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Federal Register
Vol. 81, No. 251
Friday, December 30, 2016

Presidential Documents

Title 3—

The President

Executive Order 13755 of December 23, 2016

Providing an Order of Succession Within the Department of Labor

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this order, and to the limitations set forth in the Act, the following officials of the Department of Labor, in the order listed, shall act as and perform the functions and duties of the office of Secretary of Labor (Secretary) during any period in which both the Secretary and the Deputy Secretary of Labor have died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary:

(a) Solicitor of Labor;

(b) Assistant Secretary for Administration and Management;

(c) Assistant Secretary for Policy;

(d) Assistant Secretary for Congressional and Intergovernmental Affairs;

(e) Assistant Secretary for Employment and Training;

(f) Assistant Secretary for Employee Benefits Security;

(g) Assistant Secretary for Occupational Safety and Health;

(h) Assistant Secretary for Mine Safety and Health;

(i) Assistant Secretary for Public Affairs;

(j) Chief Financial Officer;

(k) Administrator, Wage and Hour Division;

(l) Assistant Secretary for Veterans' Employment and Training;

(m) Assistant Secretary for Disability Employment Policy;

(n) First assistants, pursuant to the Act, to the officials in the order listed in (a) and (c)–(h);

(o) Regional Solicitor—Dallas; and

(p) Regional Administrator for the Office of the Assistant Secretary for Administration and Management—Region VI/Dallas.

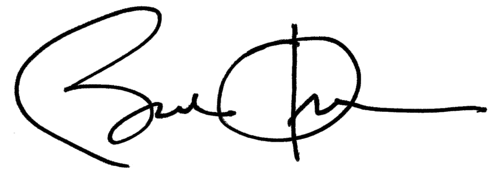
Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1(a)–(p) of this order in an acting capacity shall, by virtue of so serving, act as Secretary pursuant to this order.

(b) No individual listed in section 1(a)–(p) of this order shall act as Secretary unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this order, the President retains discretion, to the extent permitted by law, to depart from this order in designating an acting Secretary.

Sec. 3. *Revocation.* Executive Order 13245 of December 18, 2001 (Providing An Order of Succession Within the Department of Labor), is hereby revoked.

Sec. 4. *Judicial Review.* 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,
December 23, 2016.

[FR Doc. 2016–31792
Filed 12–29–16; 8:45 am]
Billing code 3295–F7–P

Presidential Documents

Memorandum of December 23, 2016

Designation of Officers of the National Archives and Records Administration to Act as Archivist of the United States

Memorandum for the Archivist of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and the limitations set forth in the Act, the following officials of the National Archives and Records Administration, in the order listed, shall act as and perform the functions and duties of the office of the Archivist of the United States (Archivist), during any period in which both