excavation.''

**§ 196.105 Are there any exceptions to the requirement to use one-call before digging?**

NAPSR stated that, in § 196.105, the exemption for homeowners conflicts with many State laws and with State and national awareness initiatives. However, NAPSR commented that State laws may include reasonable exemptions to the requirement to use one-call before digging such as opening a grave in a cemetery, landfill operations, and tilling for agricultural purposes. Therefore, NAPSR believes that any requirements or exceptions on when to use the one-call system before digging should be deferred to the State law.

MidAmerican Energy Company (MidAmerican) stated that it is concerned with the homeowner exemption language in § 196.105, and it believes that it would be safer and more appropriate to always require the homeowner to call for a locate than leaving it to the homeowner's discretion.

AGA stated that the exception from Federal enforcement for homeowners using hand tools on their own property under § 196.105 is to simply attempt to establish a reasonable boundary around the excavation damages PHMSA would be considering for enforcement action in those States with inadequate programs. Therefore, AGA recommended that hand digging to shallow depths be allowed for any party since digging with hand tools to shallow depths (less than 12 inches in depth) is typically not one of the highest risks among third party excavations in States with an inadequate program. AGA suggested that PHMSA delete the sentence ''This does not include homeowners excavating on their own property with hand tools'' since it is likely to cause confusion and is unnecessary if the language in § 196.105 is amended. AGA also stated that it agrees with PHMSA's use of the word ''exception'' under § 196.105 since its incorporation into a Federal excavation standard is very different from the one-call exemptions that exist at the State level. AGA stated that consideration should also be given to whether or not a farmer is a ''homeowner'' and if so, whether their exception would be for their entire property or just for their farm. AGA pointed out that Page 25 of CGA's 2010 DIRT Report shows that ''occupant/farmer'' is the excavator involved in 10 percent to 17 percent of the events collected for six of the eight One-Call System International Regions, and AGA believes this is a significant issue.

INGAA stated that homeowners using hand tools to dig more than 12 inches deep should not be exempt from contacting one-call and opposes the § 196.105 language that would exempt homeowners from contacting one-call before digging with hand tools.

TPA stated that § 196.105 should be revised to read as follows: ''. . . provided that the homeowner does not dig deeper than 16 inches.''

NUCA stated that in § 196.107 homeowners should not be exempted from calling one-call before excavation activity.

Response

PHMSA agrees with the comments regarding the need to eliminate the proposed exemption for homeowners.

This exemption has been removed from the regulatory language. The final regulatory language is silent on the subject of exemptions/exceptions.

**§ 196.107 What must an excavator do if a pipeline is damaged by excavation activity?**

AOPL and API requested that § 196.107 be amended to state that an excavator may not backfill a site where damage or a near miss has occurred until the operator has been provided an opportunity to inspect the site. In addition, AOPL and API suggested that a stop work requirement be included in § 196.107 as, ''If a pipeline is damaged in any way by excavation activity, the excavator must immediately stop work at that location and report such damage to the pipeline operator, whether or not a leak occurs. Work may not resume at the location until the pipeline operator determines it is safe to do so.''

CenterPoint stated that in § 196.107 the excavator should not backfill a pipeline if it is damaged by the excavator, and the excavator should remain on site and leave the damaged area accessible to the operator unless it would be unsafe or impractical to do so. If the damaged area is not left accessible, the excavator should leave clear markings to assist the operator with finding the damage.

Kern River stated that § 196.107 should first require that work be stopped immediately and the pipeline operator be contacted immediately since the excavator is not qualified to make a determination of the extent of the damage caused to a pipeline.

NAPSR recommended that § 196.107 state ''. . . if a pipeline is damaged in any way by excavation activity, the excavator must report such damage to the pipeline operator.'' NAPSR stated that consideration should be given to requiring the excavator to also notify the one-call center in the event of damage to an underground facility and/or a release of product to make sure there is a centralized location for the reporting of damages and a method of proper documentation of pipeline damages due to excavation.

NYDPS stated that § 196.107 requires excavators to notify the pipeline operator if the facility is damaged in any way by the excavation activities. The NPRM would require notification at the ''earliest practicable moment,'' but the NPRM indicates that PHMSA is considering requiring notification in no less than 2 hours. NYDPS stated that, instead of requiring a specific notification time, it believes that the language in the NPRM is preferable. NYDPS recommended that the regulation require, after the evacuation of employees and any other endangered persons, ''immediate notification'' by the excavator to the operator of any contact or damage to the pipeline, since this language is somewhat less open to interpretation and less subjective than the ''earliest practicable moment.''

On the other hand, TPA stated that § 196.107 should be revised to include a time limit by which an excavator must notify the operator of damage to a pipeline. TPA stated that even if there is no release of product, an operator needs to get to the damage site as soon as possible to assess the situation and take any necessary remedial action. TPA suggested that the time limit be 2 hours following discovery of the damage. TPA also suggested that § 196.107 should be revised to include a requirement that an excavator not backfill any portion of a damaged pipeline without the operator's approval.

Pennsylvania One Call stated that § 196.107 be amended to cover not only damage to a pipeline but also physical contact with a pipeline because this would prevent an excavator from exercising discretion to determine whether contact did or did not result in damage, and mere contact could create damage to pipeline coating.

Response

While PHMSA understands the comments from AOPL, API, CenterPoint, and Kern River regarding stop work and backfill requirements, PHMSA has not included these requirements in the final rule. These requirements would be very difficult to communicate in States with inadequate enforcement programs. The requirements would also be different from the requirements of State damage prevention laws in most cases. PHMSA does not wish to create confusion or create a scenario under which excavators would be subject to Federal enforcement of a requirement of which they would likely not be aware.

PHMSA has considered requiring excavators to notify the one-call center, in addition to the pipeline operator, in the event of excavation damage to a pipeline. PHMSA does not believe this requirement should be included in the final rule. One-call centers are not necessarily equipped to accept damage reports in every State. NAPSR's recommendation, therefore, could create an undue burden on both excavators and one-call centers and could lead to confusion among damage prevention stakeholders.

In response to the comments from NYDPS and TPA regarding the time limit for notice of damage to pipeline operators, PHMSA believes that the language proposed in the NPRM is practical and enforceable. Establishing a specific timeline may create confusion among stakeholders in States where PHMSA has Federal enforcement authority.

In response to the Pennsylvania One Call, PHMSA believes the definition of the terms ''damage/excavation damage'' in § 196.3 is broad enough to encompass all of the types of excavation damage that may have an impact on pipeline integrity and safety.

**§ 196.109 What must an excavator do if damage to a pipeline from excavation activity causes a leak where product is released from the pipeline?**

AGA suggested in § 196.109, PHMSA add a requirement that an excavator responsible for damage that results in the escape of dangerous fluids or gasses must take actions to protect the public until the arrival of the operator or public safety personnel in a manner consistent with the second half of CGA Best Practice 5–25: ''The excavator takes reasonable measures to protect everyone in immediate danger, the general public, property, and the environment until the facility owner/operator or emergency responders arrive and complete their assessment.'' AGA suggested that in § 196.109, PHMSA delete ''Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site,'' because this type of decision should rest with the 911 operator not the excavator.

NAPSR commented that in § 196.109, if the incident is such that it ''may endanger life or cause serious bodily harm,'' then emergency personnel should always respond to the site; the excavator should not be making a ''judgment call'' at this point. NAPSR recommended that the sentence ''Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site'' be removed from the proposed language in this section.

AOPL and API and INGAA suggested that § 196.109 should specify that if damage to a pipeline from excavation activity causes the release of any material, either gas or liquid, from the pipeline, the excavator must immediately stop work at that location and report the release to appropriate emergency response authorities by calling 911. Excavators should be required to contact the pipeline operator to notify them of the release after contacting the appropriate emergency

response authorities. Work should not resume at the location until the pipeline operator determines the work can be resumed.

Kern River stated that § 196.109 should first require that work be stopped immediately, next that the damage be reported to appropriate emergency response authorities, and finally that the pipeline operator be promptly notified.

MidAmerican commented that § 196.109 requires excavators to immediately report the release of hazardous products to the appropriate emergency response authorities by calling 911. Once the 911 emergency telephone number is called, § 196.109 would allow excavators the discretion of whether to request that emergency response personnel be dispatched to the damage site. MidAmerican stated that it believes that an exception should be made to the requirement to call 911 for pipeline operators who damage their own pipelines. Pipeline operators' personnel are directly on-site and can see that the necessary repairs can be made safely and expeditiously without the need to first contact emergency response personnel.

NUCA, NUCA of Ohio, DCA, and Pennsylvania One Call stated that the ''911 requirement'' in § 196.109 presents a ''Pandora's box'' to the excavation community. They stated that professional excavators are not first responders. Expecting a contract excavator to accurately determine if the product released following excavation damage is one that can ''cause serious bodily harm or damage property or the environment'' is outside their responsibilities. They stated that the decision as to whether a 911 call ought to result in a dispatch of emergency responders is a matter to be decided by the 911 center, not the excavator. They encourage PHMSA to revise or delete this provision in the final rule. NUCA agrees with PHMSA's proposal for calling 911 except for the excavator needing to maintain the option to exercise discretion on whether it is necessary for the 911 dispatcher to send emergency response personnel. NUCA stated that in many situations, all the excavator may need to do is inform the owner/operator that the pipeline was damaged so the pipeline operator can respond with the personnel who are best educated and equipped to handle the situation.

TPA stated that § 196.109 should be revised in three ways. First, to prevent the excavators using their discretion to call 911, the phrase, ''that may endanger life or cause serious bodily harm or damage to property or the environment'' should be deleted. Second, to eliminate any ambiguity in the final rule concerning when 911 should be contacted, the phrase, ''of hazardous products,'' which occurs immediately following the second occurrence of the word, ''release,'' in the first sentence of the Section, should be deleted. Third, the phrase, ''in addition to contacting the operator,'' should be added to the end of the first sentence of the Subsection to clarify that the operator needs to be contacted first.

Response

PHMSA disagrees with AGA's suggestion of requiring compliance with CGA Best Practice 5–25. While PHMSA supports CGA Best Practices (including Best Practice 5–25), PHMSA does not intend to require compliance with the Best Practices through this regulation. PHMSA agrees with AGA's and NAPSR's suggestion of removing the phrase, ''Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site'' from § 196.109. The phrase has been removed from the final regulatory language. PHMSA agrees with the suggestions from AOPL, API, INGAA, and NUCA regarding the need for excavators to contact 911 and the pipeline operator if excavation damage causes a release. PHMSA has removed from the final rule the proposed option for excavators to exercise discretion as to whether emergency response personnel be dispatched to a damage site. For reasons already noted in previous responses to comments, PHMSA disagrees with the idea of requiring excavators to stop work because of challenges related to communication and enforcement of the requirement.

PHMSA disagrees with MidAmerican's belief that an exception to the 911 requirement be made for operators who damage their own pipelines. The PIPES Act of 2006 requires the call to 911 in cases of excavation damage that result in releases, regardless of who is conducting the excavation.

PHMSA has made the changes to § 196.109 as recommended by TPA, with one exception. PHMSA has not included the phrase, ''in addition to contacting the operator,'' as recommended by TPA because contacting the operator after excavation damage occurs is already required under § 196.107.

PHMSA has also modified § 196.109 from the originally proposed ''any flammable, toxic, or corrosive gas or liquid from the pipeline that may endanger life or cause serious bodily harm or damage to property or the environment'' to ''any PHMSA regulated natural and other gas or hazardous liquid as defined in parts 192, 193 or 195.'' PHMSA made this change to ensure consistency with existing PHMSA regulations.

**§ 196.111 What if a pipeline operator fails to respond to a locate request or fails to accurately locate and mark its pipeline?**

NAPSR stated that § 196.111 states that ''PHMSA may enforce existing requirements applicable to pipeline operators, including those specified in 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114 . . .'' However, most State regulations are more stringent than §§ 192.614, 195.442, and 60114, which generally cover only the broad basics and do not include as detailed compliance requirements as State law. NAPSR stated that PHMSA would not have a way of knowing if the pipeline operator fails to respond. In addition, it is not clear to NAPSR whether additional reporting requirements on pipeline operators or excavators, or both, would be established. NAPSR stated that State laws, regulations, and rules usually provide specific and detailed requirements for when an operator fails to respond to a locate request or fails to accurately locate and mark its pipelines. Therefore, NAPSR stated that any requirements concerning failure to respond or accurately locate needs to defer to the State law in the State where the event occurred.

Pennsylvania One Call requested that § 196.111 be amended to make it clear that PHMSA's direct role in State enforcement normally will be limited to those situations where (a) the State lacks enforcement authority, or (b) the State systematically refuses (by action or inaction) to utilize the authority it has.

NUCA stated that § 196.111 should include action against the owner/operator that results in reimbursement to the contractor for financial losses due to the owner/operators' failure to locate and/or accurately mark the pipeline. NUCA stated that this requirement would encourage pipeline owner/operators to respond to a request for ''a locate'' in a timely manner.

TPA stated that § 196.111 requires enforcement for the failure of an operator to accurately locate and mark its pipeline, but there is no standard in part 196 establishing the requirements for accurate locating and marking. TRA suggested that, to make sure pipeline operators accurately locate and mark their pipelines under the Federal damage prevention requirements,

§ 196.111 should be revised by adding a sentence that reads as follows: ''A locate mark will be considered accurate if it is located anywhere within the tolerance zone.''

Response

In response to the comments from NAPSR, PHMSA will be considerate of State laws and regulations when conducting Federal enforcement. The policy in this preamble further clarifies PHMSA's position. States often do not enforce 49 CFR 192.614 and 195.442. PHMSA believes that enforcement of these regulations, applicable to pipeline operators, ensures fairness in the damage prevention process and that pipeline operators take their damage prevention responsibilities seriously.

In response to the comments from Pennsylvania One Call, § 196.111 will only be enforced in States with damage prevention law enforcement programs that PHMSA deems inadequate.

For reasons stated in response to another comment above, PHMSA disagrees with NUCA's recommendation that § 196.111 should include action against the owner/operator requiring reimbursement to the excavator for financial losses due to an owner/operators' failure to locate and/or accurately mark a pipeline.

PHMSA disagrees with TPA's recommendation to include in § 196.111 a sentence that reads as follows: ''A locate mark will be considered accurate if it is located anywhere within the tolerance zone.'' PHMSA has not defined a tolerance zone in this final rule. In conducting Federal enforcement, PHMSA will be considerate of State requirements for accurate marking, consistent with the enforcement policy included in the preamble to this final rule.

## Subpart C—Enforcement

### § 196.203 What is the administrative process PHMSA will use to conduct enforcement proceedings for alleged violations of excavation damage prevention requirements?

and

### § 196.205 Can PHMSA assess administrative civil penalties for violations?

AOPL and API requested that PHMSA clarify whether civil penalties in § 196.205 are intended to be used for failure to report a near-miss, or whether civil penalties will only be issued for damage and release events. They suggested that PHMSA should clarify that civil penalties may be imposed pursuant to the enforcement authority granted in subpart C, even if an excavator violates the subpart but does not cause damage. They support a case-by-case approach to imposing penalties, support weighing the facts and circumstances in each case, and support PHMSA's discretion to assess civil penalties regarding near-misses based on its investigation as to the excavator's efforts at communicating near-miss information. On the other hand, CenterPoint and the IUB were skeptical of the effectiveness of near-miss reporting. CenterPoint stated that the most difficult aspect of reporting near misses may be defining exactly what one is and stated that investigating possible near misses to determine if they are reportable would also tie up limited resources. IUB questioned if meaningful or accurate data would be collected by such a requirement. IUB stated that excavators would have little incentive to report near-misses that would otherwise likely go unnoticed, and the reports would bring potential penalties and shame. More rigorous (and expensive) monitoring of excavators by operators would also be of little benefit, as near misses would most likely occur during excavations where one-call was not notified, and the operator would be unaware that an excavation, let alone a near miss, had occurred. IUB suggested no rule on near-miss reporting be adopted on the basis that it is unlikely to provide worthwhile information.

AOPL and API stated that they support PHMSA's recommendations for establishing administrative procedures for a State wishing to challenge a finding of inadequacy. They also supported PHMSA's proposed adjudication process to be used by excavators for pipeline safety violations. Although no prescriptive timeframe is recommended, they suggested that PHMSA ensures that these processes be completed expeditiously. AOPL and API also suggested that the right to request the Attorney General to bring an action for relief, as necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, civil penalties, and punitive damages, be retained by the Administrator of PHMSA, or a designated authority, as authorized in 49 CFR 190.25.

AGC supported the administrative process outlined in the NPRM. AGC suggested, however, that in the process of the paper hearing that happens after the initial finding of inadequacy, PHMSA should request input from all stakeholders in the State with the inadequacy rating. AGC also suggested that in the penalty phase, PHMSA should consider education as an alternative or supplement to civil or other penalties and in cases where financial penalties are assessed, and/or that revenues generated must be reserved to finance damage prevention education and technologies used in support of damage prevention activities.

CenterPoint suggested that PHMSA should adopt a complaint-based administrative procedure as the primary trigger of the enforcement process provided in proposed §§ 196.205 and 196.207. CenterPoint commented that State and, if necessary, Federal criminal and civil penalties should be imposed to repeat excavation damage offenders who do not respond to any amount of monetary fines.

Paiute and Southwest stated that the process outlined within the NPRM is lengthy and potentially ineffective in dealing with an at-fault excavator. The administrative process defined in the NPRM could develop into 12-to-24 month interplay between the defending State and PHMSA before any enforcement action is taken with the excavator. An excavator should not be penalized for the inadequacy of a State's enforcement program by receiving a second fine from PHMSA upon the finding that a State's enforcement activities are inadequate. Additionally, they stated that an excavator would not be given credit for any improvements they may have made immediately following the infraction. Paiute and Southwest encourage the development of a process for determining the adequacy of a State's enforcement program in advance of an infraction and prior to invoking Federal administrative enforcement. They stated that PHMSA should first determine if the State's program is effective, notify the State of the inadequacies, and allow time for the State to take the steps necessary to improve their program. Then, PHMSA should initiate Federal enforcement immediately following an infraction should the State fail to improve its program.

DCA and NUCA of Ohio stated that PHMSA proposes to apply the same adjudication process for these new regulations as is used for other pipeline safety violations included in 49 CFR part 190. They suggested that improvements could be made to the logistical provisions in the final rule for excavators to address alleged violations of the Federal excavation standard. They stated that it is overly burdensome to expect professional excavators to travel to PHMSA regional offices that have jurisdiction over several States. Also, NULCA stated that PHMSA proposes to use the same adjudication process for these new regulations as is used for other pipeline safety violations

included in 49 CFR part 190. It believes that the process described in the NPRM is fair and consistent with current Federal law.

Paiute and Southwest commented that licensed, professional excavators should be aware of the damage prevention laws in the State(s) in which they do business and thus be held accountable for following the excavation law within those State(s). They stated that excavators should be required to follow the same adjudication process as pipeline operators as set forth in 49 CFR part 190. They also stated that the proposed adjudication process for homeowners would be unfair.

Response

PHMSA does not intend to require reporting of near misses. A more detailed explanation of PHMSA's enforcement policy is included in the preamble to this final rule.

PHMSA agrees with the comments from AOPL and API regarding the proposed administrative procedures for a State wishing to challenge a finding of inadequacy as well as the process to be used by excavators for pipeline safety violations. PHMSA intends to ensure that the processes are completed expeditiously. PHMSA also agrees with AOPL and API regarding the need for PHMSA to retain the right to request the Attorney General to bring an action for relief as authorized in 49 CFR 190.25.

PHMSA does not intend to request input from all stakeholders in determining the adequacy of a State's damage prevention law enforcement program as suggested by AGC. The adequacy of enforcement programs will be assessed using the criteria listed in § 198.55. Further, PHMSA does not intend to impose education requirements or other alternative or supplemental enforcement actions in addition to civil penalties in cases where financial penalties are assessed. Alternative enforcement actions would be overly cumbersome for PHMSA to administer.

PHMSA will consider complaints as a trigger for the enforcement process proposed in §§ 196.205 and 196.207. However, PHMSA will not consider complaints to be the only trigger for enforcement action. Additional information is available in the enforcement policy in the preamble to this final rule.

As originally proposed and as described in this final rule, and as recommended by Paiute and Southwest, PHMSA intends to determine the adequacy of State enforcement programs before exercising any Federal enforcement authority in States with inadequate programs.

PHMSA recognizes that the adjudication process in 49 CFR part 190 for violators of pipeline safety regulations could be burdensome for excavators if excavators are expected to travel to PHMSA regional offices. PHMSA regularly conducts these hearings via teleconference, which should relieve alleged violators of any requirement to travel.

PHMSA disagrees with the comments from Paiute and Southwest regarding the fairness of the proposed adjudication process for homeowners. PHMSA does not intend to make special accommodations for homeowners who violate pipeline safety regulations.

**§ 196.207 What are the maximum administrative civil penalties for violations?**

AGA stated that it is concerned that the civil penalty should always be restricted to the State's maximum penalty. AGA stated that excessive Federal penalties would actually serve as a deterrent for an excavator in reporting damage or perhaps even tempt individuals to make their own unauthorized repairs to a pipeline rather than notifying the operator. AGA stated that either way, this issue is a legitimate concern that could lead to unsafe conditions.

Response

PHMSA recognizes AGA's concern about the potential for excessive penalties to create an unsafe condition. However, PHMSA cannot restrict Federal civil penalties to maximum State penalties in States with no civil penalty authority. PHMSA will assess penalties pursuant to 49 CFR 190.225.

**§ 196.209 May other civil enforcement actions be taken?**

IUB commented that § 196.209 proposes additional types of civil enforcement actions against any person believed to have violated any provision of 49 U.S.C. 60101 *et seq.* or any regulation issued there under. IUB stated that this language would include any person, not just excavators, for any alleged violation of any Federal pipeline safety law or rule instead of just those related to damage prevention. IUB believes that this language far exceeds the scope of Part 196 and the law on which it is based.

Response

In response to the comment from IUB, § 196.209 is consistent with 49 CFR 190.235.

**§ 196.211 May criminal penalties be imposed for violations?**

NUCA recommended that, to ensure all parties are aware of potential penalty amounts, § 196.211 should include the penalties specified in 49 U.S.C. 60122.

Response

PHMSA has chosen to reference 49 U.S.C. 60122 with regard to civil penalties instead of noting the penalty amounts listed in 49 U.S.C. 60122. The maximum civil penalties in 49 U.S.C. 60122 are subject to change.

## PART 198—REGULATIONS FOR GRANTS TO AID STATE PIPELINE SAFETY PROGRAMS

### Subpart D—State Damage Prevention Enforcement Programs

**§ 198.53 When and how will PHMSA evaluate state excavation damage prevention law enforcement programs?**

Missouri PSC stated that it understands PHMSA's incentive to make States comply with the damage prevention criteria is to reduce grant funding; however, Missouri's pipeline safety legislative actions are outside the control of the Missouri PSC. An adequate damage prevention program is only a portion of a State's overall pipeline safety program and, therefore, reducing the grant for an inadequate damage prevention program would mean not having adequate funding for the entire pipeline safety program, which would reduce the effectiveness of Missouri's overall pipeline safety program.

The IUB recommended that this portion of the NPRM be deleted in its entirety. The IUB stated that the section was not required or contemplated by Congress, the proposed penalty to State base grants is disproportionate and excessive, and it has the potential to drive States out of the Federal/State pipeline safety partnership. The IUB believes that this NPRM requires a public meeting for PHMSA to take evidence on the impact of such an onerous provision on State programs, and suggested that if public meetings are not possible, PHMSA should enter discussion with NAPSR on what a reasonable level of penalty on States might be.

IUB stated, with regard to § 198.53, that Congress directed PHMSA to develop ''through a rulemaking proceeding, procedures for determining inadequate State enforcement of penalties.'' PHMSA was not directed to take punitive action against States whose enforcement was deemed inadequate. IUB argued that the proposed grant penalties for States with

inadequate enforcement programs are unsupported by the law, unwarranted and unnecessary, and beyond the scope of this rulemaking; in addition, the amount of penalty proposed is disproportionate, excessive, and the deductions are cumulative.

IUB commented that a State pipeline safety program that is dependent on the PHMSA base grant would soon be unable to conduct a pipeline safety program and would be forced to withdraw or would be decertified from the program. IUB stated that the Federal grant reduction would likely drive States out of the pipeline safety program. IUB stated that even if a State would adopt new one-call enforcement provisions that PHMSA would find adequate, under the grant payment limitations of 49 U.S.C. 60107(b), it could take years for a State to recover from the loss of funding. IUB believes that no other single provision of PHMSA State program oversight could have an impact this devastating on the Federal/State pipeline safety partnership or the contributions of States to pipeline safety.

NAPSR stated that § 198.53 proposes that ''PHMSA will also conduct annual reviews of state excavation damage prevention law enforcement programs'' and ''if PHMSA finds a state's enforcement program inadequate, PHMSA may take immediate enforcement against excavators in that state'' and that ''a state that fails to establish an adequate enforcement program in accordance with 49 CFR 198.55 within five years of the finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107.'' NAPSR stated that the proposed language further states that ''the amount of the reduction in 49 U.S.C. 60107 grant funding shall not exceed 10% of prior year funding.'' NAPSR stated that a 10% reduction in a State's pipeline safety program base grant is disproportionate and excessive, especially when compared with the point allocations of the other parts of the annual evaluation scoring (*i.e.,* incident investigations, field inspections), and penalizing a State that is in need of additional resources to implement an ''adequate'' program does nothing but increase the difficulty of making the necessary changes, which may require legislative action that is beyond the control of the State agency. NAPSR stated that it believes the proposed penalty for States that are deemed by PHMSA to have inadequate excavation damage prevention law enforcement programs is unnecessary, unjustified, and excessive, and this provision should be removed from the proposed language, or at a minimum, should be reevaluated to determine a more equitable and reasonable level of penalty.

American Public Gas Association (APGA) stated that it believes that any grant funding cuts should be limited to State Damage Prevention grants, and the general pipeline safety funding (base grants) for the State should not be reduced. APGA stated that in many States, the pipeline safety agency is not the agency responsible for enforcing damage prevention laws. In most States, the legislature must act to enact effective damage prevention, and the pipeline safety agency is under the legislature. Therefore, neither the damage prevention grants program nor the general pipeline safety grants program is sufficiently large enough to overcome legislative resistance, but cutting pipeline safety grants would negatively affect the resources available for pipeline safety in a particular State.

AGA suggested a 5-year grace period after the initial determination of inadequacy is too long and suggested a 3-year grace period during which PHMSA should consider any incremental improvements to a State's damage prevention program before reducing base grant funding. Also, AOPL and API suggested a 2-year grace period. However, DCA supported the administrative process and believes that allowing State authorities 5 years to make program improvements to meet PHMSA's criteria is appropriate. TPA is fully supportive of the use of PHMSA's annual program evaluations and certification reviews as the vehicle under which to conduct evaluations of State damage prevention programs as proposed in § 198.53. However, TPA considers the proposed 5-year grace period too long for the improvement of a State damage prevention program that is found to be inadequate. TPA recommended a grace period be limited to 3 years. Also, TPA recommended that a fixed time limit be placed on the temporary waiver period of no more than 2 years. In addition, TPA recommended that if a State program is found to be inadequate, PHMSA not begin enforcement during the 3-year grace period.

AOPL and API supported PHMSA's proposal that a State's base grant funding can be impacted due to a determination that the State's excavation damage prevention program is inadequate. They stated that funding reductions may serve as an appropriate incentive for States to reform inadequate programs expeditiously, but should be coupled with other incentives to remedy inadequate programs. They commented that States are granted ample opportunity to address program deficiencies prior to such a determination and are similarly provided opportunities to demonstrate improvements within programs following this determination. The 10 percent cap on funding reductions would ensure that significant fluctuations in funding do not occur. AOPL and API suggested that those States that demonstrate reductions in damage rates as a result of effective enforcement should qualify to receive additional grant money, serving as a positive incentive to continually improve programs.

TPA urged PHMSA to limit its funding reductions proposed in § 198.53 to 10 percent of the Federal excavation damage prevention funds allocated to a State. TPA stated that while reducing overall funding levels by 10 percent might provide PHMSA with a bigger stick, it would adversely impact a State's ability to maintain an adequate pipeline safety program in all other respects. Such a result is contrary to the overall goal of PHMSA to promote and support all aspects of pipeline safety.

Response

In response to Missouri PSC's comments regarding incentives, PHMSA understands that the State's legislative actions are outside the complete control of the Missouri PSC. The same holds true for most States. Accordingly, PHMSA does not intend to arbitrarily reduce State base grant funding. Base grant funding levels are currently determined, in part, through an evaluation of State damage prevention programs. This final rule simply refines the criteria by which State damage prevention programs are evaluated. It is not PHMSA's goal to weaken State pipeline safety programs by reducing base grant funding. However, PHMSA, as a granting Federal agency, must use the financial incentives at its disposal to encourage States to adopt adequate excavation damage prevention enforcement programs. In addition to base grant incentives, PHMSA also intends to directly notify the Governors of States that PHMSA has determined to have inadequate enforcement programs. This notification to Governors may help encourage positive legislative action. Finally, PHMSA offers two grants—the State Damage Prevention grants and the one-call grants—that are available to States for improving damage prevention programs, including enforcement programs.

In response to the IUB, PHMSA has not removed the proposed penalty to State base grants for failure to

implement adequate enforcement programs. PHMSA currently calculates State base grant funding levels based upon a variety of factors, including damage prevention programs. This rulemaking simply changes the criteria upon which damage prevention programs are assessed. PHMSA has opted not to hold public meetings to discuss this provision. It is not PHMSA's intent to drive States out the Federal/State pipeline safety partnership. Instead, it is PHMSA's intent to provide incentives to States with inadequate enforcement programs to adopt adequate enforcement programs. PHMSA has reduced the proposed penalty from a maximum of 10 percent of prior year funding to a maximum of four percent of prior year funding.

As a granting agency under 49 U.S.C. 60107, PHMSA has the ability to use base grant funding levels as an incentive for improvements to State pipeline safety programs. The deductions are not intended to be cumulative.

PHMSA recognizes the IUB's concerns regarding potential reductions in base grant funding. PHMSA will take these concerns into consideration when determining the amount of potential reductions. States that are deemed to have inadequate enforcement programs will have a grace period of 5 years before any penalties take place. PHMSA will also notify Governors of determinations of inadequacy. PHMSA believes that adequate enforcement of State damage prevention laws is important enough to warrant the base grant incentive. PHMSA believes that States should enforce their own damage prevention laws and that enforcement is an essential part of a strong pipeline safety program.

In response to the comments from NAPSR regarding the proposed base grant penalty amount, PHMSA has reduced the maximum penalty to four percent. PHMSA does recognize that implementing an adequate State program may take legislative action that is beyond the complete control of PHMSA's State partners.

In response to the comments from AGA and APGA, PHMSA believes that limiting the discretionary State Damage Prevention grants would provide no incentive for States to implement adequate enforcement programs. On the contrary, the State Damage Prevention grants are made to improve damage prevention programs, including enforcement programs, and are a positive incentive for improvement.

PHMSA believes that given that some of PHMSA's State partners have limited influence over legislative processes, States should have a generous 5-year grace period after a finding of enforcement program inadequacy before base grant funding is reduced.

PHMSA recognizes AOPL's and API's comments about the need for additional incentives for State enforcement program improvement. PHMSA intends to work with State stakeholders to encourage improvement in States with inadequate enforcement programs. However, PHMSA cannot increase State base grant funding for good performance due to the way base grant levels are calculated. PHMSA may only reduce base grant funding for ineffective State pipeline safety programs, including inadequate State damage prevention enforcement programs.

PHMSA agrees with TPA's comments regarding exercising caution when determining reductions to State base grants.

**§ 198.55 What criteria will PHMSA use in evaluating the effectiveness of State damage prevention enforcement programs?**

*General Comments on § 198.55*

KCC stated that PHMSA's approach toward providing a transparent evaluation process using the seven criteria listed in paragraph (a) of § 198.55 appears to be trumped by paragraph (b) of that section. Paragraph (b) would allow PHMSA to deem a State program inadequate if PHMSA did not agree with an enforcement action taken by the State. What is not clear in the NPRM is whether PHMSA could find a State program inadequate based only on a single, individual State enforcement action, assume jurisdiction over the same excavator, and initiate Federal charges. If a State program is deemed inadequate based on a single State enforcement action, KCC asked, how does a State rectify that situation without putting the excavator in double jeopardy? KCC believes that due process and 49 U.S.C. 60114(f) requires that any Federal determination of inadequacy of a State's enforcement efforts must be made before PHMSA initiates Federal enforcement activities, and then the applicable Federal standards may be given only prospective effect. KCC also believes that 49 U.S.C. 60114(f) prohibits PHMSA from determining a State's enforcement of its damage prevention laws is inadequate until PHMSA establishes the procedures for making such a determination. KCC believes that while some of PHMSA's criteria in the proposed § 198.55(a) are well defined, others can best be described as concepts. KCC believes that PHMSA has not offered sufficient guidance (procedures) on how it will carry out the proposals found in the NPRM.

Missouri PSC commented that PHMSA stated ''PHMSA's primary interest with regard to state civil penalties [for violations of excavation damage prevention law] is that (1) civil penalty authority exists within the state, and (2) civil penalty authority is used by the state consistently enough to deter violation of state excavation damage prevention laws.'' Missouri PSC would like clarification as to whether those two criteria are more important than the other criteria, and if they are, they should be identified as mandatory requirements.

AGA stated that PHMSA's ultimate goal should be to ensure there is effective and consistent enforcement of excavation damage prevention laws and regulations at the State level. AGA and its members are supportive of the NPRM and are encouraged by the possibilities of stronger enforcement in States determined to have inadequate enforcement programs. However, AGA stated that before a State's damage prevention program is evaluated, PHMSA should consider what circumstances will actually trigger Federal enforcement action in States that have been evaluated and found to have inadequate damage prevention programs. AGA also stated that there should be a mechanism to proactively address repeat offenders who have a history of damaging pipelines due to risky behaviors or who have failed to report damages to the pipeline operator.

AGA stated that because enforcement of pipeline safety regulations is often assigned to State public utility commissions that only have jurisdiction over pipeline operators and the enforcement of excavation laws, related violations may rest with other State agencies having broader jurisdiction over excavators. AGA cautioned PHMSA not to create perverse incentives that spur excessive enforcement actions against pipeline operators alone. In AGA's opinion, pipeline operators are often the victims of excavation law violations. AGA suggests that PHMSA should create incentive for State agencies assigned the task of enforcing one-call violations against third-party excavators or underground utilities that fail to properly locate and mark their lines in a timely fashion.

AGA suggested that PHMSA examine State damage prevention performance metrics (damages per 1,000 locate requests) to determine if the State is performing adequately or is improving. The Association suggested that damages per 1,000 requests should only be used

to gauge an individual State's improvement over time without comparing the metric to other States or determine adequate performance. AGA suggested that PHMSA collect data on the number of enforcement actions taken against excavators and operators by the State authority in order to determine overall enforcement effectiveness. In addition, AGA suggested that PHMSA have an annual evaluation of excavation programs in States that are close to being inadequate (or are found to be inadequate) and a more general evaluation of excavation programs in those States that are far above the threshold.

CenterPoint asked that PHMSA provide enough time for a State program to be deemed adequate or better before the agency takes actions against a State so that PHMSA will never have to assume jurisdiction.

AGC stated that PHMSA should encourage State regulatory authorities to equally enforce State laws applicable to underground facility owners and operators who fail to respond to a location request or fail to take reasonable steps in response to such a request. Without accurate locating and marking, contractors are put in harm's way. APGA supports the efforts of PHMSA to encourage States to adopt and enforce effective excavation damage prevention programs. Pennsylvania One Call stated that State 811 centers have an audience that is larger than the pipelines covered by Federal statute. Pipelines are only one part of the facilities and parties covered by State one-call statutes, and PHMSA should avoid creating a situation where it places itself in conflict with enforcement policies mandated under State law that apply to all other covered parties, or creates a dual enforcement system at the State level.

NUCA stated that it opposes a permanent Federal role in State enforcement activities. NUCA suggested that the same enforcement requirements should be applied equally to all excavators, no matter their relationship to pipeline owners or operators. When an incident occurs, excavators working in-house for a pipeline owner or operator, and third-party contractors working under contract for pipeline owners or operators, should be treated as any other excavator. NUCA also suggested PHMSA consider adding one more element to the nine already-listed requirements for a comprehensive damage prevention program: The item should require all excavators and pipeline operators or owners to report near misses and/or mismarks to the State one-call (dig safe) system and/or Damage Information Reporting Tool (DIRT) that is sponsored by the Common Ground Alliance.

NUCA of Ohio stated that PHMSA's jurisdiction is limited to the natural gas and hazardous liquid pipelines; however, State policymakers will inevitably look at this regulation when adjusting their laws and enforcement practices subject to water, sewer, electric, telecommunications, and other underground infrastructure. To ensure the largest impact on damage prevention, PHMSA must encourage States to consider protection of all underground facilities when adjusting their safe digging programs and the enforcement of damage prevention requirements. Also, Southwest stated that an effective damage prevention program should lead to an overall reduction in damages to all underground facilities, not just natural gas and hazardous liquid pipelines, and PHMSA should take this into account when determining the adequacy of a State's program.

On PHMSA's request for comments concerning the issue of evaluating State programs on an incident-by-incident basis, KCC stated that it agrees with PHMSA that an annual review of the adequacy of enforcement of the State program would be less burdensome for the State. KCC stated that incident-by-incident evaluation is impractical given PHMSA's budgetary constraints. In addition, consistent with due process considerations, Federal enforcement actions could only be implemented prospectively and, therefore, incident-specific review would do little to rectify even glaring omissions or deficiencies in the State enforcement program. KCC, however, stated that the NPRM does not prohibit PHMSA from evaluating a State program based on a single incident. KCC suggested that PHMSA state in the rulemaking that the ''adequacy'' of State enforcement programs will be determined on the basis of an annual review.

Paiute and Southwest stated that they believe mandating adherence to specific criteria without consideration of alternate methodologies may be challenging for States due to staffing levels and varying legislative environments. Therefore, they believe that an effective damage prevention program should lead to an overall reduction in damages to all underground facilities, and not just natural gas and hazardous liquids pipelines. They suggested that PHMSA take this into account when determining the adequacy of a State's program. They suggested the States utilize data from the CGA's DIRT. They stated that this existing mechanism provides comprehensive data essential for learning about damages to all underground facilities statewide, not only those to natural gas and hazardous liquids pipelines. They stated that all stakeholders have a shared responsibility in damage prevention, and States should have knowledge of all underground damages when determining the effectiveness and/or necessary enhancements to their enforcement program.

AGA suggested that PHMSA should define an evaluation system using the criteria listed in the NPRM and make it transparent so that the public can see exactly which actions must be taken in order for a particular State's excavation program to become adequate. AGA suggested that there be a multi-stakeholder advisory council to flesh out the evaluation process after the regulation has been finalized. PHMSA would still conduct the evaluation, but the advisory council would provide guidance on how to perform that evaluation such as the following: What considerations should be made in evaluating each of the criteria listed; what data/information would be used in making the evaluation (and where to obtain the data/information); how to conduct the overall evaluation with respect to the various criteria reviewed and evaluated; how to address criteria where data/information is missing or non-existent; how to determine whether or not a State's grant funding should be reduced; if the State is taking some actions to improve its damage prevention program under a waiver submission; and, the advisory council could be comprised of anyone with experience in damage prevention. AGA stated that implementing an advisory council will help PHMSA gain support for the evaluations performed for each State.

CenterPoint Energy stated that it supports using the listed criteria, but the level of acceptability for each one needs to be set as pass/fail. If the criteria are properly established, absence of any one should be a basis for a finding of inadequacy. Any fine structure should be tied to a fund used to develop and execute a program to raise public awareness.

KCC stated that in the Commission's opinion, before subjective requirements, such as those presented in the NPRM, are enforceable, PHMSA should have the burden of proof to demonstrate how a State's program is ineffective by showing performance metrics that compare to other States of similar demographics.

On whether the proposed criteria strikes the right balance between establishing standards for minimum adequacy of State enforcement programs without being overly prescriptive, TRA stated that it appreciates PHMSA's acknowledgement that it is a State's prerogative to craft its own laws and regulations. TRA recommended that States should be granted maximum flexibility to implement excavation damage prevention law enforcement programs with the only provision that it meet minimum Federal standards, and those minimum standards should, however, be clear. TRA suggested that as an alternative, PHMSA could comment on State legislative efforts, prior to passage, to provide guidance as to whether they comply with PHMSA standards. Input by PHMSA in the form of explicit minimum standards or comment on legislation is the only way that a State can know it would not meet PHMSA's standards for excavation damage prevention law enforcement program.

KCC asked if a State program could be determined ''inadequate'' if only one criterion is not met to PHMSA's satisfaction, whether PHMSA provides guidance on the more subjective terms, and whether PHMSA's State partners be offered the opportunity to provide feedback on the guidance. KCC stated that without an opportunity to comment on any guidance that would be the true framework of the regulation, KCC believes that the rulemaking would lack due process and fail to satisfy the procedural requirements of the Administrative Procedure Act.

Response

In response to the comments from KCC, paragraph (b) in the proposal was not intended to trump paragraph (a) in the proposed § 198.55. Paragraph (b) is intended to allow PHMSA to consider individual enforcement actions taken by a State in the overall evaluation of a State's enforcement program. PHMSA will not make an adequacy determination based on a single enforcement action taken by a State but will evaluate enforcement actions taken by a State in the context of the evaluation criteria. PHMSA agrees that any Federal determination of inadequacy of a State's enforcement efforts must be made before PHMSA initiates Federal enforcement proceedings, and that the applicable Federal standards may be given only prospective effect. PHMSA has offered guidance regarding the scope and applicability of the evaluation criteria in the preamble to this final rule.

In response to Missouri PSC, PHMSA has clarified the scope and applicability of the evaluation criteria in the policy included in the preamble to this final rule.

PHMSA agrees with AGA's comments regarding PHMSA's ultimate goal to encourage effective and consistent enforcement of State excavation damage prevention laws and regulations. PHMSA has considered what circumstances will trigger Federal enforcement, as described in the enforcement policy in the preamble to this final rule. PHMSA has not developed a mechanism to proactively address repeat offenders who have a history of damaging pipelines because PHMSA is concerned primarily with enforcing future violations of regulations and not addressing past behavior.

PHMSA understands AGA's concerns regarding creating the wrong incentives that may spur unfair or inequitable enforcement programs. PHMSA does not believe the final rule, as written, will create these kinds of incentives. However, PHMSA will monitor the implementation of this final rule with consideration provided to AGA's concerns.

PHMSA acknowledges AGA's suggestion to examine State damage prevention performance metrics. However, State and Federal data that would enable this type of analysis are limited. PHMSA will review any data made available by the States in making a determination of enforcement program adequacy. PHMSA also acknowledges AGA's suggestion to evaluate marginal State programs on a more frequent basis. However, PHMSA does not intend to make determinations of marginal adequacy; rather, PHMSA will deem a State enforcement program either adequate or inadequate.

PHMSA agrees with CenterPoint's comment regarding providing enough time for State programs to be deemed adequate before PHMSA contemplates reducing State base grant funding. PHMSA will provide a 5-year grace period after the first determination of inadequacy to ensure States have time to improve their enforcement programs before base grants are affected. However, in States deemed to have inadequate enforcement programs, PHMSA will have the authority to take immediate enforcement actions against excavators if necessary and appropriate.

PHMSA agrees with AGC's comments regarding the need to equally enforce damage prevention requirements applicable to operators. To that end, PHMSA will work to ensure that enforcement is applied to the responsible parties in a damage incident. Fair and equitable enforcement will require thorough investigation of incidents and enforcement of applicable Federal regulations. PHMSA acknowledges the comments from Pennsylvania One Call and believes the final rule and the accompanying policies in the preamble to the final rule largely avoid the creation of dual enforcement systems at the State level.

PHMSA agrees with NUCA and opposes a permanent Federal role in State enforcement activities. Enforcement of State damage prevention laws is a State responsibility. PHMSA also agrees that this final rule should be applied equally to all excavators, regardless of their relationship to pipeline operators. PHMSA disagrees with NUCA's recommendation to require reporting of near misses and/or mismarks to State one-call systems and/or the Damage Information Reporting Tool. PHMSA believes this requirement would be out of the scope this rulemaking. PHMSA strongly encourages the use of data to analyze State damage prevention programs and encourages the States to collect damage and near-miss information for such purposes.

PHMSA acknowledges the comments from NUCA of Ohio and Southwest regarding the potential impact of this final rule. However, PHMSA regulatory authority extends only to specific pipelines, and PHMSA has attempted to be cautious in not unduly influencing other aspects of damage prevention. PHMSA believes that implementing adequate enforcement programs specifically for improving pipeline safety could lead to other changes in State enforcement programs that may result in reductions in the rate of excavation damage to all underground facilities.

With regard to the comments from KCC regarding incident-by-incident analysis, PHMSA agrees. PHMSA will not evaluate a State program based on its handling of a single incident, but instead will evaluate a State program based on the criteria stated in § 198.55.

PHMSA agrees with the comments from Paiute and Southwest regarding the holistic nature of damage prevention programs, but PHMSA must also be cognizant of PHMSA's mission and scope of regulatory authority, which is limited to pipelines. PHMSA is in favor of using DIRT for a variety of analytical purposes, but PHMSA will not use DIRT for evaluating State enforcement programs. DIRT data is consolidated at the regional level, and PHMSA has no access to State-specific data. In addition,

information in DIRT is submitted on a voluntary, anonymous basis by damage prevention stakeholders.

PHMSA agrees with AGA's suggestion to define a transparent evaluation system using the criteria listed in the final rule. PHMSA has developed a policy in the preamble of this final rule that clarifies the evaluation system. At this time, PHMSA does not intend to implement AGA's recommendation to convene a multi-stakeholder advisory council to further refine the evaluation process. PHMSA may consider the idea in the future.

PHMSA acknowledges CenterPoint Energy's recommendation to route civil penalties to a fund that could be used to develop a public awareness program. However, PHMSA is limited by law with regard to how civil penalties are collected. Civil penalties collected by PHMSA go directly to the U.S. Treasury.

PHMSA acknowledges KCC's comments regarding the comparison of States. However, past efforts by many damage prevention stakeholders to compare the performance of States to one another has proven impossible for a variety of reasons. PHMSA will not compare State enforcement programs to one another but will review available records that demonstrate performance trends within States.

In response to the suggestion from TRA regarding influencing State legislative efforts, PHMSA does not generally attempt to directly influence the State legislative process. However, if requested, PHMSA does work with States to provide information and guidance regarding PHMSA enforcement policies and other programs.

In response to the comments from KCC regarding how the evaluation criteria will be applied, PHMSA has developed a policy that addresses the scope and applicability of the evaluation criteria in the preamble of this final rule. This policy is not equivalent to regulation and is subject to change as PHMSA implements this regulation over time.

*Comments on § 198.55(a)(2)*

Kern River stated that § 198.55(a)(2) should require designation of a State agency, such as the State's Attorney General's Office, to enforce local damage prevention laws in a fair and effective manner. Kern River stated that it is important that enforcement remains a responsibility of the State and not be relinquished to local authorities where mechanisms, such as penalties or fines for violators, may not provide sufficient incentive for excavators to utilize the local one-call system.

Response

PHMSA agrees with Kern River that States should be responsible for enforcing damage prevention laws. However, PHMSA is not requiring that enforcement be conducted solely by a State agency. The proposed criterion at § 198.55(a)(2) focuses on enforcement at the State level but does not preclude enforcement by designated bodies other than State agencies. PHMSA does not wish to be overly prescriptive about who conducts enforcement within the State.

*Comments on § 198.55(a)(3)*

KCC stated that this criterion is vague and does not provide any guidance on how PHMSA would define sufficient levels or how the State would demonstrate effectiveness. Therefore, KCC seeks clarification on whether open records act requests are sufficient means of making information available to demonstrate effectiveness. Also, the KCC asks if PHMSA envisions each State preparing and filing a report on the State's enforcement program in order to demonstrate effectiveness and, if so, what would the report entail.

Paiute and Southwest stated that States can achieve effective enforcement by imposing remedial actions in lieu of civil penalties, such as through program awareness and/or mandated damage prevention training. As an example, Nevada has effectively enforced its damage prevention program through mandated damage prevention training for at-fault excavators. Other States may have established additional actions that have also been effective. Paiute and Southwest agree when civil penalties are warranted, they should be at levels sufficient to ensure compliance; however, they believe PHMSA should regard all effective actions taken by a State as part of its damage prevention program just as important as civil penalties. They believe that any publicly available damage and enforcement data should be comprehensive enough to demonstrate the effectiveness of the enforcement program while maintaining the confidentiality of the parties involved.

AOPL and API commented that where States use alternative enforcement mechanisms in addition to civil penalties in § 198.55(a)(3), PHMSA should consider effective alternatives to civil penalties when assessing whether States have undertaken actions to ensure compliance.

The IUB and NAPSR stated that § 198.55(a)(3) contains two separate and unrelated provisions: One about assessment of civil penalties, and another about publicizing information on the enforcement program. They stated that if both provisions were adopted, these should be separated into two sections. However, they recommended that the second part should not be adopted. They stated that publicizing enforcement actions is not of itself an act of enforcement and should not be used to judge if State enforcement is effective.

On whether State excavation damage prevention enforcement records should be made available to the public to the extent practicable, KCC believes the phrase ''to the extent practicable'' is vague. KCC suggested that PHMSA modify the NPRM to allow an open records act requirement similar to the Federal Freedom of Information Act requirements as an effective means of meeting this criterion.

Pennsylvania One Call recommended that § 198.55(a)(3) be amended to clarify that the size of the fine would be relative to the damage caused and the frequency of damage. Participation in a remedial education program may be a substitute for all or part of a fine where appropriate for the first offense. They also recommended that language should be inserted to reflect that transparency, while desirable as a general matter, may not always be possible under State law or may not be useful in settlement negotiations.

TRA suggested that in § 198.55(a)(3), the word ''ensure'' be replaced with the word ''promote,'' because no amount of civil penalties can ever ensure compliance.

Southwest stated that any publicly available damage and enforcement data should be comprehensive enough to demonstrate the effectiveness of the enforcement program while maintaining the confidentiality of the parties involved.

Response

In response to the comments from the KCC, PHMSA has developed a policy in the preamble to this final rule that clarifies how the evaluation criteria will be applied. In addition, PHMSA will post a policy document on the agency's Web site. PHMSA does not envision each State preparing and filing a report on the State's enforcement program. PHMSA staff will evaluate State damage prevention enforcement programs as part of the annual certification of State pipeline safety partners. PHMSA does not believe open records acts—or Freedom of Information Act (FOIA) requests—constitute a sufficient means of making enforcement information available to the public. PHMSA prefers to see enforcement records proactively

shared (via a Web site, for example), assuming the records can be shared legally and with regard to the rights of involved parties.

PHMSA acknowledges the comments from Paiute and Southwest regarding the use of alternative enforcement actions, in lieu of civil penalties, to promote compliance with damage prevention laws. PHMSA will consider the adequacy of all enforcement actions taken by a State. PHMSA will also evaluate whether State law provides civil penalty authority to the enforcement agency and will evaluate past enforcement actions with the goal of determining if those actions have promoted compliance with State damage prevention laws. The policy in the preamble of this document further clarifies how the State program evaluation criteria will be applied.

In response to the comments from AOPL and API, PHMSA believes that States can and do use alternative enforcement mechanisms (such as required training) to effectively encourage compliance with State damage prevention laws. However, PHMSA believes that civil penalties are the most effective deterrent to violation of the law.

In response to IUB and NAPSR, PHMSA believes that civil penalty authority and publicizing enforcement actions are important components of adequate damage prevention law enforcement programs. However, a State having civil penalty authority is relatively more important to an adequate enforcement program than publicizing enforcement actions. PHMSA has developed a policy in the preamble to this final rule that describes how the evaluation criteria will be applied, including how the criteria will be weighted.

In response to the KCC's comments about public records, PHMSA believes that transparency is an important component of an adequate enforcement program. PHMSA makes every effort to proactively make those records that are subject to Freedom of Information Act requirements public. PHMSA does this by posting records, to the extent practicable, to PHMSA's Web sites. PHMSA believes that State damage prevention law enforcement authorities should do the same in an effort to demonstrate the State's commitment to deterring excavation damage to pipelines through law enforcement. Additional clarification is made in the policies included in this preamble.

In response to the comments from Pennsylvania One Call regarding § 198.55(a)(3), PHMSA recognizes that States use alternatives to civil penalties, such as education requirements, for enforcement of State damage prevention laws. PHMSA believes that, under appropriate circumstances, using civil penalties is essential to adequate enforcement. PHMSA will be considerate of States' use of alternative enforcement actions when evaluating enforcement programs. In addition, PHMSA recognizes that transparency in enforcement actions may not always be possible under State law in every circumstance.

PHMSA agrees with TRA's suggestion to replace the word ''ensure'' with the word ''promote'' in § 198.55(a)(3). The regulatory language has been modified accordingly.

PHMSA agrees with Southwest's comments regarding confidentiality concerns pertaining to enforcement records. PHMSA does not intend for States to violate the confidentiality of any party, and PHMSA only seeks for States to make publicly available records that demonstrate the effectiveness of the enforcement program as permitted by State law and as practicable with regard to the rights of all involved parties.

*Comments on § 198.55(a)(5)*

KCC stated that the phrase ''investigation practices that are adequate'' in this criterion is a vague phrase and one that requires additional guidance from PHMSA. KCC believes that this guidance, and an opportunity to comment on the guidance, should be part of the rulemaking process.

Paiute and Southwest stated that investigation practices should be employed fairly and consistently to effectively determine the at-fault party. They suggested State investigators be trained in effective and consistent investigation practices.

TRA stated that because excavation damage often is the result of partial failures of the excavator and the operator, it is difficult to always determine a single party who would qualify as the ''at-fault'' party in any specific situation. Therefore, TRA recommended that the language in § 198.55(a)(5) be revised by replacing the phrase ''at-fault party'' with the phrase ''responsible party or parties.''

Response

PHMSA acknowledges KCC's request for clarification of how the State program evaluation criteria will be applied. This clarification is provided in the policy in the preamble to this final rule. PHMSA does not intend to subject this guidance to stakeholder comment as part of this rulemaking process. However, PHMSA did take into consideration comments from the NPRM in the development of this guidance.

PHMSA agrees with Paiute and Southwest. State damage investigation practices should be fair and consistent to effectively determine the responsible party. PHMSA also agrees that State investigators should be trained in investigation practices. However, those issues are not within the scope of this final rule.

PHMSA also agrees with TRA's suggestion to replace the phrase ''at-fault party'' with the phrase, ''responsible party or parties'' in § 198.55(a)(5). The regulatory language has been updated accordingly.

*Comments on § 198.55(a)(6) and (7)*

The IUB and NAPSR stated that § 198.55(a)(6) and (7) would include in the evaluation of the effectiveness of a State damage prevention program whether the State's law contains provisions that have nothing to do with enforcement. They stated that 49 U.S.C. 60114(f) does not authorize PHMSA to find State enforcement is inadequate due to unrelated deficiencies in the State law, and that only the adequacy of enforcement can be considered. Therefore, they recommended § 198.55(a)(6) and (7) be deleted.

The IUB stated that Congress directed PHMSA to conduct a study of the potential safety benefits and adverse consequences of other State exemptions; therefore, until that study is completed, the significance of State exemptions is undetermined. Attempting to link State exemptions to damage prevention enforcement, where it does not belong anyway, is contrary to the direction given by Congress regarding exemptions.

AOPL and API suggested that a stop work requirement be added in § 198.55(a)(6)(c). They suggested language that reads, ''An excavator who causes damage to a pipeline facility must immediately stop work at that location and report the damage to the owner or operator of the facility; and if the damage results in the escape of any material, gas or liquid, the excavator must immediately stop work at that location and promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.'' AOPL and API also suggested that the stop work requirement be added to § 198.55(a)(6)(d) (new section). They suggested language that reads, ''Work stopped under subparagraph (c) may not resume until the pipeline operator determines it is safe to do so.'' Also, AOPL and API stated that they do not

oppose the AGA's recommendation that PHMSA adopt the full Common Ground Alliance best practices on actions an excavator must practice following a strike and release in this section. Kern River stated that the proposed criteria in § 198.55(a)(6)(c)(i) and (ii) should first clarify that work must be stopped immediately when an excavator causes damage or suspected damage to a pipeline, whether there is a substance released or not.

DCA and NUCA of Ohio stated that the criteria to determine the adequacy of the State law itself provided in § 198.55(a)(6) are incomplete. They stated that PHMSA should restate the operator's responsibilities related to one-call participation and accurate locating and marking of their facilities in the criteria to determine the adequacy of a State damage prevention law described in the NPRM.

NUCA of Ohio stated that while consideration of exemptions to damage prevention requirements is important, it is one-sided as currently written. Section 198.55(a)(7) asks: ''Does the state limit exemptions for excavators from its excavation damage prevention law?'' And answers: ''A state must provide to PHMSA a written justification for any exemptions for excavators from state damage prevention requirements.'' NUCA of Ohio stated the NPRM neglects to include consideration of exemptions to one-call membership requirements as well as from locating and marking responsibilities. As written, PHMSA would only consider enforcement of requirements subject to excavators in its criteria but not pipeline operator requirements.

TPA stated that in § 198.55(a)(6)(i), the words ''but no later than two hours following discovery of the damage'' should be added immediately following the word ''damage'' at the end of the subsection because of the need to provide clear guidance on the outer limit of time for a damage notification to occur. In this same subsection, TPA recommended that the phrase ''owner or'' be deleted because the pipeline safety regulations are directed towards operators of pipeline facilities, and the most effective communication to address damage is with the person who operates the pipeline. In § 198.55(a)(6)(c)(ii), TRA suggested that the language should be revised in the same manner as what TPA proposed for the language of § 196.109 to eliminate ambiguity in the provision and promote timely contact of the operator as well as 911.

The Missouri PSC stated that the Missouri damage prevention statute requires that damages to underground facilities must be reported to MOCS by the excavator. MOCS then immediately notifies the facility owner or operator of the damage. This is a method that works well in Missouri. Further, the excavator may not have contact information for the underground facility owner/operator but can readily contact MOCS by dialing ''811.'' The Missouri PSC requested clarification from PHMSA that this notification process (the excavator reporting damage to MOCS) is acceptable (meets the criteria) and that damages do not have to be reported directly to the owner or operator of the pipeline facility.

Response

In response to the comments from the IUB and NAPSR, PHMSA does have the authority to evaluate State damage prevention laws in order to determine the adequacy of enforcement of the laws. PHMSA believes that an adequate law enforcement program is dependent upon an adequate law that, at a minimum, contains the requirements of § 195.55(a)(6) and does not excessively exempt parties from damage prevention responsibilities.

In response to the IUB, Congress did direct PHMSA to conduct a study of State exemptions in the PHMSA reauthorization bill of 2011 (Public Law 112–90). This final rule is an extension of the PIPES Act of 2006. PHMSA agrees that more information about the safety implications of exemptions is required, but, in general, PHMSA opposes exemptions in State damage prevention laws. However, some exemptions may be warranted, especially when justified by data, which is why PHMSA is requiring a written justification of exemptions in State damage prevention laws. In addition, as described in the policies included in this preamble, PHMSA does not intend to determine the adequacy of a State enforcement program based solely on the existence of exemptions.

PHMSA acknowledges the recommendation from AOPL, API, and Kern River to include a ''stop work'' requirement to § 198.55(a)(6)(c), which is now § 198.55(a)(6)(iii), and § 198.55(a)(6)(d), which is now § 198.55(a)(6)(iv). However, PHMSA has not added this requirement to the final regulatory language. The requirement was not proposed in the NPRM and has therefore not been subject to public review and comment. In addition, PHMSA believes that communicating a Federal stop work requirement to excavators would be very difficult, thereby making the provision challenging to enforce. PHMSA has also not adopted the recommendation from AGA to require compliance with CGA best practices on actions an excavator must practice following a pipeline damage and product release. PHMSA strongly supports the CGA best practices but does not intend to implement the best practices through this regulation.

PHMSA recognizes the concerns of DCA and NUCA of Ohio regarding the need to enforce operators' responsibilities in the damage prevention process. These responsibilities are codified at 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114. Therefore, using these requirements as a criterion for determining the adequacy of enforcement programs is redundant. However, PHMSA recognizes the need for States to more vigorously enforce these existing requirements on pipeline operators. PHMSA believes that to ensure fair and consistent enforcement of damage prevention requirements, States should consistently enforce 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114.

In response to the comments from NUCA of Ohio regarding § 198.55(a)(7), PHMSA deliberately omitted exemptions for one-call membership. While exemptions regarding one-call membership may have the potential to impact pipeline safety, especially with regard to sewer cross-bores, PHMSA believes that notification exemptions likely have the greatest potential for negative impact on pipeline safety. Pipeline operators are required by existing regulations to be members of one-calls in the States in which they operate, which is the fundamental membership requirement that has the greatest positive impact on excavation damage prevention for pipelines.

PHMSA acknowledges TPA's and TRA's suggestion regarding the 2-hour time limit in § 198.55(a)(6)(i), but PHMSA has opted not to set a specific time limit on notification to the operator. PHMSA believes that the regulatory language, as written, is enforceable. PHMSA agrees with TPA's recommendation to eliminate the phrase ''owner or'' from this same section; the regulatory language has been updated accordingly.

PHMSA affirms that the notification process described by Missouri PSC is acceptable and meets the intent of this criterion, provided the notification from the excavator to the MOCS and from MOCS to the pipeline operator is prompt.

*Comments on § 198.55(a)(7)*

KCC stated that the Kansas damage prevention laws contain negotiated

exemptions for various categories of excavators, such as tillage for agricultural purposes. KCC stated that most tillage occurs during a very small time period over millions of acres in the State. Requiring all farmers to request locates, and for the operators to provide such locates each year during the very narrow planting season window, would be a logistical nightmare with little to no benefit if pipeline depth of cover is regularly monitored and maintained by the operator. KCC stated that Federal enforcement of a standard applied to pipeline rights-of-way, which differs from the statewide standard, would lead to confusion and possibly an increase in accidents. The KCC objected to the proposed requirement that States provide PHMSA a written justification for any exemptions for excavators from State damage prevention requirements. KCC believes that PHMSA has no authority to require States to provide such justifications.

The Missouri PSC stated that some exemptions may be reasonable. The Missouri PSC requested clarification as to what exemptions, if any (beyond a homeowner hand-digging on their private property), may be acceptable. Also, the Missouri PSC stated that a written justification for any exemptions would lead to PHMSA approving or allowing that exemption to remain in the State damage prevention law.

NYDPS commented that exemptions from State excavation damage prevention programs should be limited to ensure public safety, but States and PHMSA must appropriately balance the risks and costs of such exemptions. NYDPS stated that exempting excavators that are only using hand tools from providing notice of intent to excavate to the State one-call system may make sense in individual States, particularly in States with significant urban areas, since most excavation would require powered equipment to remove pavement in those States. NYDPS stated that requiring anyone (except a homeowner excavating on his or her own property) to provide notice of intent to excavate when only employing hand tools would impose significant costs on facility members to respond to requests for mark-outs, and these costs would, in the case of regulated utilities, be passed on to customers. Therefore, NYDPS stated that PHMSA should consider such exemptions on a case-by-case basis in light of the particular attributes of the State and its excavation damage prevention program.

GPA stated that to promote the message of pipeline damage prevention, it is necessary to include references to the nationwide 811 one-call number in the final rule, and any exemptions to the requirements to use the one-call system should be severely limited.

National Grid stated that PHMSA should consider where exemptions from membership in one-call centers and/or exemptions from compliance with one-call regulations exist—those exemptions may be a matter of law in some States, and they are likely beyond the influence of a regulatory commission. Also, National Grid stated that, as a penalty, the reduction in State damage prevention program funding will prove counterproductive in cases where the State commission has no authority to eliminate exemptions. Instead, National Grid suggested providing incentives to States to eliminate exemptions.

Response

PHMSA has clarified the scope and applicability of the evaluation criteria, including criterion number 7, in the policy in the preamble of this final rule. PHMSA's purpose in requiring States to address exemptions is to raise awareness of the potential impact of exemptions on pipeline safety. In general, PHMSA believes that all excavators should be required to make notification to a one-call before engaging in excavation activity. However, PHMSA acknowledges that the subject of exemptions is complex. Some exemptions to State damage prevention laws are justifiable with data that demonstrates that the exemptions have no appreciable effect on pipeline safety. By focusing on exemptions in State laws, PHMSA intends to encourage States to investigate the impact of exemptions on pipeline safety and, whenever possible, justify the exemptions with data.

*General Comments Regarding State Damage Prevention Enforcement Programs*

NUCA of Ohio stated that excavators are commonly determined to be at fault for failing to notify the one-call center prior to excavation, but what is significantly lacking is enforcement of requirements that pipeline operators accurately mark their facilities as prescribed by State law. The enforcement authorities could impose civil penalties or other appropriate measures regardless of the stakeholder involved.

NYDPS agrees with PHMSA's proposed case-by-case determination of program adequacy. NYDPS stated that while the proposed penalties will likely have the effect of deterring willful violations, NYDPS believes that a State excavation damage prevention program with substantially less in civil penalties can also achieve the same result. NYDPS stated that this is especially true when one considers that most excavating companies are small, closely held corporations or proprietorships, and penalties in the range of five figures are generally enough to put these entities out of business or cause severe economic hardship.

NYDPS said it is concerned with PHMSA's proposal to evaluate program adequacy with regard to penalty levels by determining whether they are sufficient to deter violations. It is unclear to NYDPS how PHMSA would make determinations of ''sufficient to deter violations.'' NYDPS stated that the standard is subjective and may imply some level of forecasting and/or assumptions. NYDPS suggested that with regard to penalty levels, PHMSA should review a State's excavation damage prevention program in terms of the annual decrease in underground facility damages and the magnitude of tickets processed by the State's damage prevention program. NYDPS stated that if a State can show a favorable rate over a period of years in underground facility damages per 1000 ''one-call tickets'' and a general downward trend, PHMSA should determine that the penalty levels under that particular State program are sufficient to deter noncompliance among the regulated community. NYDPS recommended that PHMSA take into account the level of compliance and maturity of the State's damage prevention program because these factors will have a significant impact on a State's annual data. NYDPS recommended, in addition, that the magnitude of excavation work within a State should be considered in PHMSA's review since the amount of excavation work varies depending on the particular characteristics of each State (*e.g.,* population, the mix of urban and rural areas, the size of its urban centers). NYDPS recommended that when reviewing State programs, PHMSA should take into account other important aspects of damage prevention programs, including but not limited to outreach and education, damage prevention meetings among facility owners and excavators, and training programs.

NYDPS stated that PHMSA should also take into account the deterrent effect of metrics in rate plans for regulated utilities that impose negative rate adjustments on a company for failure to meet certain metrics related to their performance of required duties and responsibilities under the State excavation damage prevention program law. NYDPS stated that these

performance metrics are generally part of most large gas utilities' rate plans in New York, with negative rate adjustments imposed for failure to meet applicable standards. NYDPS stated that PHMSA should take into account the effect of requiring training for those who violate the requirements of a State excavation damage prevention program. Such non-monetary sanctions have a positive effect on future compliance, particularly with regard to small excavating companies and their employees, and tend to prevent or deter future willful or unintentional noncompliance.

Pennsylvania One Call suggests that where PHMSA determines that a State program's effectiveness is compromised by the lack of adequate resources, PHMSA should comment on the problem and consider establishing a mechanism to assist the State in making up such a revenue shortfall; fines should be earmarked for enforcement activities and educational efforts related to damage prevention.

NYDPS supports PHMSA's evaluation of whether the State employs investigation practices that are adequate to determine the at-fault party when excavation damage occurs. NYDPS agrees with PHMSA that State programs must be capable of determining fault, since investigative practices are critical to the success and adequacy of State excavation damage prevention programs. However, NYDPS believes that the NPRM is too narrowly focused on determining the person or entity at fault for pipeline damages. Violations may occur without any damage to facilities; therefore, citations for violations of damage prevention program rules where no damage occurred should be important to correct behavior that could result in damages in future excavations.

Response

PHMSA acknowledges the concerns of NUCA of Ohio regarding the need to emphasize the responsibilities of all stakeholders, including pipeline operators, in the damage prevention process. Federal regulations at 49 CFR 192.614 and 195.442 address the damage prevention responsibilities of pipeline operators. PHMSA will enforce these regulations in any Federal enforcement case related to this final rule; PHMSA will also work with relevant States to ensure these regulations are enforced with operators under State jurisdiction.

PHMSA understands that many excavators are unable to pay excessive fines. PHMSA encourages States to enforce their own damage prevention regulations and assess fines and other penalties accordingly. PHMSA intends to enforce this final rule with civil penalties in accordance with 49 U.S.C. 190.225.

PHMSA acknowledges the comments from NYDPS. PHMSA will use the criteria in § 198.55 to assess the adequacy of State damage prevention law enforcement programs. The applicability of the criteria is clarified in the policy statement in the preamble to this final rule. PHMSA believes that the criteria and the accompanying policy take into account the concerns raised by NYDPS. PHMSA understands that State damage prevention programs are highly variable and PHMSA intends to give consideration to the unique aspects of State enforcement programs during annual evaluations.

PHMSA acknowledges Pennsylvania One Call's recommendation to clearly explain the reasons for any findings of State enforcement program inadequacy. PHMSA intends to make these explanations public by making all of PHMSA's findings pertaining to State enforcement program evaluations available on PHMSA's Web sites. However, PHMSA is limited by law with regard to how civil penalties are collected. PHMSA may not use civil penalties to create funds for specific purposes. Civil penalties assessed by PHMSA are paid directly to the U.S. Treasury.

PHMSA acknowledges the comments from NYDPS regarding the narrow focus of § 198.55(a)(5). However, this final rule is intentionally constructed to be narrowly focused in this regard. PHMSA will likely only conduct enforcement proceedings in cases of actual excavation damage to pipelines and, most likely, only in cases of egregious violations of the Federal excavation standard set forth in this final rule. PHMSA encourages States to implement adequate enforcement programs that can address the variety of potential violations to State laws and regulations.

*Comments on the Regulatory Analysis and Notices*

AAR stated that the Preliminary Regulatory Evaluation errs in stating that the NPRM would not impose any new costs on excavators. The AAR stated that railroads do not routinely contact one-call centers for the constant maintenance-of-way work undertaken along their 140,000 miles of right-of-way; therefore, there would be a significant cost to the railroads, the call centers, and utilities if such calls were required. AAR stated that PHMSA has not shown a safety benefit from requiring railroads to participate in one-call systems for activities that pose no threat to underground pipelines. AAR stated that from a cost-benefit perspective, it makes no sense to require railroads to notify one-call centers for routine maintenance-of-way activities.

CenterPoint stated that one cost that PHMSA has not adequately addressed is the cost to administer a damage prevention program. Whether the State incurs the expense to meet the proposed criteria, or PHMSA takes over the enforcement, these costs are significant and would vary depending on the reporting system adopted. Therefore, CenterPoint requested that PHMSA predict the number of States expected to be held inadequate to determine the cost of this rulemaking action.

IUB stated that the evaluation for cost analysis states the proposed Federal excavation requirement mimics the excavation requirement in each State and does not impose any additional costs on regulators, but the proposed definitions of ''excavation'' and ''excavator'' in the NPRM would not mimic State law and would set different standards for when a notice of excavation is required than a State may require. IUB stated that the costs to excavators of contending with two sets of notice requirements are not reflected in this evaluation. IUB stated that the cost evaluation states that PHMSA believes the NPRM does not mandate States to have adequate excavation damage prevention enforcement programs. IUB stated that perhaps it does not do so explicitly, but it certainly attempts to do so implicitly, as grant penalties are proposed for States without adequate enforcement in § 198.53. In addition, IUB stated that PHMSA's data stated that an effective rate for Federal enforcement of even 50 percent of the State success rate is over-optimistic; that the 63 percent excavation damage incident reduction rate the evaluation attributes solely to state enforcement, with no consideration of other factors, is exaggerated; and that certain costs were omitted. IUB believes that whether proper consideration of these issues would cause the benefit/cost ratio to become unfavorable is unclear, but the 19-to-1 ratio stated in the rulemaking preamble is certainly highly inflated.

The KCC questions the accuracy of PHMSA's cost estimates as unrealistic and that they are based upon flawed assumptions. KCC stated that the NPRM states, ''PHMSA believes that excavators will not incur any additional costs because the Federal excavation standard, which is also a self-executing standard, mirrors the excavation standard in each state and does not

impose any additional costs on excavators.'' KCC stated that this assumption is demonstrably not true and may even conceal the full scope of PHMSA's NPRM. KCC stated that the cost-benefit analysis makes it sound like PHMSA is proposing only to enforce State standards when the state's enforcement efforts are deemed inadequate. KCC stated that if the rulemaking were confined in that manner, then the KCC's views might be different.

NAPSR stated that PHMSA conducted a study that reviewed three States before and after they had enforcement programs and concluded that excavation enforcement programs might decrease pipeline excavation damages over time, and therefore, decrease fatalities, injuries, and property damage. NAPSR stated that for the States without enforcement programs, the NPRM does not indicate that PHMSA reviewed whether these States have experienced damage reduction on a year-to-year basis as the result of non-enforcement damage prevention initiatives—PHMSA only documents total damages and incidents over a 22-year period. In order to show the true advantages of a damage prevention enforcement program versus non-enforcement initiatives, NAPSR stated that it would be beneficial to show the damage trending rates of the States without enforcement programs. Also, NAPSR stated that PHMSA states that they intend to investigate all incidents in States without pipeline excavation damage enforcement programs. In the NPRM, PHMSA suggests that the 63 percent reduction is a helpful starting point on which to estimate the benefits of this final rule. NAPSR stated that PHMSA utilized three separate rates to conservatively evaluate the benefits of this final rule, but any significant reduction in pipeline damages would depend upon implementation of not just occasional incident enforcement, but all nine elements.

Response

As stated in responses to other comments throughout this preamble, PHMSA will be considerate of existing exemptions in State damage prevention laws. This includes exemptions for railroads. PHMSA's position is further clarified in the policy in the preamble of this final rule.

As of 2012, PHMSA already identified nine States without excavation damage prevention enforcement programs. Therefore, unless these States are able to begin enforcing their excavation damage prevention laws before the effective date of this final rule, PHMSA would likely deem those State programs inadequate. PHMSA's preliminary cost/benefit estimates were based on assumptions that PHMSA would be enforcing its rules in States without excavation enforcement programs. With regard to the States already enforcing their excavation damage enforcement programs, this rulemaking action has no effect.

PHMSA is modifying some definitions to address the IUB's concerns. Also, as stated in the regulatory analysis document (same docket number), PHMSA agrees and has noted that all nine elements do contribute to the reduction of excavation incidents.

It appears to PHMSA that KCC has misunderstood the NPRM because PHMSA has no intention of enforcing the Federal excavation standard in States where the States exercise their enforcement authorities and their excavation damage enforcement programs have not been determined to be inadequate.

PHMSA agrees with NAPSR's assessment that all nine elements are very important in reducing pipeline excavation damage. However, this action is limited to enforcement. Therefore, available enforcement data was used to determine the effects of excavation damage enforcement prevention programs, and the results show that enforcement may be a major tool in decreasing underground pipeline excavation damages.

*Existing Requirements Applicable to Owners and Operators of Pipeline Facilities*

Under existing pipeline safety regulations, 49 CFR 192.614 for gas pipelines and 49 CFR 195.442 for hazardous liquid pipelines, operators are required to have written excavation damage prevention programs that require, in part, that the operator provide for marking its pipelines in the area of an excavation for which the excavator has submitted a locate request.

*Federal Pipeline Damage Prevention Regulations*

No commenters that addressed the existing pipeline safety damage prevention regulations, 49 CFR 192.614 and 195.442, considered these requirements to be inadequate, nor did they believe that PHMSA needed to make these requirements more detailed or specific. Several commented that to do otherwise would lead to confusion where the Federal requirements were different from State standards.

## V. Regulatory Analysis and Notices

This final rule amends the Federal Pipeline Safety Regulations (49 CFR parts 190–199) to establish criteria and procedures PHMSA will use to determine the adequacy of State pipeline excavation damage prevention law enforcement programs.

*Statutory/Legal Authority for This Rulemaking*

PHMSA's general authority to publish this final rule and prescribe pipeline safety regulations is codified at 49 U.S.C. 60101 *et seq.* Section 2(a) of the PIPES Act (Pub. L. 109–468) authorizes the Secretary of Transportation to enforce pipeline damage prevention requirements against persons who engage in excavation activity in violation of such requirements provided that, through a proceeding established by rulemaking, the Secretary has determined that the relevant State's enforcement is inadequate to protect safety.

*Executive Order 12866, Executive Order 13563, and DOT Policies and Procedures*

This final rule is a non-significant regulatory action under section 3(f) of Executive Order 12866 (58 FR 51735) and 13563, and therefore was not reviewed by the Office of Management and Budget (OMB). This final rule is non-significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' PHMSA analyzed the costs and benefits of this final rule. PHMSA expects the total cost of this final rule to be $1.8 million, and the benefits to be $31 million.[9]

PHMSA compared the overall costs of this final rule to the average costs associated with a single excavation damage incident. PHMSA found that this final rule has three separate potential cost impacts: (1) The costs to excavators to comply with the Federal excavation standard; (2) the cost to States to have their enforcement programs reviewed, to appeal a determination of ineffectiveness, and to ask for reconsideration; and (3) the cost impact on the Federal Government to enforce the Federal excavation standard.

[9] These numbers are discounted over 10 years at 7%.

With regard to the potential cost impacts on excavators, PHMSA believes that excavators will not incur any additional costs because the Federal excavation standard, which is also a self-executing standard, is a minimum standard. Since it is a minimum standard, all States already have excavation standards that are more stringent than the Federal standard. Therefore, this minimum standard imposes no additional costs on excavators. The cost impacts on States are those costs associated with having the State enforcement programs reviewed (estimated to be $20,000 per year), appealing a determination of ineffectiveness (estimated to be a one-time cost of $125,000), asking for reconsideration (estimated to be a one-time cost of $350,000 (14 × $25,000)). Therefore, assuming 14 States would be deemed to have inadequate enforcement programs, the total estimated first year cost impacts on States are (($20,000 (annually) + (14 × $25,000) + (5 × $25,000)) = $495,000. The annual cost impacts on States in subsequent years are estimated to be $20,000. The annual cost impacts on the Federal Government are estimated to be approximately $163,145. Therefore, the total first-year cost of this final rule is estimated to be $658,145 ($495,000 + $163,145). In the following years, the costs are estimated to be approximately $183,145 ($20,000 + $163,145) per year. The total cost over 10 years, with a 3 percent discount rate, is $2,084,132, and at a 7 percent discount rate is $1,720,214. PHMSA specifically asked for comments on whether it had adequately captured the scope and size of the costs of this final rule but, other than general comments, PHMSA did not receive any identified costs.

To determine the benefits, PHMSA was able to obtain data for three States over the course of the establishment of their excavation damage prevention programs (additional information about these States can be found in the regulatory analysis that is in the public docket). Each of the three States had a decrease of at least 63 percent in the number of excavation damage incidents occurring after they initiated their enforcement programs. While many factors can contribute to the decrease in State excavation damage incidents, the data from these States was useful in helping to estimate the benefits of this final rule. PHMSA utilized three separate effectiveness rates to conservatively evaluate the benefits of this final rule. The rates are based on the reduction of incidents of the three States studied and more conservative effective rates because State pipeline programs vary widely, which may lead to a lower effective rate than that of the three States PHMSA analyzed. One expected unquantifiable benefit is that this rulemaking action will provide an increased deterrent to violate one-call requirements (although requirements vary by State, a one-call system allows excavators to call one number in a given State to ascertain the presence of underground utilities) and the attendant reduction in pipeline incidents and accidents caused by excavation damage. Based on incident reports submitted to PHMSA, failure to use an available one-call system is a known cause of pipeline accidents.

The average annual benefits range from $4,642,829 to $14,739,141. Evaluating just the lower range of benefits over 10 years results in a total benefit of over $40,790,000 with a 3 percent discount rate, and over $31,150,000 with a 7 percent discount rate. In addition, over the past 24 years, the average reportable incident caused $282,930 in property damage alone. Therefore, if this regulatory action prevents just one average reportable incident per year, this final rule would be cost beneficial.

A regulatory evaluation containing a statement of the purpose and need for this rulemaking and an analysis of the costs and benefits is available in the docket.

*Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), PHMSA must consider whether rulemaking actions would have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 603, PHMSA has made a determination that this final rule will not have a significant economic impact on a substantial number of small entities. This determination is based on the minimal cost to excavators to call the one-call center. In addition, this final rule is procedural in nature, and its purpose is to set forth an administrative enforcement process for actions that are already required. This final rule has no material effect on the costs or burdens of compliance for regulated entities, regardless of size. Thus, the marginal cost, if any, that is imposed by the final rule on regulated entities, including small entities, is not significant. Based on the facts available about the expected impact of this final rule, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

Since the Regulatory Flexibility Act does not require a final regulatory flexibility analysis when a rule will not have a significant economic impact on a substantial number of small entities, such an analysis is not necessary for this final rule.

*Executive Order 13175*

PHMSA has analyzed this final rule according to the principles and criteria in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because this final rule will not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

*Paperwork Reduction Act*

Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. PHMSA estimates that this final rule will cause an increase to the currently approved information collection titled ''Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification'' identified under OMB Control Number 2137–0584. Based on this final rule, PHMSA estimates a 20 percent reporting time increase to States with gas pipeline safety program certifications/agreements. PHMSA estimates the increase at 12 hours per respondent for a total increase of 612 hours (12 hours * 51 respondents). As a result, PHMSA has submitted an information collection revision request to OMB for approval based on the requirements in this final rule. The information collection is contained in the pipeline safety regulations, 49 CFR parts 190–199. The following information is provided for that information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. The information collection burden for the following information collection will be revised as follows:

*Title:* Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification.

*OMB Control Number:* 2137–0584.

*Current Expiration Date:* October 31, 2017.

*Abstract:* A State must submit an annual certification to assume responsibility for regulating intrastate

pipelines, and certain records must be maintained to demonstrate that the State is ensuring satisfactory compliance with the pipeline safety regulations. PHMSA uses that information to evaluate a State's eligibility for Federal grants.

*Affected Public:* State and local governments.

*Annual Reporting and Recordkeeping Burden:*

*Total Annual Responses:* 67.

*Total Annual Burden Hours:* 4,532 (this estimate includes an increase of 612 hours).

*Frequency of Collection:* Annually and occasionally at State's discretion.

Requests for a copy of this information collection should be directed to Angela Dow, Office of Pipeline Safety (PHP–30), Pipeline and Hazardous Materials Safety Administration (PHMSA), 2nd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, Telephone 202–366–4595.

*Unfunded Mandates Reform Act of 1995*

This final rule will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It will not result in costs of $153 million, adjusted for inflation, or more in any one year to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of this final rule.

*National Environmental Policy Act*

PHMSA analyzed this final rule in accordance with section 102(2)(c) of the National Environmental Policy Act (42 U.S.C. 4332), the Council on Environmental Quality regulations (40 CFR parts 1500–1508), and DOT Order 5610.1C, and has determined that this action, which is designed to reduce pipeline accidents and spills, will not significantly affect the quality of the human environment. An environmental assessment of this final rule is available in the docket.

*Executive Order 13132*

PHMSA has analyzed this final rule according to the principles and criteria of Executive Order 13132 (''Federalism''). A rule has implications for Federalism under Executive Order 13132 if it has a substantial direct effect on State or local governments, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government.

The Federal pipeline safety statutes in 49 U.S.C. 60101, *et seq.,* create a strong Federal-State partnership for ensuring the safety of the Nation's interstate and intrastate pipelines. That partnership permits States to regulate intrastate pipelines after they certify to PHMSA, among other things, that they have and are enforcing standards at least as stringent as the Federal requirements and are promoting a damage prevention program. PHMSA provides Federal grants to States to cover a large portion of their pipeline safety program expenses, and PHMSA also makes grants available to assist in improving the overall quality and effectiveness of their damage prevention programs.

In recognition of the value of this close partnership, PHMSA has made and continues to make every effort to ensure that our State partners have the opportunity to provide input on this final rule. For example, at the ANPRM stage, PHMSA sought advice from NAPSR and offered NAPSR officials the opportunity to meet with PHMSA and discuss issues of concern to the States. As a result of these consultation efforts with State officials and their comments on the ANPRM, PHMSA became aware of State concerns regarding the rigorousness of the criteria for program effectiveness. PHMSA had taken these concerns into account in developing the NPRM and asked for comments from State and local governments on any other Federalism issues. PHMSA received no additional comments on any impacts to the State and local governments.

Under this final rule, Federal administrative enforcement action against an excavator that violates damage prevention requirements will be taken only in the demonstrable absence of enforcement by a State authority. Additionally, the final rule will establish a framework for evaluating State programs individually so that the exercise of Federal administrative enforcement in one State has no effect on the ability of all other States to continue to exercise State enforcement authority. This final rule will not preempt State law in the State where the violation occurred, or any other State, but will authorize Federal enforcement in the limited instance explained above. Finally, a State that establishes an effective damage prevention enforcement program has the ability to be recognized by PHMSA as having such a program.

For the reasons discussed above, and based on the results of our consultations with the States, PHMSA has concluded this final rule will not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. In addition, this final rule does not impose substantial direct compliance costs on State and local governments. Accordingly, the consultation and funding requirements of Executive Order 13132 do not apply.

*Executive Order 13211*

This final rule is not a ''significant energy action'' under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). It is not likely to have a significant adverse effect on supply, distribution, or energy use. Further, the Office of Information and Regulatory Affairs has not designated this final rule as a significant energy action.

*Privacy Act Statement*

Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (70 FR 19477), or visit *http://www.regulations.gov.*

**List of Subjects**

*49 CFR Part 196*

Administrative practice and procedure, Pipeline safety, Reporting and recordkeeping requirements.

*49 CFR Part 198*

Grant programs-transportation, Pipeline safety, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, PHMSA amends 49 CFR subchapter D as follows:

■ 1. Part 196 is added to read as follows:

## PART 196—PROTECTION OF UNDERGROUND PIPELINES FROM EXCAVATION ACTIVITY

**Subpart A—General**



**Subpart B—Damage Prevention Requirements**

**Authority:** 49 U.S.C. 60101 *et seq.;* and 49 CFR 1.97.

## Subpart A—General

### § 196.1 What is the purpose and scope of this part?

This part prescribes the minimum requirements that excavators must follow to protect underground pipelines from excavation-related damage. It also establishes an enforcement process for violations of these requirements.

### § 196.3 Definitions.

*Damage* or *excavation damage* means any excavation activity that results in the need to repair or replace a pipeline due to a weakening, or the partial or complete destruction, of the pipeline, including, but not limited to, the pipe, appurtenances to the pipe, protective coatings, support, cathodic protection or the housing for the line device or facility.

*Excavation* refers to excavation activities as defined in § 192.614, and covers all excavation activity involving both mechanized and non-mechanized equipment, including hand tools.

*Excavator* means any person or legal entity, public or private, proposing to or engaging in excavation.

*One-call* means a notification system through which a person can notify pipeline operators of planned excavation to facilitate the locating and marking of any pipelines in the excavation area.

*Pipeline* means all parts of those physical facilities through which gas, carbon dioxide, or a hazardous liquid moves in transportation, including, but not limited to, pipe, valves, and other appurtenances attached or connected to pipe (including, but not limited to, tracer wire, radio frequency identification or other electronic marking system devices), pumping units, compressor units, metering stations, regulator stations, delivery stations, holders, fabricated assemblies, and breakout tanks.

## Subpart B—Damage Prevention Requirements

### § 196.101 What is the purpose and scope of this subpart?

This subpart prescribes the minimum requirements that excavators must follow to protect pipelines subject to PHMSA or State pipeline safety regulations from excavation-related damage.

### § 196.103 What must an excavator do to protect underground pipelines from excavation-related damage?

Prior to and during excavation activity, the excavator must:

(a) Use an available one-call system before excavating to notify operators of underground pipeline facilities of the timing and location of the intended excavation;

(b) If underground pipelines exist in the area, wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating;

(c) Excavate with proper regard for the marked location of pipelines an operator has established by taking all practicable steps to prevent excavation damage to the pipeline;

(d) Make additional use of one-call as necessary to obtain locating and marking before excavating to ensure that underground pipelines are not damaged by excavation.

### § 196.105 [Reserved]

### § 196.107 What must an excavator do if a pipeline is damaged by excavation activity?

If a pipeline is damaged in any way by excavation activity, the excavator must promptly report such damage to the pipeline operator, whether or not a leak occurs, at the earliest practicable moment following discovery of the damage.

### § 196.109 What must an excavator do if damage to a pipeline from excavation activity causes a leak where product is released from the pipeline?

If damage to a pipeline from excavation activity causes the release of any PHMSA regulated natural and other gas or hazardous liquid as defined in part 192, 193, or 195 of this chapter from the pipeline, the excavator must promptly report the release to appropriate emergency response authorities by calling the 911 emergency telephone number.

### § 196.111 What if a pipeline operator fails to respond to a locate request or fails to accurately locate and mark its pipeline?

PHMSA may enforce existing requirements applicable to pipeline operators, including those specified in 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114 if a pipeline operator fails to properly respond to a locate request or fails to accurately locate and mark its pipeline. The limitation in 49 U.S.C. 60114(f) does not apply to enforcement taken against pipeline operators and excavators working for pipeline operators.

## Subpart C—Administrative Enforcement Process

### § 196.201 What is the purpose and scope of this subpart?

This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator for Pipeline Safety for achieving and maintaining pipeline safety under this part. It also prescribes the procedures governing the exercise of that authority and the imposition of those sanctions.

### § 196.203 What is the administrative process PHMSA will use to conduct enforcement proceedings for alleged violations of excavation damage prevention requirements?

PHMSA will use the existing administrative adjudication process for alleged pipeline safety violations set forth in 49 CFR part 190, subpart B. This process provides for notification that a probable violation has been committed, a 30-day period to respond including the opportunity to request an administrative hearing, the issuance of a final order, and the opportunity to petition for reconsideration.

### § 196.205 Can PHMSA assess administrative civil penalties for violations?

Yes. When the Associate Administrator for Pipeline Safety has reason to believe that a person has violated any provision of the 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder, including a violation of excavation damage prevention requirements under this part and 49 U.S.C. 60114(d) in a State with an excavation damage prevention law enforcement program PHMSA has deemed inadequate under 49 CFR part 198, subpart D, PHMSA may conduct a proceeding to determine the nature and extent of the violation and to assess a civil penalty.

### § 196.207 What are the maximum administrative civil penalties for violations?

The maximum administrative civil penalties that may be imposed are specified in 49 U.S.C. 60122.

**§ 196.209 May other civil enforcement actions be taken?**

Whenever the Associate Administrator has reason to believe that a person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of 49 U.S.C. 60101 *et seq.,* or any regulations issued thereunder, PHMSA, or the person to whom the authority has been delegated, may request the Attorney General to bring an action in the appropriate U.S. District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, civil penalties, and punitive damages as provided under 49 U.S.C. 60120.

**§ 196.211 May criminal penalties be imposed?**

Yes. Criminal penalties may be imposed as specified in 49 U.S.C. 60123.

## PART 198—REGULATIONS FOR GRANTS TO AID STATE PIPELINE SAFETY PROGRAMS

■ 2. The authority citation for part 198 is revised to read as follows:

**Authority:** 49 U.S.C. 60101 *et seq.;* 49 CFR 1.97.

■ 3. Part 198 is amended by adding subpart D to read as follows:

**Subpart D—State Damage Prevention Enforcement Programs**



## Subpart D—State Damage Prevention Enforcement Programs

**§ 198.51 What is the purpose and scope of this subpart?**

This subpart establishes standards for effective State damage prevention enforcement programs and prescribes the administrative procedures available to a State that elects to contest a notice of inadequacy.

**§ 198.53 When and how will PHMSA evaluate State damage prevention enforcement programs?**

PHMSA conducts annual program evaluations and certification reviews of State pipeline safety programs. PHMSA will also conduct annual reviews of State excavation damage prevention law enforcement programs. PHMSA will use the criteria described in § 198.55 as the basis for the enforcement program reviews, utilizing information obtained from any State agency or office with a role in the State's excavation damage prevention law enforcement program. If PHMSA finds a State's enforcement program inadequate, PHMSA may take immediate enforcement against excavators in that State. The State will have five years from the date of the finding to make program improvements that meet PHMSA's criteria for minimum adequacy. A State that fails to establish an adequate enforcement program in accordance with § 198.55 within five years of the finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107. PHMSA will determine the amount of the reduction using the same process it uses to distribute the grant funding; PHMSA will factor the findings from the annual review of the excavation damage prevention enforcement program into the 49 U.S.C. 60107 grant funding distribution to State pipeline safety programs. The amount of the reduction in 49 U.S.C. 60107 grant funding will not exceed four percent (4%) of prior year funding (not cumulative). If a State fails to implement an adequate enforcement program within five years of a finding of inadequacy, the Governor of that State may petition the Administrator of PHMSA, in writing, for a temporary waiver of the penalty, provided the petition includes a clear plan of action and timeline for achieving program adequacy.

**§ 198.55 What criteria will PHMSA use in evaluating the effectiveness of State damage prevention enforcement programs?**

(a) PHMSA will use the following criteria to evaluate the effectiveness of a State excavation damage prevention enforcement program:

(1) Does the State have the authority to enforce its State excavation damage prevention law using civil penalties and other appropriate sanctions for violations?

(2) Has the State designated a State agency or other body as the authority responsible for enforcement of the State excavation damage prevention law?

(3) Is the State assessing civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance and is the State making publicly available information that demonstrates the effectiveness of the State's enforcement program?

(4) Does the enforcement authority (if one exists) have a reliable mechanism (*e.g.,* mandatory reporting, complaint-driven reporting) for learning about excavation damage to underground facilities?

(5) Does the State employ excavation damage investigation practices that are adequate to determine the responsible party or parties when excavation damage to underground facilities occurs?

(6) At a minimum, do the State's excavation damage prevention requirements include the following:

(i) Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.

(ii) Excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator.

(iii) An excavator who causes damage to a pipeline facility:

(A) Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and

(B) If the damage results in the escape of any PHMSA regulated natural and other gas or hazardous liquid, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

(7) Does the State limit exemptions for excavators from its excavation damage prevention law? A State must provide to PHMSA a written justification for any exemptions for excavators from State damage prevention requirements. PHMSA will make the written justifications available to the public.

(b) PHMSA may consider individual enforcement actions taken by a State in evaluating the effectiveness of a State's damage prevention enforcement program.

**§ 198.57 What is the process PHMSA will use to notify a State that its damage prevention enforcement program appears to be inadequate?**

PHMSA will issue a notice of inadequacy to the State in accordance with 49 CFR 190.5. The notice will state the basis for PHMSA's determination that the State's damage prevention enforcement program appears inadequate for purposes of this subpart and set forth the State's response options.

**§ 198.59 How may a State respond to a notice of inadequacy?**

A State receiving a notice of inadequacy will have 30 days from receipt of the notice to submit a written response to the PHMSA official who issued the notice. In its response, the State may include information and explanations concerning the alleged inadequacy or contest the allegation of inadequacy and request the notice be withdrawn.

**§ 198.61 How is a State notified of PHMSA's final decision?**

PHMSA will issue a final decision on whether the State's damage prevention enforcement program has been found inadequate in accordance with 49 CFR 190.5.

**§ 198.63 How may a State with an inadequate damage prevention enforcement program seek reconsideration by PHMSA?**

At any time following a finding of inadequacy, the State may petition PHMSA to reconsider such finding based on changed circumstances including improvements in the State's enforcement program. Upon receiving a petition, PHMSA will reconsider its finding of inadequacy promptly and will notify the State of its decision on reconsideration promptly but no later than the time of the next annual certification review.

Issued in Washington, DC, under authority delegated in 49 CFR part 1.97.

**Stacy Cummings,**

*Interim Executive Director.*

[FR Doc. 2015–17259 Filed 7–22–15; 8:45 am]

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Part III

## Department of Labor

29 CFR Part 38
Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act; Final Rule

**DEPARTMENT OF LABOR**

**Office of the Secretary**

**29 CFR Part 38**

**RIN 1291–AA37**

## Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act

**AGENCY:** Office of the Secretary, Labor.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Labor (Department) is issuing nondiscrimination and equal opportunity regulations to implement Section 188 of the Workforce Innovation and Opportunity Act (WIOA). Under Section 188(e) of WIOA, Congress required the Department to issue regulations implementing Section 188 no later than one year after enactment of WIOA. The Department's publication of this final rule complies with the statutory mandate. This final rule creates a new part in the CFR, which mirrors the regulations published in the CFR in 1999 to implement Section 188 of WIA. The Department has made no substantive changes in this final rule; the changes are technical in nature. This final rule adopts the Department's regulatory scheme for Section 188 of WIA verbatim, with technical revisions to conform to WIOA. Specifically, the Department has: Replaced references to the ''Workforce Investment Act of 1998'' or ''WIA'' with ''Workforce Innovation and Opportunity Act'' or ''WIOA'' to reflect the proper statutory authority; and updated section numbers in the text of the regulation to reflect its new location.

**DATES:** *Effective Date:* This final rule is effective July 22, 2015.

**FOR FURTHER INFORMATION CONTACT:** Naomi Barry-Perez, Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–4123, Washington, DC 20210. *CRC–WIOA@dol.gov,* telephone (202) 693–6500 (VOICE) or (202) 877–8339 (Federal Relay Service—for TTY).

**SUPPLEMENTARY INFORMATION:**

### Executive Summary

On July 22, 2014, President Obama signed the Workforce Innovation and Opportunity Act (WIOA) (Pub. L. 113–128), comprehensive legislation that reforms and modernizes the public workforce system. WIOA reaffirms the role of the public workforce system, and brings together and enhances several key employment, education, and training programs. The statute provides resources, services, and leadership tools for the workforce system to help individuals find good jobs and stay employed and improves employer prospects for success in the global marketplace. WIOA also ensures that the workforce system operates as a comprehensive, integrated and streamlined system to provide pathways to prosperity for those it serves and continuously improves the quality and performance of its services.

As with Section 188 of WIA, the Civil Rights Center (CRC) of the Department is charged with enforcing Section 188 of WIOA, which prohibits exclusion of an individual from participation in, denial of benefits of, discrimination, or denial of employment in the administration of or in connection with any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA because of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship status, or participation in a program or activity that receives financial assistance under Title I of WIOA. Section 188 of WIOA incorporates the prohibitions against discrimination in programs and activities that receive Federal financial assistance under certain civil rights laws including Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, and national origin),[1] Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex in education and training programs),[2] Age Discrimination Act of 1975 (prohibiting discrimination based on age),[3] and Section 504 of the Rehabilitation Act (prohibiting discrimination based on disability).[4] CRC interprets the nondiscrimination provisions of WIOA consistent with the principles of Title VII of the Civil Rights Act (Title VII),[5] the Americans with Disabilities Act, (ADA)[6] as amended by the Americans with Disabilities Act Amendments Act (ADAAA),[7] and Section 501 of the Rehabilitation Act, as amended,[8] which are enforced by the Equal Employment Opportunity Commission (EEOC); Executive Order 11246, as amended,[9] and Section 503 of the Rehabilitation Act, as amended,[10] which are enforced by the Department's Office of Federal Contract Compliance Programs (OFCCP); Title VI of the Civil Rights Act (Title VI), the Age Discrimination Act 1975, and Section 504 of the Rehabilitation Act, which are enforced by each Federal funding agency; and Title IX of the Education Amendments of 1972 (Title IX), which is enforced by each Federal funding agency that assists an education or training program.

This final rule sets forth the equal opportunity and nondiscrimination requirements and obligations for recipients of financial assistance under Title I of WIOA and the enforcement procedures for implementing the nondiscrimination and equal opportunity provisions of WIOA.[11] Although WIOA did not change the nondiscrimination and equal opportunity provisions in Section 188, Congress mandated that the Department issue regulations to implement the section not later than one year after the date of enactment of WIOA. The regulations are to contain standards for determining discrimination and enforcement procedures, including complaint processes for Section 188 of WIOA.

The Department is issuing this final rule to implement Section 188 of WIOA by making technical changes only to its existing regulation implementing WIA, *i.e.,* (1) replicating at part 38 the rule from part 37 (and updating section numbers in the text of the regulation to reflect its new location in part 38), and (2) replacing references to the ''Workforce Investment Act of 1998'' or ''WIA'' with ''Workforce Innovation and Opportunity Act'' or ''WIOA'' to reflect the proper statutory authority. No other regulatory changes are being made at this time.

The Department recognizes that this final rule does not reflect developments in equal opportunity and nondiscrimination jurisprudence, changes in the practices of recipients

[1] 42 U.S.C. 2000d *et seq.*

[2] 20 U.S.C. 1681 *et seq.*

[3] 42 U.S.C. 6101 *et seq.*

[4] 29 U.S.C. 794.

[5] 42 U.S.C. 2000e *et seq.*

[6] 42 U.S.C. 12101 *et seq.*

[7] 42 U.S.C. 12101 *et seq.,* Public Law 110–325, section 2(b)(1), 122 Stat. 3553 (2008).

[8] 29 U.S.C. 791.

[9] Executive Order 11246 (30 FR 12319), as amended by Executive Order 11375 (32 FR 14303), Executive Order 12086 (43 FR 46501), Executive Order 13279 (67 FR 77141), Executive Order 13665 (79 FR 20749) and Executive Order 13672 (79 FR 42971).

[10] 29 U.S.C. 793.

[11] On April 16, 2015, the Departments of Education and Labor published a joint NPRM to implement the provisions of WIOA that affect all of the WIOA core programs (titles I–IV) and which will be jointly administered by both Departments. See 80 FR 20574 (April 16, 2015). In addition, the Departments published separately four agency-specific NPRMs to implement additional provisions of WIOA that are administered separately by the Departments. See 80 FR 20689 (April 16, 2015).

and beneficiaries since 1999 (for example, the routine use of computer- and internet-based systems), and changes in the Department's enforcement procedures and processes. Therefore, the Department will publish a NPRM, with a request for comments, to reflect developments in equal opportunity and nondiscrimination jurisprudence, changes in the practices of recipients and beneficiaries since 1999, and proposed changes in the Department's enforcement procedures and processes. This final rule will apply during the period between July 22, 2015, and issuance of a final rule based on the upcoming NPRM.

**Publication as a Final Rule**

The Department is promulgating this final rule without notice or an opportunity for public comment because the Administrative Procedure Act (APA) allows an agency to dispense with notice and comment rulemaking when, as here, ''the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). Notice and comment rulemaking is unnecessary when changes in regulations merely restate the changes in the enabling legislation. *Gray Panthers Advocacy Committee* v. *Sullivan,* 936 F.2d 1284, 1291 (D.C. Cir. 1991), citing *Komjathy* v. *National Transportation Safety Board,* 832 F.2d 1294, 1296–97 (D.C. Cir. 1987).

The Department for good cause finds that notice and comment rulemaking would be impractical, unnecessary, or contrary to the public interest because (1) this final rule adopts the Department's existing regulatory scheme for WIA Section 188, with technical revisions to conform to WIOA; (2) this final rule imposes no new or substantive requirement on the public or any entity; and (3) the Department is required by statute to publish this final rule, and lacks the discretion not to do so. The Department has promulgated final rules without notice or comment rulemaking in similar situations. See, *e.g., Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors,* 79 FR 72985 (Dec. 9, 2014) (amending rule to conform to changes in Executive Order 11246, as amended by E.O. 13672 by replacing the words ''sex, or national origin'' with the words ''sex, sexual orientation, gender identity, or national origin''); *Affirmative Action Obligations of Government Contractors, Executive Order 11246, as Amended; Exemption for Religious Entities; Final Rule;* 68 FR 56392 (Sept. 30, 2003) (amending rule to conform to changes in Executive Order 11246, as amended by E.O.13279, by restating the religious exemption as a new provision in its regulations); and *Obligations of Contractors and Subcontractors; Miscellaneous Amendments; Final Rule;* 34 FR 744 (Jan. 17, 1969) (adding ''sex'' as basis for prohibited discrimination and replacing ''creed'' with ''religion'').

**Sections Revised**

This final rule makes only technical revisions to the text adopted from 29 CFR part 37. The primary change is to replace statutory references to ''Workforce Investment Act'' and ''WIA'' with ''Workforce Innovation and Opportunity Act'' and ''WIOA''. In replicating the complete text of part 37, 29 CFR as a new part 38, 29 CFR, this final rule also makes corresponding corrections to section numbers within the text of the regulation. No other revisions have been made.

**Regulatory Procedures**

*Executive Orders 12866 and 13563*

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review) direct agencies to assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating, 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, dignity, and fairness concerns). The OMB determines whether a regulatory action is significant and, therefore, subject to review.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising from legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

This final rule is not a ''significant regulatory action'' under Section 3(f)(4) of Executive Order 12866, thus, OMB has not reviewed the rule.

*The Need for Regulation*

Section 188(e) of WIOA requires that the Department issue regulations implementing Section 188, within a year of enactment, on July 22, 2015.

Congress directed the Department to issue regulations implementing Section 188 of WIOA. Thus, publication of a revised rule is required, and no less burdensome alternatives exist.

*Alternatives in Light of the Required Publication of Proposed Regulations*

The Department considered two possible rulemaking alternatives: (1) To publish a final rule as 29 CFR part 38 implementing Section 188 of WIOA with only technical updates as compared to the regulations at 29 CFR part 37, which implements Section 188 of WIA; or (2) To publish an final rule with only technical updates (effective immediately) and a NPRM. The final rule would remain in force until issuance of a revised final rule based on the NPRM. The NPRM would propose updating part 38 consistent with current law and address its application to current workforce development and workplace practices and issues.

The Department has considered these options in accordance with the provisions of Executive Order 12866 and has chosen to publish this final rule containing only technical revisions and a NPRM shortly thereafter (*i.e.,* alternative 2). The Department believes that the current rule does not reflect recent developments in equal opportunity and nondiscrimination jurisprudence. Moreover, procedures and processes for enforcement of the nondiscrimination and equal opportunity provisions of WIA Section 188 have not been revised to reflect changes in the practices of recipients since 1999, including the use of computer-based and internet-based systems to provide aid, benefit, service, and training through WIOA Title I financially-assisted programs and activities. Thus, only adopting the language of the existing regulations with technical updates (*i.e.,* alternative 1) would have the negative effect of continuing to require recipients to comply with legal standards that do not take into account recent developments in the law.

*Cost Analysis*

The expected costs resulting from this final rule are minimal, and consist only of regulatory familiarization and notice. The Department believes that the cost of both regulatory familiarization and notice will be minimal given that the only changes to the regulation are conforming amendments to properly reflect new legislative authority. This final rule substitutes statutory references to ''Workforce Investment Act'' with ''Workforce Innovation and Opportunity'', and ''WIA'' with ''WIOA,'' wherever they appear in the current regulations. This final rule also adopts the complete text of part 37, 29 CFR as a new part 38, 29 CFR (and makes corresponding corrections to sections number within the text of the regulation). No other revisions have been made.

*Cost of Regulatory Familiarization*

Table 1 presents the estimated number of recipients expected to experience the burden of regulatory familiarization for this rule. The estimate may be over-inclusive because several recipients are likely counted more than once under different categories because they receive more than one source of WIOA Title I financial assistance. For example, the Texas Workforce Commission is both a recipient of a Senior Community Service Employment Program Grant as well as an Adult WIOA Title I grantee However, the Department decided to include them in both the ''States'' category of recipient and under a ''National Programs'' category to avoid the risk of being under-inclusive in the calculations. At the same time, there are entities that local workforce boards may include in the One-Stop delivery system, and thus, may be recipients if they become partners. These optional partners include the Supplemental Nutritional Assistance Program employment and training program, Ticket-to-Work and the Self-Sufficiency Program of the Social Security Administration. Since the Department has no way of knowing how many of these programs have been included in different One-Stop delivery systems, we are unable to include them in our estimate of the total number of recipients.

TABLE 1—ESTIMATED ANNUAL NUMBER OF RECIPIENTS

| Recipients | Estimated annual number of recipients |
|---|---|
| States [12] | 56 |
| Adult Program (Title I of WIOA). | |
| Dislocated Worker Program (Title I of WIOA). | |
| Youth Program (Title I of WIOA). | |
| Wagner-Peyser Act Program (Wagner-Peyser Act, as amended by title III of WIOA). | |
| Adult Education and Literacy Program (Title II) of WIOA. | |
| Vocational Rehabilitation Program. | |
| Trade Adjustment Assistance Program. | |
| Unemployment Compensation Program. | |
| Local Veterans' Employment Representatives and Disabled Veterans' Outreach Program. | |
| Career and Technical Education (Perkins). | |
| Community Service Block Grants. | |
| Temporary Assistance for Needy Families (TANF) | |
| State and Local Workforce Investment Boards | 580 |
| Job Corps Operators (i.e. national contractors) | 18 |
| Job Corps Outreach and Admissions Operators | 24 |
| Job Corps national training contractors/Career Transition Services Operators | 21 |
| Service providers, including eligible training providers and on-the-job training employers [13] | 11,400 |
| One Stop Career Centers [14] | 2,481 |
| *National Programs Include:* | |
| Senior Community Service Employment Grants | 71 |
| National Emergency Grants [15] | 125 |
| Reintegration of Ex-Offenders—Adult Grants [16] | 28 |
| H–1B Technical Skills Training Grants [17] | 36 |
| H–1B Jobs and Innovation Accelerator Challenge Grants [18] | 30 |
| Indian and Native American Programs | 178 |
| National Farmworker Jobs Program | 69 |
| YouthBuild | 82 |
| Registered Apprenticeship Program | 19,259 |
| Total | 34,458 |

Table 2, below, presents the compensation rate for the occupational category expected to experience an increase in level of effort (workload) due to the rule. The Department used mean hourly wage rates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES) program for private, State and local employees. The Department adjusted the wage rate using a loaded wage factor to reflect total compensation, which includes

[12] The 56 State entities are the recipients for the subset of programs below.

[13] PY 2012 estimated, see *http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf.*

[14] PY 2012 see *http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf.*

[15] PY 2012 see *http://www.doleta.gov/performance/results/pdf/PY2012WIATrends.pdf.*

[16] PY 2011 announcement, see *http://www.doleta.gov/grants/pdf/sga_dfa_py_11_02_final_1_11_2012.pdf.*

[17] PY 2011, *http://www.doleta.gov/business/pdf/H-1B_TST_R1-R2_Grant_Summaries_Final.pdf.*

[18] 2011, *http://manufacturing.gov/docs/2011-jobs-accelerator-overviews.pdf.*

health and retirement benefits. For these State and local sectors, the Department used a loaded wage factor of 1.55, which represents the ratio of total compensation to wages.

The Department then multiplied the loaded wage factor by the occupational category's wage rate to calculate an hourly compensation rate. Throughout this analysis, the Department assumes Equal Opportunity Officers, at both the state and local level, are managers. This assumption is based upon the Civil Rights Center's (CRC) experience with recipients.

TABLE 2—CALCULATION OF HOURLY COMPENSATION RATES

| Position | Mean hourly wage<br>A | Loaded wage factor<br>B | Hourly compensation rate<br>C = A × B |
|---|---|---|---|
| Managers [19] | $56.35 | 1.55 | $87.34 |

Agencies are required to include in the burden analysis the estimated time it takes for recipients to review and understand the instructions for compliance with this final rule. Based on its experience with recipients' compliance with the laws the CRC enforces and the mandate of the regulations that each recipient have an Equal Opportunity (E.O.) Officer, CRC believes that E.O. Officers at each recipient will be responsible for understanding or becoming familiar with this final rule. The Department estimates that it will take thirty minutes for the E.O. Officer at each recipient to read and become familiar with this final rule. The estimated burden for rule familiarization for these managers is 17,229 hours (34,458 recipients × .5 hours). The Department calculates a one-time total estimated cost as $1,504,781 (17,229 hours × $87.34/hour).[20]

*Cost of Notice*

The final rule proposes limited changes to the specific language provided by the Department for recipients to use in the equal opportunity notice in § 38.30 that they are required to publish under § 38.31. The final rule requires recipients to substitute five references to WIA and the Workforce Investment Act of 1998 with WIOA and the Workforce Innovation and Opportunity Act in the notice.

Based upon its experience with recipients, the Department assumes the E.O. Officer at each recipient will be responsible for printing out revised notices with changes to the text of the language for the notice. The Department estimates that it would take each of them approximately 15 minutes to ensure that revised notices are printed. Dissemination includes posting the notices prominently which the Department estimates that it would take each E.O. Officer approximately an additional 15 minutes. Consequently, the estimated burden for updating the notice (*i.e.* printing revisions of, and disseminating the posters) is 17,229 hours (34,458 recipients × .5 hours). The Department calculated the total estimated first year updating and dissemination cost for the E.O. Officers as $1,504,781 (17,229 hours × $87.34/hour). The Department also calculated that each E.O. Officer will make thirty copies of the notice at $.08 each for posting in his or her establishment for a first year operational and maintenance cost of $82,699 (34,458 recipients × $.08 a copy × 30 copies). This assumes 10 copies in each English and two additional languages.

Thus the total estimated cost posed by this final rule is $3,092,261: ($1,504,781 for familiarization + $1,504.781 for updating + $82,699 for operation and maintenance).

The final rule does not pose any additional burden. It does not modify existing or create new reporting requirements, record-keeping requirements, prohibitions against discriminatory conduct, or administrative requirements. It does not modify existing, or create new, enforcement procedures. In other words, the regulated community is already subject to the requirements of this final rule, and will therefore already be aware of the requirements to be in compliance with this rule. Therefore, the final rule would not create significant new costs or burdens for Governors, recipients, or beneficiaries.

*Additional Significant Regulatory Action Analysis*

In addition to cost, the Department must consider the three additional factors identified above when determining whether or not this final rule is a significant regulatory action. First, the Department has determined that the final rule creates no inconsistency or interference with an action taken or planned by another agency—the Department, which is responsible for enforcing Section 188 of WIOA, is publishing a final rule with technical corrections to implement the statute as directed by Congress. Because the Department is the agency responsible for enforcing Section 188, the regulations create no inconsistency or interference with any other agency.

Second, the Department has determined that the final rule does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof because the final rule is simply a revision of an existing rule to reflect the proper name of the governing legislation. Finally, the Department has determined that publication of this final rule raises no novel legal or policy issues arising from legal mandates, the President's priorities, or the principles set forth in E.O. 12866 because this final rule contains no new obligations, mandates, priorities or principles; it simply removes the name of a superseded statute and inserts the name of the current governing law.

*Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)*

Because a notice of proposed rulemaking is not required for the rule under 5 U.S.C. 553(b)(B), the requirements of the Regulatory Flexibility Act and Executive Order 13272, pertaining to regulatory flexibility analysis, do not apply to this rule. See 5 U.S.C. 601(2), 603(a). Accordingly, the Department has not prepared a regulatory flexibility analysis.

[19] BLS OES, May 2014, 11–1021 General and Operations Managers (*http://www.bls.gov/oes/current/oes111021.htm*).

[20] Although DOL believes there may be others that need to familiarize themselves with this rule, this cost may nonetheless be overstated. DOL included all recipients as having E.O. Officers who are managers when the rule (29 CFR part 38) excepts small recipients from this requirement and recipients who do have E.O. Officers may have compensation rates lower than the estimate.

*Paperwork Reduction Act of 1995*

The purposes of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* include minimizing the paperwork burden on affected entities. The Department notes that 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* 44 U.S.C. 3512; 5 CFR 1320.5(a) and 1320.6.

The Department has identified the following sections containing information collections: 29 CFR 38.20, 38.22, 38.25, 38.29 through 38.40, 38.42, 38.53 through 38.55, 38.70 through 38.74, and 38.77 through 38.80.

The Department submitted an information collection request associated with this rulemaking for OMB approval. The OMB approved the request via a Notice of Action dated July 20, 2015. Control number 1225–0077 has been assigned to the information collection requirements in this rule.

The information collections are summarized as follows:

*Agency:* DOL–OASAM.

*Title of Collection:* Nondiscrimination Compliance Information Reporting.

*OMB Control Number:* 1225–0077.

*Affected Public:* Individuals or Households; State, Local, and Tribal Governments; and Private Sector—businesses or other for profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 10,006 respondents (a single respondent could be the recipient of multiple grants).

*Total Estimated Number of Responses:* 15,502,436.

*Total Estimated Annual Time Burden:* 88,553 hours.

*Total Estimated Annual Other Costs Burden:* $0.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

*Unfunded Mandates Reform Act of 1995*

This rule will not include any increased expenditures by State, local, and tribal governments in the aggregate of $100 million or more, or increased expenditures by the private sector of $100 million or more.

*Executive Order 13132 (Federalism)*

The Department has reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This final rule 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.''

*Executive Order 13175 (Indian Tribal Governments)*

This final rule does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

*Effects on Families*

The undersigned hereby certifies that the rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General government Appropriation Act, 1999. To the contrary, by ensuring that customers, including job seekers and applicants for unemployment insurance, do not suffer illegal discrimination in accessing DOL financially-assisted programs, services, and activities, the final rule would have a positive effect on the economic well-being of families.

*Executive Order 13045 (Protection of Children)*

This rule would have no environmental health risk or safety risk that may disproportionately affect children.

*Environmental Impact Assessment*

A review of this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.;* and DOL NEPA procedures, 29 CFR part 11, indicates the rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

*Executive Order 13211 (Energy Supply)*

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

*Executive Order 12630 (Constitutionally Protected Property Rights)*

This rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

*Executive Order 12988 (Civil Justice Reform Analysis)*

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**List of Subjects in 29 CFR Part 38**

Civil rights, Discrimination in employment, Equal opportunity, Nondiscrimination, Workforce development.

**Thomas E. Perez,**

*Secretary of Labor.*

Accordingly, under authority of Section 188 of WIOA and for the reasons set forth in the preamble, the Department amends title 29 of the Code of Federal Regulations, by adding part 38 as follows:

## PART 38—IMPLEMENTATION OF THE NONDISCRIMINATION AND EQUAL OPPORTUNITY PROVISIONS OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

**Authority:** 29 U.S.C. 3101 *et seq.,* 29 U.S.C. 3174(b), 29 U.S.C. 3181, 29 U.S.C. 3243, 29 U.S.C. 3245(c)(2), 29 U.S.C. 3245(d)(1)(E), 29 U.S.C. 3246, 29 U.S.C. 3247, and 29 U.S.C. 3248; 42 U.S.C. 2000d, *et seq.;* 29 U.S.C. 794; 42 U.S.C. 6101; and 20 U.S.C. 1681.

## Subpart A—General Provisions

### § 38.0 Paperwork Reduction Act approval.

The following sections of this part contain collections of information that are subject to approval by the Office of Management and Budget under control number 1225–0077: §§ 38.20, 38.22, 38.25, 38.29 through 38.40, 38.42, 38.53 through 38.55, 38.70 through 38.74, and 38.77 through 38.80. The approval status of the information collections is available at *http://www.reginfo.gov/public/do/PRAMain.*

### § 38.1 What is the purpose of this part?

The purpose of this part is to implement the nondiscrimination and equal opportunity provisions of the Workforce Innovation and Opportunity Act (WIOA), which are contained in section 188 of WIOA. Section 188 prohibits discrimination on the grounds of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in a WIOA Title I-financially assisted program or activity. This part clarifies the application of the nondiscrimination and equal opportunity provisions of WIOA and provides uniform procedures for implementing them.

### § 38.2 To whom does this part apply, and what is the scope of this part?

(a) This part applies to:

(1) Any recipient, as defined in § 38.4;

(2) Programs and activities that are part of the One-Stop delivery system and that are operated by One-Stop partners listed in section 121(b) of WIOA, to the extent that the programs and activities are being conducted as part of the One-Stop delivery system; and

(3) The employment practices of a recipient and/or One-Stop partner, as provided in § 38.10.

(b) *Limitation of application.* This part does not apply to:

(1) Programs or activities that are financially assisted by the Department exclusively under laws other than Title I of WIOA, and that are not part of the One-Stop delivery system (including programs or activities implemented under, authorized by, and/or financially assisted by the Department under, JTPA);

(2) Contracts of insurance or guaranty;

(3) The ultimate beneficiary to this program of Federal financial assistance;

(4) Federal procurement contracts, with the exception of contracts to operate or provide services to Job Corps Centers; and

(5) *Federally-operated Job Corps Centers.* The operating Department is responsible for enforcing the nondiscrimination and equal opportunity laws to which such Centers are subject.

### § 38.3 How does this part affect a recipient's other obligations?

(a) A recipient's compliance with this part will satisfy any obligation of the recipient to comply with 29 CFR part 31, the Department of Labor's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI), and with Subparts A, D and E of 29 CFR part 32, the Department's regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended (Section 504).

(b) 29 CFR part 32, subparts B and C and appendix A, the Department's regulations which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, are hereby incorporated into this part by reference. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(c) Recipients that are also public entities or public accommodations, as defined by Titles II and III of the Americans with Disabilities Act of 1990 (ADA), should be aware of obligations imposed by those titles.

(d) Similarly, recipients that are also employers, employment agencies, or other entities covered by Title I of the ADA should be aware of obligations imposed by that title.

(e) Compliance with this part does not affect, in any way, any additional obligation that a recipient may have to comply with the following laws and their implementing regulations:

(1) Executive Order 11246, as amended;

(2) Sections 503 and 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793 and 794);

(3) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);

(4) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);

(5) Titles VI and VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d *et seq.* and 2000e *et seq.*);

(6) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101);

(7) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);

(8) Title IX of the Education Amendments of 1972, as amended (Title IX) (20 U.S.C. 1681);

(9) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*); and

(10) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b).

(f) This rule does not preempt consistent State and local requirements.

**§ 38.4 What definitions apply to this part?**

As used in this part, the term:

*Administrative Law Judge* means a person appointed as provided in 5 U.S.C. 3105 and 5 CFR 930.203, and qualified under 5 U.S.C. 557, to preside at hearings held under the nondiscrimination and equal opportunity provisions of WIOA and this part.

*Aid, benefits, services, or training.* (1) The term ''aid, benefits, service, or training'' means WIOA Title I—financially assisted services, financial or other aid, or benefits provided by or through a recipient or its employees, or by others through contract or other arrangements with the recipient. ''Aid, benefits, services, or training'' includes, but is not limited to:

(i) Core and intensive services;

(ii) Education or training;

(iii) Health, welfare, housing, social service, rehabilitation, or other supportive services;

(iv) Work opportunities; and

(v) Cash, loans, or other financial assistance to individuals.

(2) As used in this part, the term includes any aid, benefits, services, or training provided in or through a facility that has been constructed, expanded, altered, leased, rented, or otherwise obtained, in whole or in part, with Federal financial assistance under Title I of WIOA.

*Applicant* means an individual who is interested in being considered for WIOA Title I—financially assisted aid, benefits, services, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by the recipient. See also the definitions of ''application for benefits,'' ''eligible applicant/registrant,'' ''participant,'' ''participation,'' and ''recipient'' in this section.

*Applicant for employment* means a person or persons who make(s) application for employment with a recipient of Federal financial assistance under WIOA Title I.

*Application for assistance* means the process by which required documentation is provided to the Governor, recipient, or Department before and as a condition of receiving WIOA Title I financial assistance (including both new and continuing assistance).

*Application for benefits* means the process by which information, including but not limited to a completed application form, is provided by applicants or eligible applicants before and as a condition of receiving WIOA Title I—financially assisted aid, benefits, services, or training from a recipient.

*Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

*Assistant Secretary* means the Assistant Secretary for Administration and Management, United States Department of Labor.

*Auxiliary aids or services* includes—

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs/TTYs), videotext displays, or other effective means of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, brailled materials, large print materials, or other effective means of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

*Beneficiary* means the individual or individuals intended by Congress to receive aid, benefits, services, or training from a recipient.

*Citizenship* See ''Discrimination on the ground of citizenship'' in this section.

*CRC* means the Civil Rights Center, Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor.

*Department* means the U.S. Department of Labor (DOL), including its agencies and organizational units.

*Departmental grantmaking agency* means a grantmaking agency within the U.S. Department of Labor.

*Director* means the Director, Civil Rights Center (CRC), Office of the Assistant Secretary for Administration and Management, U.S. Department of Labor, or a designee authorized to act for the Director.

*Disability* means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The phrase ''physical or mental impairment'' does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by the recipient as being such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the recipient as having such an impairment.

*Discrimination on the ground of citizenship* means a denial of participation in programs or activities financially assisted in whole or in part under Title I of WIOA to individuals on the basis of their status as citizens or nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, or other

immigrants authorized by the Attorney General to work in the United States.

*Eligible applicant/registrant* means an individual who has been determined eligible to participate in one or more WIOA Title I—financially assisted programs or activities.

*Employment practices* means a recipient's practices related to employment, including but not limited to:

(1) Recruitment or recruitment advertising;

(2) Selection, placement, layoff or termination of employees;

(3) Upgrading, promotion, demotion or transfer of employees;

(4) Training, including employment-related training;

(5) Participation in upward mobility programs;

(6) Deciding rates of pay or other forms of compensation;

(7) Use of facilities; or

(8) Deciding other terms, conditions, benefits and/or privileges of employment.

*Employment-related training* means training that allows or enables an individual to obtain employment.

*Entity* means any person, corporation, partnership, joint venture, sole proprietorship, unincorporated association, consortium, Indian tribe or tribal organization, Native Hawaiian organization, and/or entity authorized by State or local law; any State or local government; and/or any agency, instrumentality or subdivision of such a government.

*Facility* means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, rolling stock or other conveyances, or other real or personal property or interest in such property, including the site where the building, property, structure, or equipment is located. The phrase ''real or personal property'' in the preceding sentence includes indoor constructs that may or may not be permanently attached to a building or structure. Such constructs include, but are not limited to, office cubicles, computer kiosks, and similar constructs.

*Federal grantmaking agency* means a Federal agency that provides financial assistance under any Federal statute.

*Financial assistance* means any of the following:

(1) Any grant, subgrant, loan, or advance of funds, including funds extended to any entity for payment to or on behalf of participants admitted to that entity for training, or extended directly to such participants for payment to that entity;

(2) Provision of the services of grantmaking agency personnel, or of other personnel at the grantmaking agency's expense;

(3) A grant or donation of real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration;

(ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the grantmaking agency's share of the fair market value of the property is not returned to the grantmaking agency; and

(iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:

(A) Without consideration;

(B) At a nominal consideration; or

(C) At a consideration that is reduced or waived either for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;

(4) Waiver of charges that would normally be made for the furnishing of services by the grantmaking agency; and

(5) Any other agreement, arrangement, contract or subcontract (other than a procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under the statute or policy that authorizes assistance by the grantmaking agency.

*Financial assistance under Title I of WIOA* means any of the following, when authorized or extended under WIOA Title I:

(1) Any grant, subgrant, loan, or advance of Federal funds, including funds extended to any entity for payment to or on behalf of participants admitted to that entity for training, or extended directly to such participants for payment to that entity;

(2) Provision of the services of Federal personnel, or of other personnel at Federal expense;

(3) A grant or donation of Federal real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration;

(ii) Proceeds from a subsequent sale, transfer, or lease of such property, if the Federal share of the fair market value of the property is not returned to the Federal Government; and

(iii) The sale, lease, or license of, and/or the permission to use (other than on a casual or transient basis), such property or any interest in such property, either:

(A) Without consideration;

(B) At a nominal consideration; or

(C) At a consideration that is reduced or waived either for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient;

(4) Waiver of charges that would normally be made for the furnishing of Government services; and

(5) Any other agreement, arrangement, contract or subcontract (other than a Federal procurement contract or a contract of insurance or guaranty), or other instrument that has as one of its purposes the provision of assistance or benefits under WIOA Title I.

*Fundamental alteration* means:

(1) A change in the essential nature of a program or activity as defined in this part, including but not limited to an aid, service, benefit, or training; or

(2) A cost that a recipient can demonstrate would result in an undue burden. Factors to be considered in making the determination whether the cost of a modification would result in such a burden include:

(i) The nature and net cost of the modification needed, taking into consideration the availability of tax credits and deductions, and/or outside financial assistance, for the modification;

(ii) The overall financial resources of the facility or facilities involved in the provision of the modification, including:

(A) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities; and

(B) The effect the modification would have on the expenses and resources of the facility or facilities;

(iii) The overall financial resources of the recipient, including:

(A) The overall size of the recipient;

(B) The number of persons aided, benefited, served, trained, or employed by the recipient; and

(C) The number, type and location of the recipient's facilities;

(iv) The type of operation or operations of the recipient, including:

(A) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and

(B) Where the modification sought is employment-related, the composition, structure and functions of the recipient's workforce; and

(v) The impact of the modification upon the operation of the facility or facilities, including:

(A) The impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties; and

(B) The impact on the facility's ability to carry out its mission.

*Governor* means the chief elected official of any State or his or her designee.

*Grant applicant* means an entity that submits the required documentation to the Governor, recipient, or Department, before and as a condition of receiving financial assistance under Title I of WIOA.

*Grantmaking agency* means an entity that provides Federal financial assistance.

*Guideline* means written informational material supplementing an agency's regulations and provided to grant applicants and recipients to provide program-specific interpretations of their responsibilities under the regulations.

*Illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as amended (21 U.S.C. 812). ''Illegal use of drugs'' does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

*Individual with a disability* means a person who has a disability, as defined in this section.

(1) The term ''individual with a disability'' does not include an individual on the basis of:

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

(2) The term ''individual with a disability'' also does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use. This limitation does not exclude as an individual with a disability an individual who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use, except that it is not a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1)(i) or (ii) of this definition is no longer engaging in the illegal use of drugs.

(2) With regard to employment, the term ''individual with a disability'' does not include any individual who:

(i) Is an alcoholic:

(A) Whose current use of alcohol prevents such individual from performing the duties of the job in question; or

(B) Whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others; or

(ii) Has a currently contagious disease or infection, if:

(A) That disease or infection prevents him or her from performing the duties of the job in question; or

(B) His or her employment, because of that disease or infection, would constitute a direct threat to the health and safety of others.

*Labor market area* means an economically integrated geographic area within which individuals can reside and find employment within a reasonable distance or can readily change employment without changing their place of residence. Such an area must be identified in accordance with either criteria used by the Bureau of Labor Statistics of the Department of Labor in defining such areas, or similar criteria established by a Governor.

*LWIOA (Local Workforce Investment Area) grant recipient* means the entity that receives WIOA Title I financial assistance for a Local Workforce Investment Area directly from the Governor and disburses those funds for Workforce Innovation and Opportunity Act activities.

*Methods of Administration* means the written document and supporting documentation developed under § 38.54.

*National Programs* means:

(1) Job Corps; and

(2) Programs receiving Federal funds under Title I, Subtitle D of WIOA directly from the Department. Such programs include, but are not limited to, the Migrant and Seasonal Workers Programs, Native American Programs, and Veterans' Workforce Investment programs.

*Noncompliance* means a failure of a grant applicant or recipient to comply with any of the applicable requirements of the nondiscrimination and equal opportunity provisions of WIOA or this part.

*On-the-Job Training (OJT)* means training by an employer that is provided to a paid participant while the participant is engaged in productive work that:

(1) Provides knowledge or skills essential to the full and adequate performance of the job;

(2) Provides reimbursement to the employer of up to 50 percent of the wage rate of the participant, for the extraordinary costs of providing the training and additional supervision related to the training; and

(3) Is limited in duration as appropriate to the occupation for which the participant is being trained, taking into account the content of the training, the prior work experience of the participant, and the service strategy of the participant, as appropriate.

*Participant* means an individual who has been determined to be eligible to participate in, and who is receiving aid, benefits, services or training under, a program or activity funded in whole or in part under Title I of WIOA. ''Participant'' includes, but is not limited to, applicants receiving any service(s) under state Employment Service programs, and claimants receiving any service(s) under state Unemployment Insurance programs.

*Participation* is considered to commence on the first day, following determination of eligibility, on which the participant began receiving subsidized aid, benefits, services, or training provided under Title I of WIOA.

*Parties to a hearing* means the Department and the grant applicant(s), recipient(s), or Governor.

*Population eligible to be served* means the total population of adults and eligible youth who reside within the labor market area that is served by a particular recipient, and who are eligible to seek WIOA Title I-financially assisted aid, benefits, services or training from that recipient. See the definition of ''labor market area'' in this section.

*Program or activity.* See ''WIOA Title I-financially assisted program or activity'' in this section.

*Prohibited ground* means any basis upon which it is illegal to discriminate under the nondiscrimination and equal opportunity provisions of WIOA or this part, *i.e.,* race, color, religion, sex, national origin, age, disability, political affiliation or belief, and, for beneficiaries only, citizenship or participation in a WIOA Title I-financially assisted program or activity.

*Public entity means:*

(1) Any State or local government; and

(2) Any department, agency, special purpose district, workforce investment board, or other instrumentality of a State or States or local government.

*Qualified individual with a disability* means*:*

(1) With respect to employment, an individual with a disability who, with or without reasonable accommodation, is capable of performing the essential functions of the job in question;

(2) With respect to aid, benefits, services, or training, an individual with a disability who, with or without reasonable accommodation and/or reasonable modification, meets the essential eligibility requirements for the receipt of such aid, benefits, services, or training.

*Qualified interpreter* means an interpreter who is able to interpret effectively, accurately, and impartially, either for individuals with disabilities or for individuals with limited English skills. The interpreter must be able to interpret both receptively and expressively, using any necessary specialized vocabulary.

*Reasonable accommodation.* (1) The term ''reasonable accommodation'' means:

(i) Modifications or adjustments to an application/registration process that enables a qualified applicant/registrant with a disability to be considered for the aid, benefits, services, training, or employment that the qualified applicant/registrant desires; or

(ii) Modifications or adjustments that enable a qualified individual with a disability to perform the essential functions of a job, or to receive aid, benefits, services, or training equal to that provided to qualified individuals without disabilities. These modifications or adjustments may be made to:

(A) The environment where work is performed or aid, benefits, services, or training are given; or

(B) The customary manner in which, or circumstances under which, a job is performed or aid, benefits, services, or training are given; or

(iii) Modifications or adjustments that enable a qualified individual with a disability to enjoy the same benefits and privileges of the aid, benefits, services, training, or employment as are enjoyed by other similarly situated individuals without disabilities.

(2) Reasonable accommodation includes, but is not limited to:

(i) Making existing facilities used by applicants, registrants, eligible applicants/registrants, participants, applicants for employment, and employees readily accessible to and usable by individuals with disabilities; and

(ii) Restructuring of a job or a service, or of the way in which aid, benefits, or training is/are provided; part-time or modified work or training schedules; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the recipient to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

*Recipient.* The term ''recipient'' means:

(1) Any entity to which financial assistance under WIOA Title I is extended, either directly from the Department or through the Governor or another recipient (including any successor, assignee, or transferee of a recipient), but excluding the ultimate beneficiaries of the WIOA Title I-funded program or activity. In instances in which a Governor operates a program or activity, either directly or through a State agency, using discretionary funds apportioned to him or her under WIOA Title I (rather than disbursing the funds to another recipient), the Governor is also a recipient. ''Recipient'' includes, but is not limited to:

(i) State-level agencies that administer, or are financed in whole or in part with, WIOA Title I funds;

(ii) State Employment Security Agencies;

(iii) State and local Workforce Investment Boards;

(iv) LWIOA grant recipients;

(v) One-Stop operators;

(vi) Service providers, including eligible training providers;

(vii) On-the-Job Training (OJT) employers;

(viii) Job Corps contractors and center operators, excluding the operators of federally-operated Job Corps centers;

(ix) Job Corps national training contractors;

(x) Outreach and admissions agencies, including Job Corps contractors that perform these functions;

(xi) Placement agencies, including Job Corps contractors that perform these functions; and

(xii) Other National Program recipients.

(2) In addition, for purposes of this part, One-Stop partners, as defined in section 121(b) of WIOA, are treated as ''recipients,'' and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the One-Stop delivery system.

*Registrant* means the same as ''applicant'' for purposes of this part. See also the definitions of ''application for benefits,'' ''eligible applicant/registrant,'' ''participant,'' ''participation,'' and ''recipient'' in this section.

*Respondent* means a grant applicant or recipient (including a Governor) against which a complaint has been filed under the nondiscrimination and equal opportunity provisions of WIOA or this part.

*Secretary* means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

*Sectarian activities* means religious worship or ceremony, or sectarian instruction.

*Section 504* means Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, which forbids discrimination against qualified individuals with disabilities in federally-financed and conducted programs and activities.

*Service provider* means:

(1) Any operator of, or provider of aid, benefits, services, or training to:

(i) Any WIOA Title I—funded program or activity that receives financial assistance from or through any State or LWIOA grant recipient; or

(ii) Any participant through that participant's Individual Training Account (ITA); or

(2) Any entity that is selected and/or certified as an eligible provider of training services to participants.

*Small recipient* means a recipient who:

(1) Serves a total of fewer than 15 beneficiaries during the entire grant year; and

(2) Employs fewer than 15 employees on any given day during the grant year.

*Solicitor* means the Solicitor of Labor, U.S. Department of Labor, or his or her designee.

*State* means the individual states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau.

*State Employment Security Agency (SESA)* means the State agency that, under the State Administrator, contains

both State agencies with responsibility for administering programs authorized under the Wagner-Peyser Act, and unemployment insurance programs authorized under Title III of the Social Security Act.

*State programs.* The term ''State programs'' means:

(1) Programs financially assisted in whole or in part under Title I of WIOA in which either:

(i) The Governor and/or State receives and disburses the grant to or through LWIOA grant recipients; or

(ii) The Governor retains the grant funds and operates the programs, either directly or through a State agency.

(2) ''State programs'' also includes State Employment Security Agencies, State Employment Service agencies, and/or State unemployment compensation agencies.

*Supportive services* means services, such as transportation, child care, dependent care, housing, and needs-related payments, that are necessary to enable an individual to participate in WIOA Title I-financially assisted programs and activities, as consistent with the provisions of WIOA.

*Terminee* means a participant whose participation in the program terminates, voluntarily or involuntarily, during the applicable program year.

*Title VI* means Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.,* as amended, which forbids recipients of Federal financial assistance from discriminating on the basis of race, color, or national origin.

*Transferee* means a person or entity to whom real or personal property, or an interest in such property, is transferred.

*Ultimate beneficiary* See the definition of ''beneficiary'' in this section.

*Undue hardship* This term has different meanings, depending upon whether it is used with regard to reasonable accommodation of individuals with disabilities, or with regard to religious accommodation.

(1) *Reasonable accommodation of individuals with disabilities.* (i) In general, ''undue hardship'' means significant difficulty or expense incurred by a recipient, when considered in light of the factors set forth in paragraph (ii) of this definition.

(ii) Factors to be considered in determining whether an accommodation would impose an undue hardship on a recipient include:

(A) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding, for the accommodation;

(B) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, including:

(*1*) The number of persons aided, benefited, served, or trained by, or employed at, the facility or facilities, and

(*2*) The effect the accommodation would have on the expenses and resources of the facility or facilities;

(C) The overall financial resources of the recipient, including:

(*1*) The overall size of the recipient;

(*2*) The number of persons aided, benefited, served, trained, or employed by the recipient; and

(*3*) The number, type and location of the recipient's facilities;

(D) The type of operation or operations of the recipient, including:

(*1*) The geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the recipient; and

(*2*) Where the individual is seeking an employment-related accommodation, the composition, structure and functions of the recipient's workforce; and

(E) The impact of the accommodation upon the operation of the facility or facilities, including:

(*1*) The impact on the ability of other participants to receive aid, benefits, services, or training, or of other employees to perform their duties; and

(*2*) The impact on the facility's ability to carry out its mission.

(2) *Religious accommodation.* For purposes of religious accommodation only, ''undue hardship'' means any additional, unusual costs, other than *de minimis* costs, that a particular accommodation would impose upon a recipient. *See Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 81, 84 (1977).

*WIOA* means the Workforce Innovation and Opportunity Act, Public Law 113–128.

*WIOA Title I financial assistance* See the definition of ''Federal financial assistance under Title I of WIOA'' in this section.

*WIOA Title I-funded program or activity* means:

(1) A program or activity, operated by a recipient and funded, in whole or in part, under Title I of WIOA, that provides either:

(i) Any aid, benefits, services, or training to individuals; or

(ii) Facilities for furnishing any aid, benefits, services, or training to individuals;

(2) Aid, benefits, services, or training provided in facilities that are being or were constructed with the aid of Federal financial assistance under WIOA Title I; or

(3) Aid, benefits, services, or training provided with the aid of any non-WIOA Title I funds, property, or other resources that are required to be expended or made available in order for the program to meet matching requirements or other conditions which must be met in order to receive the WIOA Title I financial assistance. *See* the definition of ''aid, benefits, services, or training'' in this section.

**§ 38.5 What forms of discrimination are prohibited by this part?**

No individual in the United States may, on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in any WIOA Title I—financially assisted program or activity, be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with any WIOA Title I—funded program or activity.

**§ 38.6 What specific discriminatory actions, based on prohibited grounds other than disability, are prohibited by this part, and what limitations are there related to religious activities?**

(a) For the purposes of this section, ''prohibited ground'' means race, color, religion, sex, national origin, age, political affiliation or belief, and for beneficiaries only, citizenship or participation in any WIOA Title I—financially assisted program or activity.

(b) A recipient must not, directly or through contractual, licensing, or other arrangements, on a prohibited ground:

(1) Deny an individual any aid, benefits, services, or training provided under a WIOA Title I—funded program or activity;

(2) Provide to an individual any aid, benefits, services, or training that is different, or is provided in a different manner, from that provided to others under a WIOA Title I—funded program or activity;

(3) Subject an individual to segregation or separate treatment in any matter related to his or her receipt of any aid, benefits, services, or training under a WIOA Title I—funded program or activity;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any aid, benefits, services, or training under a WIOA Title I—funded program or activity;

(5) Treat an individual differently from others in determining whether he or she satisfies any admission, enrollment, eligibility, membership, or other requirement or condition for any

aid, benefits, services, or training provided under a WIOA Title I—funded program or activity;

(6) Deny or limit an individual with respect to any opportunity to participate in a WIOA Title I—funded program or activity, or afford him or her an opportunity to do so that is different from the opportunity afforded others under a WIOA Title I—funded program or activity;

(7) Deny an individual the opportunity to participate as a member of a planning or advisory body that is an integral part of the WIOA Title I—funded program or activity; or

(8) Otherwise limit on a prohibited ground an individual in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any WIOA Title I—financially assisted aid, benefits, services, or training.

(c) A recipient must not, directly or through contractual, licensing, or other arrangements:

(1) Aid or perpetuate discrimination by providing significant assistance to an agency, organization, or person that discriminates on a prohibited ground in providing any aid, benefits, services, or training to registrants, applicants or participants in a WIOA Title I—funded program or activity; or

(2) Refuse to accommodate an individual's religious practices or beliefs, unless to do so would result in undue hardship, as defined in § 38.4.

(d)(1) In making any of the determinations listed in paragraph (d)(2) of this section, either directly or through contractual, licensing, or other arrangements, a recipient must not use standards, procedures, criteria, or administrative methods that have any of the following purposes or effects:

(i) Subjecting individuals to discrimination on a prohibited ground; or

(ii) Defeating or substantially impairing, on a prohibited ground, accomplishment of the objectives of either:

(A) The WIOA Title I—funded program or activity; or

(B) the nondiscrimination and equal opportunity provisions of WIOA or this part.

(2) The determinations to which this paragraph (d) applies include, but are not limited to:

(i) The types of aid, benefits, services, training, or facilities that will be provided under any WIOA Title I—funded program or activity;

(ii) The class of individuals to whom such aid, benefits, services, training, or facilities will be provided; or

(iii) The situations in which such aid, benefits, services, training, or facilities will be provided.

(3) Paragraph (d) of this section applies to the administration of WIOA Title I—funded programs or activities providing aid, benefits, services, training, or facilities in any manner, including, but not limited to:

(i) Outreach and recruitment;

(ii) Registration;

(iii) Counseling and guidance;

(iv) Testing;

(v) Selection, placement, appointment, and referral;

(vi) Training; and

(vii) Promotion and retention.

(4) A recipient must not take any of the prohibited actions listed in paragraph (d) of this section either directly or through contractual, licensing, or other arrangements.

(e) In determining the site or location of facilities, a grant applicant or recipient must not make selections that have any of the following purposes or effects:

(1) On a prohibited ground:

(i) Excluding individuals from a WIOA Title I—financially assisted program or activity;

(ii) Denying them the benefits of such a program or activity; or

(iii) Subjecting them to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the objectives of either:

(i) The WIOA Title I—financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(f)(1) 29 CFR part 2, subpart D, governs the circumstances under which DOL support, including WIOA Title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* 20 CFR 667.266 and 667.275. 29 CFR part 2, subpart D, also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries.

(2) Except under the circumstances described in paragraph (f)(3) of this section, a recipient must not employ participants to carry out the construction, operation, or maintenance of any part of any facility that is used, or to be used, for religious instruction or as a place for religious worship.

(3) A recipient may employ participants to carry out the maintenance of a facility that is not primarily or inherently devoted to religious instruction or religious worship if the organization operating the facility is part of a program or activity providing services to participants.

(g) The exclusion of an individual from programs or activities limited by Federal statute or Executive Order to a certain class or classes of individuals of which the individual in question is not a member is not prohibited by this part.

### § 38.7 What specific discriminatory actions based on disability are prohibited by this part?

(a) In providing any aid, benefits, services, or training under a WIOA Title I—financially assisted program or activity, a recipient must not, directly or through contractual, licensing, or other arrangements, on the ground of disability:

(1) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefits, services, or training;

(2) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefits, services, or training that is not equal to that afforded others;

(3) Provide a qualified individual with a disability with an aid, benefit, service or training that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different, segregated, or separate aid, benefits, services, or training to individuals with disabilities, or to any class of individuals with disabilities, unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, services or training that are as effective as those provided to others;

(5) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(6) Otherwise limit a qualified individual with a disability in enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, service or training.

(b) A recipient must not, directly or through contractual, licensing, or other

arrangements, aid or perpetuate discrimination against qualified individuals with disabilities by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefits, services or training to registrants, applicants, or participants.

(c) A recipient must not deny a qualified individual with a disability the opportunity to participate in WIOA Title I—financially assisted programs or activities despite the existence of permissibly separate or different programs or activities.

(d) A recipient must administer WIOA Title I—financially assisted programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e) A recipient must not, directly or through contractual, licensing, or other arrangements, use standards, procedures, criteria, or administrative methods:

(1) That have the purpose or effect of subjecting qualified individuals with disabilities to discrimination on the ground of disability;

(2) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the WIOA Title I—financially assisted program or activity with respect to individuals with disabilities; or

(3) That perpetuate the discrimination of another entity if both entities are subject to common administrative control or are agencies of the same state.

(f) In determining the site or location of facilities, a grant applicant or recipient must not make selections that have any of the following purposes or effects:

(1) On the basis of disability:

(i) Excluding qualified individuals from a WIOA Title I-financially assisted program or activity;

(ii) Denying them the benefits of such a program or activity; or

(iii) Subjecting them to discrimination; or

(2) Defeating or substantially impairing the accomplishment of the disability-related objectives of either:

(i) The WIOA Title I-financially assisted program or activity; or

(ii) The nondiscrimination and equal opportunity provisions of WIOA or this part.

(g) A recipient, in the selection of contractors, must not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(h) A recipient must not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a recipient are not, themselves, covered by this part.

(i) A recipient must not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any aid, benefit, service, training, program, or activity, unless such criteria can be shown to be necessary for the provision of the aid, benefit, service, training, program, or activity being offered.

(j) Nothing in this part prohibits a recipient from providing aid, benefits, services, training, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part.

(k) A recipient must not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by WIOA Title I or this part.

(l) A recipient must not exclude, or otherwise deny equal aid, benefits, services, training, programs, or activities to, an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(m) The exclusion of an individual without a disability from the benefits of a program limited by Federal statute or Executive Order to individuals with disabilities, or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive Order to a different class of individuals with disabilities, is not prohibited by this part.

(n) This part does not require a recipient to provide any of the following to individuals with disabilities:

(1) Personal devices, such as wheelchairs;

(2) Individually prescribed devices, such as prescription eyeglasses or hearing aids;

(3) Readers for personal use or study; or

(4) Services of a personal nature, including assistance in eating, toileting, or dressing.

(o)(1) Nothing in this part requires an individual with a disability to accept an accommodation, aid, benefit, service, training, or opportunity provided under WIOA Title I or this part that such individual chooses not to accept.

(2) Nothing in this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

### § 38.8 What are a recipient's responsibilities regarding reasonable accommodation and reasonable modification for individuals with disabilities?

(a) With regard to aid, benefits, services, training, and employment, a recipient must provide reasonable accommodation to qualified individuals with disabilities who are applicants, registrants, eligible applicants/registrants, participants, employees, or applicants for employment, unless providing the accommodation would cause undue hardship. See the definitions of ''reasonable accommodation'' and ''undue hardship'' in § 38.4.

(1) In those circumstances where a recipient believes that the proposed accommodation would cause undue hardship, the recipient has the burden of proving that the accommodation would result in such hardship.

(2) The recipient must make the decision that the accommodation would cause such hardship only after considering all factors listed in the definition of ''undue hardship'' in § 38.4. The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the accommodation.

(3) If a requested accommodation would result in undue hardship, the recipient must take any other action that would not result in such hardship, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.

(b) A recipient must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity. See the

definition of ''fundamental alteration'' in § 38.4.

(1) In those circumstances where a recipient believes that the proposed modification would fundamentally alter the program, activity, or service, the recipient has the burden of proving that the modification would result in such an alteration.

(2) The recipient must make the decision that the modification would result in such an alteration only after considering all factors listed in the definition of ''fundamental alteration'' in § 38.4. The decision must be accompanied by a written statement of the recipient's reasons for reaching that conclusion. The recipient must provide a copy of the statement of reasons to the individual or individuals who requested the modification.

(3) If a modification would result in a fundamental alteration, the recipient must take any other action that would not result in such an alteration, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the aid, benefits, services, training, or employment provided by the recipient.

**§ 38.9 What are a recipient's responsibilities to communicate with individuals with disabilities?**

(a) Recipients must take appropriate steps to ensure that communications with beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, employees, and members of the public who are individuals with disabilities, are as effective as communications with others.

(b) A recipient must furnish appropriate auxiliary aids or services where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the WIOA Title I—financially assisted program or activity. In determining what type of auxiliary aid or service is appropriate and necessary, such recipient must give primary consideration to the requests of the individual with a disability.

(c) Where a recipient communicates by telephone with beneficiaries, registrants, applicants, eligible applicants/registrants, participants, applicants for employment, and/or employees, the recipient must use telecommunications devices for individuals with hearing impairments (TDDs/TTYs), or equally effective communications systems, such as telephone relay services.

(d) A recipient must ensure that interested individuals, including individuals with visual or hearing impairments, can obtain information as to the existence and location of accessible services, activities, and facilities.

(e)(1) A recipient must provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The signage provided must meet the most current standards prescribed by the General Services Administration under the Architectural Barriers Act at 41 CFR 102–76.65. Alternative standards for the signage may be adopted when it is clearly evident that such alternative standards provide equivalent or greater access to the information.

(2) The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(f) This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity.

(1) In those circumstances where a recipient believes that the proposed action would fundamentally alter the WIOA Title I—financially assisted program, activity, or service, the recipient has the burden of proving that compliance with this section would result in such an alteration.

(2) The decision that compliance would result in such an alteration must be made by the recipient after considering all resources available for use in the funding and operation of the WIOA Title I—financially assisted program, activity, or service, and must be accompanied by a written statement of the reasons for reaching that conclusion.

(3) If an action required to comply with this section would result in the fundamental alteration described in paragraph (f)(1) of this section, the recipient must take any other action that would not result in such an alteration, but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

**§ 38.10 To what extent are employment practices covered by this part?**

(a) Discrimination on the ground of race, color, religion, sex, national origin, age, disability, or political affiliation or belief is prohibited in employment practices in the administration of, or in connection with:

(1) Any WIOA Title I—financially assisted program or activity; and

(2) Any program or activity that is part of the One-Stop delivery system and is operated by a One-Stop partner listed in Section 121(b) of WIOA, to the extent that the program or activity is being conducted as part of the One-Stop delivery system.

(b) *Employee selection procedures.* In implementing this section, a recipient must comply with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3.

(c) *Standards for employment-related investigations and reviews.* In any investigation or compliance review, the Director must consider Equal Employment Opportunity Commission (EEOC) regulations, guidance and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice.

(d) As provided in § 38.3(b), 29 CFR part 32, subparts B and C and appendix A, which implement the requirements of Section 504 pertaining to employment practices and employment-related training, program accessibility, and reasonable accommodation, have been incorporated into this part by reference. Therefore, recipients must comply with the requirements set forth in those regulatory sections as well as the requirements listed in this part.

(e) Recipients that are also employers, employment agencies, or other entities covered by Titles I and II of the ADA should be aware of obligations imposed by those titles. *See* 29 CFR part 1630 and 28 CFR part 35.

(f) Similarly, recipients that are also employers covered by the anti-discrimination provision of the Immigration and Nationality Act should be aware of the obligations imposed by that provision. *See* 8 U.S.C. 1324b, as amended.

(g) This rule does not preempt consistent State and local requirements.

**§ 38.11 To what extent are intimidation and retaliation prohibited by this part?**

(a) A recipient must not discharge, intimidate, retaliate, threaten, coerce or discriminate against any individual because the individual has:

(1) Filed a complaint alleging a violation of Section 188 of WIOA or this part;

(2) Opposed a practice prohibited by the nondiscrimination and equal opportunity provisions of WIOA or this part;

(3) Furnished information to, or assisted or participated in any manner in, an investigation, review, hearing, or any other activity related to any of the following:

(i) Administration of the nondiscrimination and equal

opportunity provisions of WIOA or this part;

(ii) Exercise of authority under those provisions; or

(iii) Exercise of privilege secured by those provisions; or

(4) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) The sanctions and penalties contained in Section 188(b) of WIOA or this part may be imposed against any recipient that engages in any such retaliation or intimidation, or fails to take appropriate steps to prevent such activity.

#### § 38.12 What Department of Labor office is responsible for administering this part?

The Civil Rights Center (CRC), in the Office of the Assistant Secretary for Administration and Management, is responsible for administering and enforcing the nondiscrimination and equal opportunity provisions of WIOA and this part, and for developing and issuing policies, standards, guidance, and procedures for effecting compliance.

#### § 38.13 Who is responsible for providing interpretations of this part?

The Director will make any rulings under, or interpretations of, the nondiscrimination and equal opportunity provisions of WIOA or this part.

#### § 38.14 Under what circumstances may the Secretary delegate the responsibilities of this part?

(a) The Secretary may from time to time assign to officials of other departments or agencies of the Government (with the consent of such department or agency) responsibilities in connection with the effectuation of the nondiscrimination and equal opportunity provisions of WIOA and this part (other than responsibility for final decisions under § 38.112), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the Government in the application of the nondiscrimination and equal opportunity provisions of WIOA or this part to similar programs and similar situations.

(b) Any action taken, determination made, or requirement imposed by an official of another department or agency acting under an assignment of responsibility under this section has the same effect as if the action had been taken by the Director.

#### § 38.15 What are the Director's responsibilities to coordinate with other civil rights agencies?

(a) Whenever a compliance review or complaint investigation under this part reveals possible violation of one or more of the laws listed in paragraph (b) of this section, or of any other Federal civil rights law, that is not also a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director must attempt to notify the appropriate agency and provide it with all relevant documents and information.

(b) This section applies to the following:

(1) Executive Order 11246, as amended;

(2) Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793);

(3) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212);

(4) The Equal Pay Act of 1963, as amended (29 U.S.C. 206d);

(5) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*);

(6) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621);

(7) The Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*);

(8) The anti-discrimination provision of the Immigration and Nationality Act, as amended (8 U.S.C. 1324b); and

(9) Any other Federal civil rights law.

#### § 38.16 What is this part's effect on a recipient's obligations under other laws, and what limitations apply?

(a) *Effect of State or local law or other requirements.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part are not excused or reduced by any State or local law or other requirement that, on a prohibited ground, prohibits or limits an individual's eligibility to receive aid, benefits, services, or training; to participate in any WIOA Title I—financially assisted program or activity; to be employed by any recipient; or to practice any occupation or profession.

(b) *Effect of private organization rules.* The obligation to comply with the nondiscrimination and equal opportunity provisions of WIOA and this part is not excused or reduced by any rule or regulation of any private organization, club, league or association that, on a prohibited ground, prohibits or limits an individual's eligibility to participate in any WIOA Title I—financially assisted program or activity to which this part applies.

(c) *Effect of possible future exclusion from employment opportunities.* A recipient must not exclude any individual from, or restrict any individual's participation in, any program or activity based on the recipient's belief or concern that the individual will encounter limited future employment opportunities because of his or her race, color, religion, sex, national origin, age, disability, political affiliation or belief, or citizenship.

## Subpart B—Recordkeeping and Other Affirmative Obligations of Recipients

### Assurances

#### § 38.20 What is a grant applicant's obligation to provide a written assurance?

(a)(1) Each application for financial assistance under Title I of WIOA, as defined in § 38.4, must include the following assurance:

As a condition to the award of financial assistance from the Department of Labor under Title I of WIOA, the grant applicant assures that it will comply fully with the nondiscrimination and equal opportunity provisions of the following laws:

Section 188 of the Workforce Innovation and Opportunity Act (WIOA), which prohibits discrimination against all individuals in the United States on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and against beneficiaries on the basis of either citizenship/status as a lawfully admitted immigrant authorized to work in the United States or participation in any WIOA Title I—financially assisted program or activity;

Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

The grant applicant also assures that it will comply with 29 CFR part 38 and all other regulations implementing the laws listed above. This assurance applies to the grant applicant's operation of the WIOA Title I-financially assisted program or activity, and to all agreements the grant applicant makes to carry out the WIOA Title I—financially assisted program or activity. The grant applicant understands that the United States has the right to seek judicial enforcement of this assurance.

(2) The assurance is considered incorporated by operation of law in the grant, cooperative agreement, contract

or other arrangement whereby Federal financial assistance under Title I of the WIOA is made available, whether or not it is physically incorporated in such document and whether or not there is a written agreement between the Department and the recipient, between the Department and the Governor, between the Governor and the recipient, or between recipients. The assurance also may be incorporated by reference in such grants, cooperative agreements, contracts, or other arrangements.

(b) *Continuing State programs.* Each Strategic Five-Year State Plan submitted by a State to carry out a continuing WIOA Title I-financially assisted program or activity must provide a statement that the WIOA Title I-financially assisted program or activity is (or, in the case of a new WIOA Title I-financially assisted program or activity, will be) conducted in compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, as a condition to the approval of the Five-Year Plan and the extension of any WIOA Title I financial assistance under the Plan. The State also must certify that it has developed and maintains a Methods of Administration under § 38.54.

#### § 38.21 How long will the recipient's obligation under the assurance last, and how broad is the obligation?

(a) Where the WIOA Title I financial assistance is intended to provide, or is in the form of, either personal property, real property, structures on real property, or interest in any such property or structures, the assurance will obligate the recipient, or (in the case of a subsequent transfer) the transferee, for the longer of:

(1) The period during which the property is used either:

(i) For a purpose for which WIOA Title I financial assistance is extended; or

(ii) For another purpose involving the provision of similar services or benefits; or

(2) The period during which either:

(i) The recipient retains ownership or possession of the property; or

(ii) The transferee retains ownership or possession of the property without compensating the Departmental grantmaking agency for the fair market value of that ownership or possession.

(b) In all other cases, the assurance will obligate the recipient for the period during which WIOA Title I financial assistance is extended.

#### § 38.22 How must covenants be used in connection with this part?

(a) Where WIOA Title I financial assistance is provided in the form of a transfer of real property, structures, or improvements on real property or structures, or interests in real property or structures, the instrument effecting or recording the transfer must contain a covenant assuring nondiscrimination and equal opportunity for the period described in § 38.21.

(b) Where no Federal transfer of real property or interest therein from the Federal Government is involved, but real property or an interest therein is acquired or improved under a program of WIOA Title I financial assistance, the recipient must include the covenant described in paragraph (a) of this section in the instrument effecting or recording any subsequent transfer of such property.

(c) When the property is obtained from the Federal Government, the covenant described in paragraph (a) of this section also may include a condition coupled with a right of reverter to the Department in the event of a breach of the covenant.

### Equal Opportunity Officers

#### § 38.23 Who must designate an Equal Opportunity Officer?

Every recipient must designate an Equal Opportunity Officer (''EO Officer''), except small recipients and service providers, as defined in § 38.4. The responsibilities of small recipients and service providers are described in §§ 38.27 and 38.28.

#### § 38.24 Who is eligible to serve as an Equal Opportunity Officer?

A senior-level employee of the recipient should be appointed as the recipient's Equal Opportunity Officer. Depending upon the size of the recipient, the size of the recipient's WIOA Title I—financially assisted programs or activities, and the number of applicants, registrants, and participants served by the recipient, the EO Officer may, or may not, be assigned other duties. However, he or she must not have other responsibilities or activities that create a conflict, or the appearance of a conflict, with the responsibilities of an EO Officer.

#### § 38.25 What are the responsibilities of an Equal Opportunity Officer?

An Equal Opportunity Officer is responsible for coordinating a recipient's obligations under this part. Those responsibilities include, but are not limited to:

(a) Serving as the recipient's liaison with CRC;

(b) Monitoring and investigating the recipient's activities, and the activities of the entities that receive WIOA Title I funds from the recipient, to make sure that the recipient and its subrecipients are not violating their nondiscrimination and equal opportunity obligations under WIOA Title I and this part;

(c) Reviewing the recipient's written policies to make sure that those policies are nondiscriminatory;

(d) Developing and publishing the recipient's procedures for processing discrimination complaints under §§ 38.76 through 38.79, and making sure that those procedures are followed;

(e) Reporting directly to the appropriate official (including, but not limited to, the State WIOA Director, Governor's WIOA Liaison, Job Corps Center Director, SESA Administrator, or LWIOA grant recipient) about equal opportunity matters;

(f) Undergoing training (at the recipient's expense) to maintain competency, if the Director requires him or her, and/or his or her staff, to do so; and

(g) If applicable, overseeing the development and implementation of the recipient's Methods of Administration under § 38.54.

#### § 38.26 What are a recipient's obligations relating to the Equal Opportunity Officer?

A recipient has the following obligations:

(a) Making the Equal Opportunity Officer's name, and his or her position title, address, and telephone number (voice and TDD/TTY) public;

(b) Ensuring that the EO Officer's identity and contact information appears on all internal and external communications about the recipient's nondiscrimination and equal opportunity programs;

(c) Assigning sufficient staff and resources to the Equal Opportunity Officer, and providing him or her with the necessary support of top management, to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part; and

(d) Ensuring that the EO Officer and his/her staff are afforded the opportunity to receive the training necessary and appropriate to maintain competency.

#### § 38.27 What are the obligations of small recipients regarding Equal Opportunity Officers?

Although small recipients do not need to designate Equal Opportunity Officers who have the full range of responsibilities listed above, they must designate an individual who will be responsible for developing and publishing of complaint procedures, and the processing of complaints, as explained in §§ 38.76 through 38.79.

**§ 38.28 What are the obligations of service providers regarding Equal Opportunity Officers?**

Service providers, as defined in § 38.4, are not required to designate an Equal Opportunity Officer. The obligation for ensuring service provider compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part rests with the Governor or LWIOA grant recipient, as specified in the State's Methods of Administration.

**Notice and Communication**

**§ 38.29 What are a recipient's obligations to disseminate its equal opportunity policy?**

(a) A recipient must provide initial and continuing notice that it does not discriminate on any prohibited ground. This notice must be provided to:

(1) Registrants, applicants, and eligible applicants/registrants;

(2) Participants;

(3) Applicants for employment and employees;

(4) Unions or professional organizations that hold collective bargaining or professional agreements with the recipient;

(5) Subrecipients that receive WIOA Title I funds from the recipient; and

(6) Members of the public, including those with impaired vision or hearing.

(b) As provided in § 38.9, the recipient must take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others.

**§ 38.30 What specific wording must the notice contain?**

The notice must contain the following specific wording:

Equal Opportunity Is the Law

It is against the law for this recipient of Federal financial assistance to discriminate on the following bases:

against any individual in the United States, on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief; and

against any beneficiary of programs financially assisted under Title I of the Workforce Innovation and Opportunity Act (WIOA), on the basis of the beneficiary's citizenship/status as a lawfully admitted immigrant authorized to work in the United States, or his or her participation in any WIOA Title I-financially assisted program or activity.

The recipient must not discriminate in any of the following areas:

deciding who will be admitted, or have access, to any WIOA Title I-financially assisted program or activity;

providing opportunities in, or treating any person with regard to, such a program or activity; or

making employment decisions in the administration of, or in connection with, such a program or activity.

What To Do If You Believe You Have Experienced Discrimination

If you think that you have been subjected to discrimination under a WIOA Title I-financially assisted program or activity, you may file a complaint within 180 days from the date of the alleged violation with either:

the recipient's Equal Opportunity Officer (or the person whom the recipient has designated for this purpose); or

the Director, Civil Rights Center (CRC), U.S. Department of Labor, 200 Constitution Avenue NW., Room N–4123, Washington, DC 20210.

If you file your complaint with the recipient, you must wait either until the recipient issues a written Notice of Final Action, or until 90 days have passed (whichever is sooner), before filing with the Civil Rights Center (see address above).

If the recipient does not give you a written Notice of Final Action within 90 days of the day on which you filed your complaint, you do not have to wait for the recipient to issue that Notice before filing a complaint with CRC. However, you must file your CRC complaint within 30 days of the 90-day deadline (in other words, within 120 days after the day on which you filed your complaint with the recipient).

If the recipient does give you a written Notice of Final Action on your complaint, but you are dissatisfied with the decision or resolution, you may file a complaint with CRC. You must file your CRC complaint within 30 days of the date on which you received the Notice of Final Action.

**§ 38.31 Where must the notice required by §§ 38.29 and 38.30 be published?**

(a) At a minimum, the notice required by §§ 38.29 and 38.30 must be:

(1) Posted prominently, in reasonable numbers and places;

(2) Disseminated in internal memoranda and other written or electronic communications;

(3) Included in handbooks or manuals; and

(4) Made available to each participant, and made part of each participant's file.

(b) The notice must be provided in appropriate formats to individuals with visual impairments. Where notice has been given in an alternate format to a participant with a visual impairment, a record that such notice has been given must be made a part of the participant's file.

**§ 38.32 When must the notice required by §§ 38.29 and 38.30 be provided?**

The notice required by §§ 38.29 and 38.30 must be initially provided within October 21, 2015, or within 90 days of the date this part first applies to the recipient, whichever comes later.

**§ 38.33 Who is responsible for meeting the notice requirement with respect to service providers?**

The Governor or the LWIOA grant recipient, as determined by the Governor and as provided in that State's Methods of Administration, will be responsible for meeting the notice requirement provided in §§ 38.29 and 38.30 with respect to a State's service providers.

**§ 38.34 What type of notice must a recipient include in publications, broadcasts, and other communications?**

(a) Recipients must indicate that the WIOA Title I-financially assisted program or activity in question is an ''equal opportunity employer/program,'' and that ''auxiliary aids and services are available upon request to individuals with disabilities,'' in recruitment brochures and other materials that are ordinarily distributed or communicated in written and/or oral form, electronically and/or on paper, to staff, clients, or the public at large, to describe programs financially assisted under Title I of WIOA or the requirements for participation by recipients and participants. Where such materials indicate that the recipient may be reached by telephone, the materials must state the telephone number of the TDD/TTY or relay service used by the recipient, as required by § 38.9(c).

(b) Recipients that publish or broadcast program information in the news media must ensure that such publications and broadcasts state that the WIOA Title I-financially assisted program or activity in question is an equal opportunity employer/program (or otherwise indicate that discrimination in the WIOA Title I-financially assisted program or activity is prohibited by Federal law), and indicate that auxiliary aids and services are available upon request to individuals with disabilities.

(c) A recipient must not communicate any information that suggests, by text or illustration, that the recipient treats beneficiaries, registrants, applicants, participants, employees or applicants for employment differently on any prohibited ground specified in § 38.5, except as such treatment is otherwise permitted under Federal law or this part.

**§ 38.35 What are a recipient's responsibilities to provide services and information in languages other than English?**

(a) A significant number or proportion of the population eligible to be served, or likely to be directly affected, by a WIOA Title I-financially assisted program or activity may need services or information in a language other than

English in order to be effectively informed about, or able to participate in, the program or activity. Where such a significant number or proportion exists, a recipient must take the following actions:

(1) Consider:

(i) The scope of the program or activity; and

(ii) The size and concentration of the population that needs services or information in a language other than English; and

(2) Based on those considerations, take reasonable steps to provide services and information in appropriate languages. This information must include the initial and continuing notice required under §§ 38.29 and 38.30, and all information that is communicated under § 38.34.

(b) In circumstances other than those described in paragraph (a) of this section, a recipient should nonetheless make reasonable efforts to meet the particularized language needs of limited-English-speaking individuals who seek services or information from the recipient.

#### § 38.36 What responsibilities does a recipient have to communicate information during orientations?

During each presentation to orient new participants, new employees, and/or the general public to its WIOA Title I-financially assisted program or activity, a recipient must include a discussion of rights under the nondiscrimination and equal opportunity provisions of WIOA and this part, including the right to file a complaint of discrimination with the recipient or the Director.

### Data and Information Collection and Maintenance

#### § 38.37 What are a recipient's responsibilities to collect and maintain data and other information?

(a) The Director will not require submission of data that can be obtained from existing reporting requirements or sources, including those of other agencies, if the source is known and available to the Director.

(b)(1) Each recipient must collect such data and maintain such records, in accordance with procedures prescribed by the Director, as the Director finds necessary to determine whether the recipient has complied or is complying with the nondiscrimination and equal opportunity provisions of WIOA or this part. The system and format in which the records and data are kept must be designed to allow the Governor and CRC to conduct statistical or other quantifiable data analyses to verify the recipient's compliance with section 188 of WIOA and this part.

(2) Such records must include, but are not limited to, records on applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment. Each recipient must record the race/ethnicity, sex, age, and where known, disability status, of every applicant, registrant, eligible applicant/registrant, participant, terminee, applicant for employment, and employee. Such information must be stored in a manner that ensures confidentiality, and must be used only for the purposes of recordkeeping and reporting; determining eligibility, where appropriate, for WIOA Title I-financially assisted programs or activities; determining the extent to which the recipient is operating its WIOA Title I-financially assisted program or activity in a nondiscriminatory manner; or other use authorized by law.

(c) Each recipient must maintain, and submit to CRC upon request, a log of complaints filed with it that allege discrimination on the ground(s) of race, color, religion, sex, national origin, age, disability, political affiliation or belief, citizenship, and/or participation in a WIOA Title I-financially assisted program or activity. The log must include: The name and address of the complainant; the ground of the complaint; a description of the complaint; the date the complaint was filed; the disposition and date of disposition of the complaint; and other pertinent information. Information that could lead to identification of a particular individual as having filed a complaint must be kept confidential.

(d) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

(e) A service provider's responsibility for collecting and maintaining the information required under this section may be assumed by the Governor or LWIOA grant recipient, as provided in the State's Methods of Administration.

#### § 38.38 What information must grant applicants and recipients provide to CRC?

In addition to the information which must be collected, maintained, and, upon request, submitted to CRC under § 38.37:

(a) Each grant applicant and recipient must promptly notify the Director when any administrative enforcement actions or lawsuits are filed against it alleging discrimination on the ground of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and for beneficiaries only, citizenship or participation in a WIOA Title I-financially assisted program or activity. This notification must include:

(1) The names of the parties to the action or lawsuit;

(2) The forum in which each case was filed; and

(3) The relevant case numbers.

(b) Each grant applicant (as part of its application) and recipient (as part of a compliance review conducted under § 38.63, or monitoring activity carried out under § 38.65) must provide the following information:

(1) The name of any other Federal agency that conducted a civil rights compliance review or complaint investigation, and that found the grant applicant or recipient to be in noncompliance, during the two years before the grant application was filed or CRC began its examination; and

(2) Information about any administrative enforcement actions or lawsuits that alleged discrimination on any protected basis, and that were filed against the grant applicant or recipient during the two years before the application or renewal application, compliance review, or monitoring activity. This information must include:

(i) The names of the parties;

(ii) The forum in which each case was filed; and

(iii) The relevant case numbers.

(c) At the discretion of the Director, grant applicants and recipients may be required to provide, in a timely manner, any information and data necessary to investigate complaints and conduct compliance reviews on grounds prohibited under the nondiscrimination and equal opportunity provisions of WIOA and this part.

(d) At the discretion of the Director, recipients may be required to provide, in a timely manner, the particularized information and/or to submit the periodic reports that the Director considers necessary to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(e) At the discretion of the Director, grant applicants may be required to submit, in a timely manner, the particularized information necessary to determine whether or not the grant applicant, if financially assisted, would be able to comply with the nondiscrimination and equal opportunity provisions of WIOA or this part.

(f) Where designation of individuals by race or ethnicity is required, the guidelines of the Office of Management and Budget must be used.

**§ 38.39 How long must grant applicants and recipients maintain the records required under this part?**

(a) Each recipient must maintain the following records for a period of not less than three years from the close of the applicable program year:

(1) The records of applicants, registrants, eligible applicants/registrants, participants, terminees, employees, and applicants for employment; and

(2) Such other records as are required under this part or by the Director.

(b) Records regarding complaints and actions taken on the complaints must be maintained for a period of not less than three years from the date of resolution of the complaint.

**§ 38.40 What access to sources of information must grant applicants and recipients provide the Director?**

(a) Each grant applicant and recipient must permit access by the Director during normal business hours to its premises and to its employees and participants, to the extent that such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations, compliance reviews, monitoring activities associated with a State's development and implementation of a Methods of Administration, and inspecting and copying such books, records, accounts and other materials as may be pertinent to ascertain compliance with and ensure enforcement of the nondiscrimination and equal opportunity provisions of WIOA or this part.

(b) Asserted considerations of privacy or confidentiality are not a basis for withholding information from CRC and will not bar CRC from evaluating or seeking to enforce compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(c) Whenever any information that the Director asks a grant applicant or recipient to provide is in the exclusive possession of another agency, institution, or person, and that agency, institution, or person fails or refuses to furnish the information upon request, the grant applicant or recipient must certify to CRC that it has made efforts to obtain the information and that the agency, institution, or person has failed or refused to provide it. This certification must list the name and address of the agency, institution, or person that has possession of the information and the specific efforts the grant applicant or recipient made to obtain it.

**§ 38.41 What responsibilities do grant applicants, recipients, and the Department have to maintain the confidentiality of the information collected?**

The identity of any individual who furnishes information relating to, or assisting in, an investigation or a compliance review, including the identity of any individual who files a complaint, must be kept confidential to the extent possible, consistent with a fair determination of the issues. An individual whose identity it is necessary to disclose must be protected from retaliation (see § 38.11).

**§ 38.42 What are a recipient's responsibilities under this part to provide universal access to WIOA Title I-financially assisted programs and activities?**

Recipients must take appropriate steps to ensure that they are providing universal access to their WIOA Title I-financially assisted programs and activities. These steps should involve reasonable efforts to include members of both sexes, various racial and ethnic groups, individuals with disabilities, and individuals in differing age groups. Such efforts may include, but are not limited to:

(a) Advertising the recipient's programs and/or activities in media, such as newspapers or radio programs, that specifically target various populations;

(b) Sending notices about openings in the recipient's programs and/or activities to schools or community service groups that serve various populations; and

(c) Consulting with appropriate community service groups about ways in which the recipient may improve its outreach and service to various populations.

## Subpart C—Governor's Responsibilities To Implement the Nondiscrimination and Equal Opportunity Requirements of WIOA

**§ 38.50 To whom does this subpart apply?**

This subpart applies to State Programs as defined in § 38.4. However, the provisions of § 38.52(b) do not apply to State Employment Security Agencies (SESAs), because the Governor's liability for any noncompliance on the part of a SESA cannot be waived.

**§ 38.51 What are a Governor's oversight responsibilities?**

The Governor is responsible for oversight of all WIOA Title I-financially assisted State programs. This responsibility includes ensuring compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part, and negotiating, where appropriate, with a recipient to secure voluntary compliance when noncompliance is found under § 38.95(b).

**§ 38.52 To what extent may a Governor be liable for the actions of a recipient he or she has financially assisted under WIOA Title I?**

(a) The Governor and the recipient are jointly and severally liable for all violations of the nondiscrimination and equal opportunity provisions of WIOA and this part by the recipient, unless the Governor has:

(1) Established and adhered to a Methods of Administration, under § 38.54, designed to give reasonable guarantee of the recipient's compliance with such provisions;

(2) Entered into a written contract with the recipient that clearly establishes the recipient's obligations regarding nondiscrimination and equal opportunity;

(3) Acted with due diligence to monitor the recipient's compliance with these provisions; and

(4) Taken prompt and appropriate corrective action to effect compliance.

(b) If the Director determines that the Governor has demonstrated substantial compliance with the requirements of paragraph (a) of this section, he or she may recommend to the Secretary that the imposition of sanctions against the Governor be waived and that sanctions be imposed only against the noncomplying recipient.

**§ 38.53 What are a Governor's oversight responsibilities regarding recipients' recordkeeping?**

The Governor must ensure that recipients collect and maintain records in a manner consistent with the provisions of § 38.38 and any procedures prescribed by the Director under § 38.38(b). The Governor must further ensure that recipients are able to provide data and reports in the manner prescribed by the Director.

**§ 38.54 What are a Governor's obligations to develop and maintain a Methods of Administration?**

(a)(1) Each Governor must establish and adhere to a Methods of Administration for State programs as defined in § 38.4. In those States in which one agency contains both SESA or unemployment insurance and WIOA Title I-financially assisted programs, the Governor should develop a combined Methods of Administration.

(2) Each Methods of Administration must be designed to give a reasonable guarantee that all recipients will comply, and are complying, with the nondiscrimination and equal

opportunity provisions of WIOA and this part.

(b) The Methods of Administration must be:

(1) In writing, addressing each requirement of § 38.54(d) with narrative and documentation;

(2) Reviewed and updated as required in § 38.55; and

(3) Signed by the Governor.

(c) [Reserved]

(d) At a minimum, each Methods of Administration must:

(1) Describe how the State programs and recipients have satisfied the requirements of the following regulations:

(i) Sections 38.20 through 38.22 (Assurances);

(ii) Sections 38.23 through 38.28 (Equal Opportunity Officers);

(iii) Sections 38.29 through 38.36 (Notice and Communication);

(iv) Sections 38.38 through 38.41 (Data and Information Collection and Maintenance);

(v) Section 38.42 (universal access);

(vi) Section 38.53 (Governor's oversight responsibilities regarding recipients' recordkeeping); and

(vii) Sections 38.70 through 38.79 (Complaint Processing Procedures); and

(2) Include the following additional elements:

(i) A system for determining whether a grant applicant, if financially assisted, and/or a training provider, if selected as eligible under section 122 of the Act, is likely to conduct its WIOA Title I—financially assisted programs or activities in a nondiscriminatory way, and to comply with the regulations in this part;

(ii) A system for periodically monitoring the compliance of recipients with WIOA section 188 and this part, including a determination as to whether each recipient is conducting its WIOA Title I—financially assisted program or activity in a nondiscriminatory way. At a minimum, each periodic monitoring review required by this paragraph (d)(2)(ii) must include:

(A) A statistical or other quantifiable analysis of records and data kept by the recipient under § 38.38, including analyses by race/ethnicity, sex, age, and disability status;

(B) An investigation of any significant differences identified in paragraph (d)(2)(ii)(A) of this section in participation in the programs, activities, or employment provided by the recipient, to determine whether these differences appear to be caused by discrimination. This investigation must be conducted through review of the recipient's records and any other appropriate means; and

(C) An assessment to determine whether the recipient has fulfilled its administrative obligations under section 188 or this part (for example, recordkeeping, notice and communication) and any duties assigned to it under the MOA;

(iii) A review of recipient policy issuances to ensure they are nondiscriminatory;

(iv) A system for reviewing recipients' job training plans, contracts, assurances, and other similar agreements to ensure that they are both nondiscriminatory and contain the required language regarding nondiscrimination and equal opportunity;

(v) Procedures for ensuring that recipients comply with the requirements of Section 504 and this part with regard to individuals with disabilities;

(vi) A system of policy communication and training to ensure that EO Officers and members of the recipients' staffs who have been assigned responsibilities under the nondiscrimination and equal opportunity provisions of WIOA or this part are aware of and can effectively carry out these responsibilities;

(vii) Procedures for obtaining prompt corrective action or, as necessary, applying sanctions when noncompliance is found; and

(viii) Supporting documentation to show that the commitments made in the Methods of Administration have been and/or are being carried out. This supporting documentation includes, but is not limited to:

(A) Policy and procedural issuances concerning required elements of the Methods of Administration;

(B) Copies of monitoring instruments and instructions;

(C) Evidence of the extent to which nondiscrimination and equal opportunity policies have been developed and communicated as required by this part;

(D) Information reflecting the extent to which Equal Opportunity training, including training called for by §§ 38.25(f) and 38.26(c), is planned and/or has been carried out;

(E) Reports of monitoring reviews and reports of follow-up actions taken under those reviews where violations have been found, including, where appropriate, sanctions; and

(F) Copies of any notices made under §§ 38.29 through 38.36.

#### § 38.55 When must the Governor carry out his or her obligations with regard to the Methods of Administration?

(a) Within either January 19, 2016, or the date on which the Department gives final approval to a State's Five-Year Plan, whichever is later, a Governor must:

(1) Develop and implement a Methods of Administration consistent with the requirements of this part, and

(2) Submit a copy of the Methods of Administration to the Director.

(b) The Governor must promptly update the Methods of Administration whenever necessary, and must notify the Director in writing at the time that any such updates are made.

(c) Every two years from the date on which the initial MOA is submitted to the Director under paragraph (a)(2) of this section, the Governor must review the Methods of Administration and the manner in which it has been implemented, and determine whether any changes are necessary in order for the State to comply fully and effectively with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(1) If any such changes are necessary, the Governor must make the appropriate changes and submit them, in writing, to the Director.

(2) If the Governor determines that no such changes are necessary, s/he must certify, in writing, to the Director that the Methods of Administration previously submitted continues in effect.

## Subpart D—Compliance Procedures

#### § 38.60 How does the Director evaluate compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part?

From time to time, the Director may conduct pre-approval compliance reviews of grant applicants for, and post-approval compliance reviews of recipients of, WIOA Title I financial assistance, to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. Reviews may focus on one or more specific programs or activities, or one or more issues within a program or activity. The Director may also investigate and resolve complaints alleging violations of the nondiscrimination and equal opportunity provisions of WIOA and this part.

#### § 38.61 Is there authority to issue subpoenas?

(a) Yes, section 183(c) of WIOA authorizes the issuance of subpoenas. A subpoena may direct the individual named on the subpoena to take the following actions:

(1) To appear:

(i) Before a designated CRC representative;

(ii) At a designated time and place;
(2) To give testimony; and/or
(3) To produce documentary evidence.
(b) The subpoena may require the appearance of witnesses, and the production of documents, from any place in the United States, at any designated time and place.

**Compliance Reviews**

**§ 38.62 What are the authority and procedures for conducting pre-approval compliance reviews?**

(a) As appropriate and necessary to ensure compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part, the Director may review any application, or class of applications, for Federal financial assistance under Title I of WIOA, before and as a condition of their approval. The basis for such review may be the assurance specified in § 38.20, information and reports submitted by the grant applicant under this part or guidance published by the Director, and any relevant records on file with the Department.
(b) Where the Director determines that the grant applicant for Federal financial assistance under WIOA Title I, if financially assisted, might not comply with the nondiscrimination and equal opportunity requirements of WIOA or this part, the Director must:
(1) Notify, in a timely manner, the Departmental grantmaking agency and the Assistant Attorney General of the findings of the pre-approval compliance review; and
(2) Issue a Letter of Findings. The Letter of Findings must advise the grant applicant, in writing, of:
(i) The preliminary findings of the review;
(ii) The proposed remedial or corrective action under Section 38.94 and the time within which the remedial or corrective action should be completed;
(iii) Whether it will be necessary for the grant applicant to enter into a written Conciliation Agreement as described in §§ 38.95 and 38.97; and
(iv) The opportunity to engage in voluntary compliance negotiations.
(c) If a grant applicant has agreed to certain remedial or corrective actions in order to receive WIOA Title I-funded Federal financial assistance, the Department must ensure that the remedial or corrective actions have been taken, or that a Conciliation Agreement has been entered into, before approving the award of further assistance under WIOA Title I. If a grant applicant refuses or fails to take remedial or corrective actions or to enter into a Conciliation Agreement, as applicable, the Director must follow the procedures outlined in §§ 38.98 through 38.100.

**§ 38.63 What are the authority and procedures for conducting post-approval compliance reviews?**

(a) The Director may initiate a post-approval compliance review of any recipient to determine compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part. The initiation of a post-approval review may be based on, but need not be limited to, the results of routine program monitoring by other Departmental or Federal agencies, or the nature or frequency of complaints.
(b) A post-approval review must be initiated by a Notification Letter, advising the recipient of:
(1) The practices to be reviewed;
(2) The programs to be reviewed;
(3) The information, records, and/or data to be submitted by the recipient within 30 days of the receipt of the Notification Letter, unless this time frame is modified by the Director; and
(4) The opportunity, at any time before receipt of the Final Determination described in §§ 38.99 and 38.100, to make a documentary or other submission that explains, validates or otherwise addresses the practices under review.
(c) The Director may conduct post-approval reviews using such techniques as desk audits and on-site reviews.

**§ 38.64 What procedures must the Director follow when CRC has completed a post-approval compliance review?**

(a) Where, as the result of a post-approval review, the Director has made a finding of noncompliance, he or she must issue a Letter of Findings. This Letter must advise the recipient, in writing, of:
(1) The preliminary findings of the review;
(2) Where appropriate, the proposed remedial or corrective action to be taken, and the time by which such action should be completed, as provided in § 38.94;
(3) Whether it will be necessary for the recipient to enter into a written assurance and/or Conciliation Agreement, as provided in §§ 38.96 and 38.97; and
(4) The opportunity to engage in voluntary compliance negotiations.
(b) Where no violation is found, the recipient must be so informed in writing.

**§ 38.65 What is the Director's authority to monitor the activities of a Governor?**

(a) The Director may periodically review the adequacy of the Methods of Administration established by a Governor, as well as the adequacy of the Governor's performance under the Methods of Administration, to determine compliance with the requirements of §§ 38.50 through 38.55. The Director may review the Methods of Administration during a compliance review under §§ 38.62 and 38.63, or at another time.
(b) Nothing in this subpart limits or precludes the Director from monitoring directly any WIOA Title I recipient or from investigating any matter necessary to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part.

**§ 38.66 What happens if a recipient fails to submit requested data, records, and/or information, or fails to provide CRC with the required access?**

The Director may issue a Notice to Show Cause to a recipient failing to comply with the requirements of this part, where such failure results in the inability of the Director to make a finding. Such a failure includes, but is not limited to, the recipient's failure or refusal to:
(a) Submit requested information, records, and/or data within 30 days of receiving a Notification Letter;
(b) Submit, in a timely manner, information, records, and/or data requested during a compliance review, complaint investigation, or other action to determine a recipient's compliance with the nondiscrimination and equal opportunity provisions of WIOA or this part; or
(c) Provide CRC access in a timely manner to a recipient's premises, records, or employees during a compliance review, as required in § 38.40.

**§ 38.67 What information must a Notice to Show Cause contain?**

(a) A Notice to Show Cause must contain:
(1) A description of the violation and a citation to the pertinent nondiscrimination or equal opportunity provision(s) of WIOA and this part;
(2) The corrective action necessary to achieve compliance or, as may be appropriate, the concepts and principles of acceptable corrective or remedial action and the results anticipated; and
(3) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence.
(b) A Notice to Show Cause must give the recipient 30 days to show cause why enforcement proceedings under the nondiscrimination and equal

opportunity provisions of WIOA or this part should not be instituted.

**§ 38.68 How may a recipient show cause why enforcement proceedings should not be instituted?**

A recipient may show cause why enforcement proceedings should not be instituted by, among other means:

(a) Correcting the violation(s) that brought about the Notice to Show Cause and entering into a written assurance and/or entering into a Conciliation Agreement, as appropriate, under §§ 38.95 through 38.97;

(b) Demonstrating that CRC does not have jurisdiction; or

(c) Demonstrating that the violation alleged by CRC did not occur.

**§ 38.69 What happens if a recipient fails to show cause?**

If the recipient fails to show cause why enforcement proceedings should not be initiated, the Director must follow the enforcement procedures outlined in §§ 38.99 and 38.100.

**Complaint Processing Procedures**

**§ 38.70 Who may file a complaint concerning discrimination connected with WIOA Title I?**

Any person who believes that either he or she, or any specific class of individuals, has been or is being subjected to discrimination prohibited by WIOA or this part, may file a written complaint, either by him/herself or through a representative.

**§ 38.71 Where may a complaint be filed?**

A complainant may file a complaint with either the recipient or the Director. Complaints filed with the Director should be sent to the address listed in the notice in § 38.30.

**§ 38.72 When must a complaint be filed?**

Generally, a complaint must be filed within 180 days of the alleged discrimination. However, for good cause shown, the Director may extend the filing time. The time period for filing is for the administrative convenience of CRC, and does not create a defense for the respondent.

**§ 38.73 What information must a complaint contain?**

Each complaint must be filed in writing, and must contain the following information:

(a) The complainant's name and address (or another means of contacting the complainant);

(b) The identity of the respondent (the individual or entity that the complainant alleges is responsible for the discrimination);

(c) A description of the complainant's allegations. This description must include enough detail to allow the Director or the recipient, as applicable, to decide whether:

(1) CRC or the recipient, as applicable, has jurisdiction over the complaint;

(2) The complaint was filed in time; and

(3) The complaint has apparent merit; in other words, whether the complainant's allegations, if true, would violate any of the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(d) The complainant's signature or the signature of the complainant's authorized representative.

**§ 38.74 Are there any forms that a complainant may use to file a complaint?**

Yes. A complainant may file a complaint by completing and submitting CRC's Complaint Information and Privacy Act Consent Forms, which may be obtained either from the recipient's EO Officer, or from CRC at the address listed in the notice contained in § 38.30.

**§ 38.75 Is there a right of representation in the complaint process?**

Yes. Both the complainant and the respondent have the right to be represented by an attorney or other individual of their choice.

**§ 38.76 What are the required elements of a recipient's discrimination complaint processing procedures?**

(a) The procedures that a recipient adopts and publishes must provide that the recipient will issue a written Notice of Final Action on discrimination complaints within 90 days of the date on which the complaint is filed.

(b) At a minimum, the procedures must include the following elements:

(1) Initial, written notice to the complainant that contains the following information:

(i) An acknowledgment that the recipient has received the complaint; and

(ii) Notice that the complainant has the right to be represented in the complaint process;

(2) A written statement of the issue(s), provided to the complainant, that includes the following information:

(i) A list of the issues raised in the complaint; and

(ii) For each such issue, a statement whether the recipient will accept the issue for investigation or reject the issue, and the reasons for each rejection;

(3) A period for fact-finding or investigation of the circumstances underlying the complaint;

(4) A period during which the recipient attempts to resolve the complaint. The methods available to resolve the complaint must include alternative dispute resolution (ADR), as described in paragraph (c) of this section;

(5) A written Notice of Final Action, provided to the complainant within 90 days of the date on which the complaint was filed, that contains the following information:

(i) For each issue raised in the complaint, a statement of either:

(A) The recipient's decision on the issue and an explanation of the reasons underlying the decision; or

(B) A description of the way the parties resolved the issue; and

(ii) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the Notice of Final Action is issued if he or she is dissatisfied with the recipient's final action on the complaint.

(c) The procedures the recipient adopts must provide for alternative dispute resolution (ADR). The recipient's ADR procedures must provide that:

(1) The choice whether to use ADR or the customary process rests with the complainant;

(2) A party to any agreement reached under ADR may file a complaint with the Director in the event the agreement is breached. In such circumstances, the following rules will apply:

(i) The non-breaching party may file a complaint with the Director within 30 days of the date on which the non-breaching party learns of the alleged breach;

(ii) The Director must evaluate the circumstances to determine whether the agreement has been breached. If he or she determines that the agreement has been breached, the complainant may file a complaint with CRC based upon his/her original allegation(s), and the Director will waive the time deadline for filing such a complaint.

(3) If the parties do not reach an agreement under ADR, the complainant may file a complaint with the Director as described in §§ 38.71 through 38.74.

**§ 38.77 Who is responsible for developing and publishing complaint processing procedures for service providers?**

The Governor or the LWIOA grant recipient, as provided in the State's Methods of Administration, must develop and publish, on behalf of its service providers, the complaint processing procedures required in § 38.76. The service providers must then follow those procedures.

**§ 38.78 Does a recipient have any special obligations in cases in which the recipient determines that it has no jurisdiction over a complaint?**

Yes. If a recipient determines that it does not have jurisdiction over a complaint, it must notify the complainant, in writing, immediately. This Notice of Lack of Jurisdiction must include:

(a) A statement of the reasons for that determination; and

(b) Notice that the complainant has a right to file a complaint with CRC within 30 days of the date on which the complainant receives the Notice.

**§ 38.79 If, before the 90-day period has expired, a recipient issues a Notice of Final Action with which the complainant is dissatisfied, how long does the complainant have to file a complaint with the Director?**

If, during the 90-day period, the recipient issues its Notice of Final Action, but the complainant is dissatisfied with the recipient's decision on the complaint, the complainant or his/her representative may file a complaint with the Director within 30 days after the date on which the complainant receives the Notice.

**§ 38.80 What happens if a recipient fails to issue a Notice of Final Action within 90 days of the date on which a complaint was filed?**

If, by the end of 90 days from the date on which the complainant filed the complaint, the recipient has failed to issue a Notice of Final Action, the complainant or his/her representative may file a complaint with the Director within 30 days of the expiration of the 90-day period. In other words, the complaint must be filed with the Director within 120 days of the date on which the complaint was filed with the recipient.

**§ 38.81 Are there any circumstances under which the Director may extend the time limit for filing a complaint with him or her?**

(a) Yes. The Director may extend the 30-day time limit:

(1) If the recipient does not include in its Notice of Final Action the required notice about the complainant's right to file with the Director, as described in § 38.76(b)(5)(ii); or

(2) For other good cause shown.

(b) The complainant has the burden of proving to the Director that the time limit should be extended.

**§ 38.82 Does the Director accept every complaint for resolution?**

No. The Director must determine whether CRC will accept a particular complaint for resolution. For example, a complaint need not be accepted if:

(a) It has not been timely filed;

(b) CRC has no jurisdiction over the complaint; or

(c) CRC has previously decided the matter.

**§ 38.83 What happens if a complaint does not contain enough information?**

(a) If a complaint does not contain enough information, the Director must try to get the needed information from the complainant.

(b) The Director may close the complainant's file, without prejudice, if:

(1) The Director makes reasonable efforts to try to find the complainant, but is unable to reach him or her; or

(2) The complainant does not provide the needed information to CRC within the time specified in the request for more information.

(c) If the Director closes the complainant's file, he or she must send written notice to the complainant's last known address.

**§ 38.84 What happens if CRC does not have jurisdiction over a complaint?**

If CRC does not have jurisdiction over a complaint, the Director must:

(a) Notify the complainant and explain why the complaint falls outside the coverage of the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Where possible, transfer the complaint to an appropriate Federal, State or local authority.

**§ 38.85 Are there any other circumstances in which the Director will send a complaint to another authority?**

Yes. The Director refers complaints to other agencies in the following circumstances:

(a) Where the complaint alleges discrimination based on age, and the complaint falls within the jurisdiction of the Age Discrimination Act of 1975, as amended, then the Director must refer the complaint, in accordance with the provisions of 45 CFR 90.43(c)(3).

(b) Where the only allegation in the complaint is a charge of individual employment discrimination that is covered both by WIOA or this part and by one or more of the laws listed below, then the complaint is a ''joint complaint,'' and the Director may refer it to the EEOC for investigation and conciliation under the procedures described in 29 CFR part 1640 or 1691, as appropriate. The relevant laws are:

(1) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e to 2000e–17);

(2) The Equal Pay Act of 1963, as amended (29 U.S.C. 206(d));

(3) The Age Discrimination in Employment Act of 1976, as amended (29 U.S.C. 621, *et seq.*); and

(4) Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*).

(c) Where the complaint alleges discrimination by an entity that operates a program or activity financially assisted by a Federal grantmaking agency other than the Department, but that participates as a partner in a One-Stop delivery system, the following procedures apply:

(1) Where the complaint alleges discrimination on a basis that is prohibited both by Section 188 of WIOA and by a civil rights law enforced by the Federal grantmaking agency, then CRC and the grantmaking agency have dual jurisdiction over the complaint, and the Director will refer the complaint to the grantmaking agency for processing. In such circumstances, the grantmaking agency's regulations will govern the processing of the complaint.

(2) Where the complaint alleges discrimination on a basis that is prohibited by Section 188 of WIOA, but not by any civil rights laws enforced by the Federal grantmaking agency, then CRC has sole jurisdiction over the complaint, and will retain the complaint and process it pursuant to this part. Such bases generally include religion, political affiliation or belief, citizenship, and/or participation in a WIOA Title I—financially assisted program or activity.

(d) Where the Director makes a referral under this section, he or she must notify the complainant and the respondent about the referral.

**§ 38.86 What must the Director do if he or she determines that a complaint will not be accepted?**

If a complaint will not be accepted, the Director must notify the complainant, in writing, about that fact, and provide the complainant his/her reasons for making that determination.

**§ 38.87 What must the Director do if he or she determines that a complaint will be accepted?**

If the Director accepts the complaint for resolution, he or she must notify the complainant, the respondent, and the grantmaking agency. The notice must:

(a) State that the complaint will be accepted;

(b) Identify the issues over which CRC has accepted jurisdiction; and

(c) Explain the reasons why any issues were rejected.

**§ 38.88 Who may contact CRC about a complaint?**

Both the complainant and the respondent, or their authorized representatives, may contact CRC for information about the complaint. The Director will determine what

information, if any, about the complaint will be released.

**§ 38.89 May the Director offer the parties to a complaint the option of mediation?**

Yes. The Director may offer the parties to a complaint the option of mediating the complaint. In such circumstances, the following rules apply:

(a) Mediation is voluntary; the parties must consent before the mediation process will proceed.

(b) The mediation will be conducted under guidance issued by the Director.

(c) If the parties are unable to reach resolution of the complaint through mediation, CRC will investigate and process the complaint under §§ 38.82 through 38.88.

**Determinations**

**§ 38.90 If a complaint is investigated, what must the Director do when the investigation is completed?**

At the conclusion of the investigation of the complaint, the Director must take the following actions:

(a) Determine whether there is reasonable cause to believe that the respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part; and

(b) Notify the complainant, the respondent, and the grantmaking agency, in writing, of that determination.

**§ 38.91 What notice must the Director issue if he or she finds reasonable cause to believe that a violation has taken place?**

If the Director finds reasonable cause to believe that the respondent has violated the nondiscrimination and equal opportunity provisions of WIOA or this part, he or she must issue an Initial Determination. The Initial Determination must include:

(a) The specific findings of the investigation;

(b) The corrective or remedial action that the Department proposes to the respondent, under § 38.94;

(c) The time by which the respondent must complete the corrective or remedial action;

(d) Whether it will be necessary for the respondent to enter into a written agreement under §§ 38.95 and 38.96; and

(e) The opportunity to engage in voluntary compliance negotiations.

**§ 38.92 What notice must the Director issue if he or she finds no reasonable cause to believe that a violation has taken place?**

If the Director determines that there is no reasonable cause to believe that a violation has taken place, he or she must issue a Final Determination under § 38.100. The Final Determination represents the Department's final agency action on the complaint.

**§ 38.93 What happens if the Director finds that a violation has taken place, and the recipient fails or refuses to take the corrective action listed in the Initial Determination?**

Under such circumstances, the Department must take the actions described in § 38.99.

**§ 38.94 What corrective or remedial actions may be imposed where, after a compliance review or complaint investigation, the Director finds a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part?**

(a) A Letter of Findings, Notice to Show Cause, or Initial Determination, issued under § 38.62 or §§ 38.63, 38.66, and 38.67, or § 38.91 respectively, must include the specific steps the grant applicant or recipient, as applicable, must take within a stated period of time in order to achieve voluntary compliance.

(b) Such steps must include:

(1) Actions to end and/or redress the violation of the nondiscrimination and equal opportunity provisions of WIOA or this part;

(2) Make whole relief where discrimination has been identified, including, as appropriate, back pay (which must not accrue from a date more than 2 years before the filing of the complaint or the initiation of a compliance review) or other monetary relief; hire or reinstatement; retroactive seniority; promotion; benefits or other services discriminatorily denied; and

(3) Such other remedial or affirmative relief as the Director deems necessary, including but not limited to outreach, recruitment and training designed to ensure equal opportunity.

(c) Monetary relief may not be paid from Federal funds.

**§ 38.95 What procedures apply if the Director finds that a recipient has violated the nondiscrimination and equal opportunity provisions of WIOA or this part?**

(a) *Violations at State level.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred at the State level, he or she must notify the Governor through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, under § 38.62 or §§ 38.63, 38.66, and 38.67, or § 38.91, respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part through, among other means, the execution of a written assurance and/or Conciliation Agreement, under paragraph (d) of this section.

(b) *Violations below State level.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred below the State level, the Director must so notify the Governor and the violating recipient(s) through the issuance of a Letter of Findings, Notice to Show Cause or Initial Determination, as appropriate, under § 38.62 or §§ 38.63, 38.66, and 38.67, or § 38.91, respectively.

(1) Such issuance must:

(i) Direct the Governor to initiate negotiations immediately with the violating recipient(s) to secure compliance by voluntary means;

(ii) Direct the Governor to complete such negotiations within 30 days of the Governor's receipt of the Notice to Show Cause or within 45 days of the Governor's receipt of the Letter of Findings or Initial Determination, as applicable. The Director reserves the right to enter into negotiations with the recipient at any time during the period. For good cause shown, the Director may approve an extension of time to secure voluntary compliance. The total time allotted to secure voluntary compliance must not exceed 60 days.

(iii) Include a determination as to whether compliance must be achieved by:

(A) Immediate correction of the violation(s) and written assurance that such violations have been corrected, under § 38.96;

(B) Entering into a written Conciliation Agreement under § 38.97; or

(C) Both.

(2) If the Governor determines, at any time during the period described in paragraph (b)(1)(ii) of this section, that a recipient's compliance cannot be achieved by voluntary means, the Governor must so notify the Director.

(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, he or she must submit to the Director for approval, as applicable:

(i) Written assurance that the required action has been taken, as described in § 38.96;

(ii) A copy of the Conciliation Agreement, as described in § 38.97; or

(iii) Both.

(4) The Director may disapprove any written assurance or Conciliation Agreement submitted for approval under paragraph (b)(3) of this section that fails to satisfy each of the

applicable requirements provided in § 38.96 or § 38.97.

(c) *Violations in National Programs.* Where the Director has determined that a violation of the nondiscrimination and equal opportunity provisions of WIOA or this part has occurred in a National Program, he or she must notify the Federal grantmaking agency and the recipient by issuing a Letter of Findings, Notice to Show Cause, or Initial Determination, as appropriate, under § 38.62 or §§ 38.63, 38.66, and 38.67, or § 38.91, respectively. The Director may secure compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part through, among other means, the execution of a written assurance and/or Conciliation Agreement under § 38.96 or § 38.97, as applicable.

**§ 38.96 What are the required elements of a written assurance?**

A written assurance must provide documentation that the violations listed in the Letter of Findings, Notice to Show Cause or Initial Determination, as applicable, have been corrected.

**§ 38.97 What are the required elements of a Conciliation Agreement?**

A Conciliation Agreement must:

(a) Be in writing;

(b) Address each cited violation;

(c) Specify the corrective or remedial action to be taken within a stated period of time to come into compliance;

(d) Provide for periodic reporting on the status of the corrective and remedial action;

(e) Provide that the violation(s) will not recur; and

(f) Provide for enforcement for a breach of the agreement.

**§ 38.98 When will the Director conclude that compliance cannot be secured by voluntary means?**

The Director will conclude that compliance cannot be secured by voluntary means under the following circumstances:

(a) The grant applicant or recipient fails or refuses to correct the violation(s) within the time period established by the Letter of Findings, Notice to Show Cause or Initial Determination; or

(b) The Director has not approved an extension of time for agreement on voluntary compliance, under § 38.95(b)(1)(ii), and he or she either:

(1) Has not been notified, under § 38.95(b)(3), that the grant applicant or recipient has agreed to voluntary compliance;

(2) Has disapproved a written assurance or Conciliation Agreement, under § 38.95(b)(4); or

(3) Has received notice from the Governor, under § 38.95(b)(2), that the grant applicant or recipient will not comply voluntarily.

**§ 38.99 If the Director concludes that compliance cannot be secured by voluntary means, what actions must he or she take?**

If the Director concludes that compliance cannot be secured by voluntary means, he or she must either:

(a) Issue a Final Determination;

(b) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(c) Take such other action as may be provided by law.

**§ 38.100 What information must a Final Determination contain?**

A Final Determination must contain the following information:

(a) A statement of the efforts made to achieve voluntary compliance, and a statement that those efforts have been unsuccessful;

(b) A statement of those matters upon which the grant applicant or recipient and CRC continue to disagree;

(c) A list of any modifications to the findings of fact or conclusions that were set forth in the Initial Determination, Notice to Show Cause or Letter of Findings;

(d) A statement of the grant applicant's or recipient's liability, and, if appropriate, the extent of that liability;

(e) A description of the corrective or remedial actions that the grant applicant or recipient must take to come into compliance;

(f) A notice that if the grant applicant or recipient fails to come into compliance within 10 days of the date on which it receives the Final Determination, one or more of the following consequences may result:

(1) After the grant applicant or recipient is given the opportunity for a hearing, its WIOA Title I funds may be terminated, discontinued, or withheld in whole or in part, or its application for such funds may be denied, as appropriate;

(2) The Secretary of Labor may refer the case to the Department of Justice with a request to file suit against the grant applicant or recipient; or

(3) the Secretary may take any other action against the grant applicant or recipient that is provided by law;

(g) A notice of the grant applicant's or recipient's right to request a hearing under the procedures described in §§ 38.112 through 38.115; and

(h) A determination of the Governor's liability, if any, under § 38.52.

**§ 38.101 Whom must the Director notify of a finding of noncompliance?**

Where a compliance review or complaint investigation results in a finding of noncompliance, the Director must notify:

(a) The grant applicant or recipient;

(b) The grantmaking agency; and

(c) The Assistant Attorney General.

**Breaches of Conciliation Agreements**

**§ 38.102 What happens if a grant applicant or recipient breaches a Conciliation Agreement?**

When it becomes known to the Director that a Conciliation Agreement has been breached, the Director may issue a Notification of Breach of Conciliation Agreement.

**§ 38.103 Whom must the Director notify about a breach of a Conciliation Agreement?**

The Director must send a Notification of Breach of Conciliation Agreement to the Governor, the grantmaking agency, and/or other party(ies) to the Conciliation Agreement, as applicable.

**§ 38.104 What information must a Notification of Breach of Conciliation Agreement contain?**

A Notification of Breach of Conciliation Agreement must:

(a) Specify any efforts made to achieve voluntary compliance, and indicate that those efforts have been unsuccessful;

(b) Identify the specific provisions of the Conciliation Agreement violated;

(c) Determine liability for the violation and the extent of the liability;

(d) Indicate that failure of the violating party to come into compliance within 10 days of the receipt of the Notification of Breach of Conciliation Agreement may result, after opportunity for a hearing, in the termination or denial of the grant, or discontinuation of assistance, as appropriate, or in referral to the Department of Justice with a request from the Department to file suit;

(e) Advise the violating party of the right to request a hearing, and reference the applicable procedures in § 38.111; and

(f) Include a determination as to the Governor's liability, if any, in accordance with the provisions of § 38.52.

**§ 38.105 Whom must the Director notify if enforcement action under a Notification of Breach of Conciliation Agreement is commenced?**

In such circumstances, the Director must notify:

(a) The grantmaking agency; and

(b) The Governor, recipient or grant applicant, as applicable.

## Subpart E—Federal Procedures for Effecting Compliance

### § 38.110 What enforcement procedures does the Department follow to effect compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part?

(a) *Sanctions; judicial enforcement.* If compliance has not been achieved after issuance of a Final Determination under §§ 38.99 and 38.100, or a Notification of Breach of Conciliation Agreement under §§ 38.102 through 38.105, the Secretary may:

(1) After opportunity for a hearing, suspend, terminate, deny or discontinue the WIOA Title I financial assistance, in whole or in part;

(2) Refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; or

(3) Take such action as may be provided by law.

(b) *Deferral of new grants.* When proceedings under § 38.111 have been initiated against a particular recipient, the Department may defer action on that recipient's applications for new WIOA Title I financial assistance until a Final Decision under § 38.112 has been rendered. Deferral is not appropriate when WIOA Title I financial assistance is due and payable under a previously approved application.

(1) New WIOA Title I financial assistance includes all assistance for which an application or approval, including renewal or continuation of existing activities, or authorization of new activities, is required during the deferral period.

(2) New WIOA Title I financial assistance does not include assistance approved before the beginning of proceedings under § 38.111, or increases in funding as a result of changed computations of formula awards.

### § 38.111 What hearing procedures does the Department follow?

(a) *Notice of opportunity for hearing.* As part of a Final Determination, or a Notification of Breach of a Conciliation Agreement, the Director must include, and serve on the grant applicant or recipient (by certified mail, return receipt requested), a notice of opportunity for hearing.

(b) *Complaint; request for hearing; answer.* (1) In the case of noncompliance that cannot be voluntarily resolved, the Final Determination or Notification of Breach of Conciliation Agreement is considered the Department's formal complaint.

(2) To request a hearing, the grant applicant or recipient must file a written answer to the Final Determination or Notification of Breach of Conciliation Agreement, and a copy of the Final Determination or Notification of Breach of Conciliation Agreement, with the Office of the Administrative Law Judges, 800 K Street NW., Suite 400, Washington, DC 20001.

(i) The answer must be filed within 30 days of the date of receipt of the Final Determination or Notification of Breach of Conciliation Agreement.

(ii) A request for hearing must be set forth in a separate paragraph of the answer.

(iii) The answer must specifically admit or deny each finding of fact in the Final Determination or Notification of Breach of Conciliation Agreement. Where the grant applicant or recipient does not have knowledge or information sufficient to form a belief, the answer may so state and the statement will have the effect of a denial. Findings of fact not denied are considered admitted. The answer must separately state and identify matters alleged as affirmative defenses, and must also set forth the matters of fact and law relied on by the grant applicant or recipient.

(3) The grant applicant or recipient must simultaneously serve a copy of its filing on the Office of the Solicitor, Civil Rights Division, Room N–2464, U.S. Department of Labor, 200 Constitution Avenue NW., Washington DC 20210.

(4)(i) The failure of a grant applicant or recipient to request a hearing under this paragraph (b), or to appear at a hearing for which a date has been set, waives the right to a hearing; and

(ii) Whenever a hearing is waived, all allegations of fact contained in the Final Determination or Notification of Breach of Conciliation Agreement are considered admitted, and the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary as of the day following the last date by which the grant applicant or recipient was required to request a hearing or was to appear at a hearing. *See* § 38.112(b)(3).

(c) *Time and place of hearing.* Hearings will be held at a time and place ordered by the Administrative Law Judge upon reasonable notice to all parties and, as appropriate, the complainant. In selecting a place for the hearing, due regard must be given to the convenience of the parties, their counsel, and witnesses, if any.

(d) *Judicial process; evidence.* (1) The Administrative Law Judge may use judicial process to secure the attendance of witnesses and the production of documents authorized by Section 9 of the Federal Trade Commission Act (15 U.S.C. 49).

(2) *Evidence.* In any hearing or administrative review conducted under this part, evidentiary matters will be governed by the standards and principles set forth in the Uniform Rules of Evidence issued by the Department of Labor's Office of Administrative Law Judges, 29 CFR part 18.

### § 38.112 What procedures for initial and final decisions does the Department follow?

(a) *Initial decision.* After the hearing, the Administrative Law Judge must issue an initial decision and order, containing findings of fact and conclusions of law. The initial decision and order must be served on all parties by certified mail, return receipt requested.

(b) *Exceptions; final decision*—(1) *Final decision after a hearing.* The initial decision and order becomes the Final Decision and Order of the Secretary unless exceptions are filed by a party or, in the absence of exceptions, the Secretary serves notice that he or she will review the decision.

(i) A party dissatisfied with the initial decision and order may, within 45 days of receipt, file with the Secretary and serve on the other parties to the proceedings and on the Administrative Law Judge, exceptions to the initial decision and order or any part thereof.

(ii) Upon receipt of exceptions, the Administrative Law Judge must index and forward the record and the initial decision and order to the Secretary within three days of such receipt.

(iii) A party filing exceptions must specifically identify the finding or conclusion to which exception is taken. Any exception not specifically urged is waived.

(iv) Within 45 days of the date of filing such exceptions, a reply, which must be limited to the scope of the exceptions, may be filed and served by any other party to the proceeding.

(v) Requests for extensions for the filing of exceptions or replies must be received by the Secretary no later than 3 days before the exceptions or replies are due.

(vi) If no exceptions are filed, the Secretary may, within 30 days of the expiration of the time for filing exceptions, on his or her own motion serve notice on the parties that the Secretary will review the decision.

(vii) *Final decision and order.* (A) Where exceptions have been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order of the Secretary unless the Secretary, within 30 days of the expiration of the time for filing exceptions and replies, has

notified the parties that the case is accepted for review.

(B) Where exceptions have not been filed, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order of the Secretary unless the Secretary has served notice on the parties that he or she will review the decision, as provided in paragraph (b)(1)(vi) of this section.

(viii) Any case reviewed by the Secretary under this paragraph (b) must be decided within 180 days of the notification of such review. If the Secretary fails to issue a Final Decision and Order within the 180-day period, the initial decision and order of the Administrative Law Judge becomes the Final Decision and Order of the Secretary.

(2) Final Decision where a hearing is waived.

(i) If, after issuance of a Final Determination under § 38.100 or Notification of Breach of Conciliation Agreement under § 38.104, voluntary compliance has not been achieved within the time set by this part and the opportunity for a hearing has been waived as provided for in § 38.111(b)(4), the Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary.

(ii) When a Final Determination or Notification of Breach of Conciliation Agreement becomes the Final Decision of the Secretary, the Secretary may, within 45 days, issue an order terminating or denying the grant or continuation of assistance or imposing other appropriate sanctions for the grant applicant or recipient's failure to comply with the required corrective and/or remedial actions, or referring the matter to the Attorney General for further enforcement action.

(3) *Final agency action.* A Final Decision and Order issued under paragraph (b) of this section constitutes final agency action.

### § 38.113 What procedure does the Department follow to suspend, terminate, withhold, deny or discontinue WIOA Title I financial assistance?

Any action to suspend, terminate, deny or discontinue WIOA Title I financial assistance must be limited to the particular political entity, or part thereof, or other recipient (or grant applicant) as to which the finding has been made, and must be limited in its effect to the particular program, or part thereof, in which the noncompliance has been found. No order suspending, terminating, denying or discontinuing WIOA Title I financial assistance will become effective until:

(a) The Director has issued a Final Determination under § 38.100 or Notification of Breach of Conciliation Agreement under § 38.104;

(b) There has been an express finding on the record, after opportunity for a hearing, of failure by the grant applicant or recipient to comply with a requirement imposed by or under the nondiscrimination and equal opportunity provisions of WIOA or this part;

(c) A Final Decision has been issued by the Secretary, the Administrative Law Judge's decision and order has become the Final Decision of the Secretary, or the Final Determination or Notification of Conciliation Agreement has been deemed the Final Decision of the Secretary, under § 38.112(b); and

(d) The expiration of 30 days after the Secretary has filed, with the committees of Congress having legislative jurisdiction over the program involved, a full written report of the circumstances and grounds for such action.

### § 38.114 What procedure does the Department follow to distribute WIOA Title I financial assistance to an alternate recipient?

When the Department withholds funds from a recipient or grant applicant under these regulations, the Secretary may disburse the withheld funds directly to an alternate recipient. In such case, the Secretary will require any alternate recipient to demonstrate:

(a) The ability to comply with these regulations; and

(b) The ability to achieve the goals of the nondiscrimination and equal opportunity provisions of WIOA.

### § 38.115 What procedures does the Department follow for post-termination proceedings?

(a) A grant applicant or recipient adversely affected by a Final Decision and Order issued under § 38.112(b) will be restored, where appropriate, to full eligibility to receive WIOA Title I financial assistance if the grant applicant or recipient satisfies the terms and conditions of the Final Decision and Order and brings itself into compliance with the nondiscrimination and equal opportunity provisions of WIOA and this part.

(b) A grant applicant or recipient adversely affected by a Final Decision and Order issued under § 38.112(b) may at any time petition the Director to restore its eligibility to receive WIOA Title I financial assistance. A copy of the petition must be served on the parties to the original proceeding that led to the Final Decision and Order. The petition must be supported by information showing the actions taken by the grant applicant or recipient to bring itself into compliance. The grant applicant or recipient has the burden of demonstrating that it has satisfied the requirements of paragraph (a) of this section. While proceedings under this section are pending, sanctions imposed by the Final Decision and Order under § 38.112(b) (1) and (2) must remain in effect.

(c) The Director must issue a written decision on the petition for restoration.

(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, he or she must issue a decision denying the petition.

(2) Within 30 days of its receipt of the Director's decision, the recipient or grant applicant may file a petition for review of the decision by the Secretary, setting forth the grounds for its objection to the Director's decision.

(3) The petition must be served on the Director and on the Office of the Solicitor, Civil Rights Division.

(4) The Director may file a response to the petition within 14 days.

(5) The Secretary must issue the final agency decision denying or granting the recipient's or grant applicant's request for restoration to eligibility.

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# FEDERAL REGISTER

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Part IV

## The President

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# Presidential Documents

**Title 3—**

**The President**

**Executive Order 13701 of July 17, 2015**

## Delegation of Certain Authorities and Assignment of Certain Functions Under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (the ''Act'') (Public Law 114–26) and section 301 of title 3, United States Code, I hereby order as follows:

**Section 1.** *Authorities and Functions under the Act.* (a) Except as provided in subsections (b) and (c) of this section, the authorities granted to and functions specifically assigned to the President under title I of the Act are delegated and assigned, respectively, to the United States Trade Representative (U.S. Trade Representative).

(b) The exercise of the following authorities of, and functions specifically assigned to, the President under, title I of the Act are not delegated or assigned under this order:

(i) section 102(c)(1) and (c)(3) of the Act;

(ii) section 103(a)(1)(A), (a)(1)(B), (a)(5), (a)(7), (b)(1), and (c)(2) of the Act;

(iii) section 105(a)(5) of the Act; and

(iv) section 106(a)(1)(A) and (E) of the Act.

(c) (i) The functions of the President under section 102(c)(2) of the Act with respect to establishing consultative mechanisms are assigned to the Secretary of State in consultation with the U.S. Trade Representative, with the advice and assistance of the Secretary of the Interior, the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency, the Secretary of Commerce and, as the Secretary of State determines appropriate, the heads of other executive departments and agencies.

(ii) The functions of the President under section 105(d)(1) of the Act are assigned to the U.S. Trade Representative, who shall conduct the environmental reviews under section 105(d)(1)(A) of the Act through the interagency Trade Policy Staff Committee, and shall perform the reporting function under section 105(d)(1)(B) of the Act.

(iii) The functions of the President under section 105(d)(2)(A) of the Act are assigned to the Secretary of Labor, who, in coordination with the U.S. Trade Representative, shall conduct the employment impact review under section 105(d)(2)(A) of the Act through the interagency Trade Policy Staff Committee, and shall prepare the report under section 105(d)(2) of the Act. The functions of the President under section 105(d)(2)(B) of the Act are assigned to the U.S. Trade Representative, who shall perform the reporting function under that section.

(iv) The functions of the President under section 105(d)(3) of the Act are assigned to the Secretary of Labor, who, in consultation with the U.S. Trade Representative and the Secretary of State, shall prepare the report on labor rights under section 105(d)(3)(A) and (B) of the Act, and to the U.S. Trade Representative, who shall perform the reporting function under section 105(d)(3) of the Act.

(v) The functions of the President under section 105(e)(2)(A) through (C) and (E) of the Act with respect to preparing plans for implementing and enforcing agreements submitted to the Congress pursuant to section 103(b) of the Act are assigned to the Director of the Office of Management and Budget, who shall carry out these functions with the advice and assistance of the Secretaries of State, the Treasury, Agriculture, Commerce, and Homeland Security and the U.S. Trade Representative and other executive departments and agencies as necessary.

**Sec. 2.** *Capacity Building.* The U.S. Trade Representative, with the advice and assistance of executive departments and agencies participating in capacity building activities undertaken in accordance with section 102(c)(1) and (2) of the Act, shall perform the reporting function under section 102(c)(4) of the Act.

**Sec. 3.** *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) In exercising authority delegated by or performing functions assigned in this order, officers of the United States:

(i) shall ensure that all actions taken by them are consistent with the President's constitutional authority to (A) conduct the foreign affairs of the United States, including the commencement, conduct, and termination of negotiations with foreign countries and international organizations; (B) withhold information the disclosure of which could impair the foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties; (C) recommend for congressional consideration such measures as the President may judge necessary or expedient; and (D) supervise the executive branch; and

(ii) may redelegate authority delegated by this order and may further assign functions assigned by this order to officers of any other department or agency within the executive branch to the extent permitted by law, and such redelegation or further assignment shall be published in the *Federal Register.*

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
*July 17, 2015.*

[FR Doc. 2015–18292
Filed 7–22–15; 11:15 am]
Billing code 3295–F5

# Presidential Documents

**Notice of July 21, 2015**

## Continuation of the National Emergency With Respect to Transnational Criminal Organizations

On July 24, 2011, by Executive Order 13581, I declared a national emergency with respect to transnational criminal organizations pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the activities of significant transnational criminal organizations.

The activities of significant transnational criminal organizations have reached such scope and gravity that they threaten the stability of international political and economic systems. Such organizations are becoming increasingly sophisticated and dangerous to the United States; they are increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets. These organizations facilitate and aggravate violent civil conflicts and increasingly facilitate the activities of other dangerous persons.

The activities of significant transnational criminal organizations continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared in Executive Order 13581 of July 24, 2011, and the measures adopted on that date to deal with that emergency, must continue in effect beyond July 24, 2015. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to transnational criminal organizations declared in Executive Order 13581.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
*July 21, 2015.*

[FR Doc. 2015–18293
Filed 7–22–15; 11:15 am]
Billing code 3295–F5

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**H.R. 91/P.L. 114–31**

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**H.R. 728/P.L. 114–32**

To designate the facility of the United States Postal Service located at 7050 Highway BB in Cedar Hill, Missouri, as the ''Sergeant First Class William B. Woods, Jr. Post Office''. (July 20, 2015; 129 Stat. 431)

**H.R. 891/P.L. 114–33**

To designate the facility of the United States Postal Service located at 141 Paloma Drive in Floresville, Texas, as the ''Floresville Veterans Post Office Building''. (July 20, 2015; 129 Stat. 432)

**H.R. 1326/P.L. 114–34**

To designate the facility of the United States Postal Service located at 2000 Mulford Road in Mulberry, Florida, as the ''Sergeant First Class Daniel M. Ferguson Post Office''. (July 20, 2015; 129 Stat. 433)

**H.R. 1350/P.L. 114–35**

To designate the facility of the United States Postal Service located at 442 East 167th Street in Bronx, New York, as the ''Herman Badillo Post Office Building''. (July 20, 2015; 129 Stat. 434)

**H.R. 2620/P.L. 114–36**

To amend the United States Cotton Futures Act to exclude certain cotton futures contracts from coverage under such Act. (July 20, 2015; 129 Stat. 435)

**S. 179/P.L. 114–37**

To designate the facility of the United States Postal Service located at 14 3rd Avenue, NW, in Chisholm, Minnesota, as the ''James L. Oberstar Memorial Post Office Building''. (July 20, 2015; 129 Stat. 436)

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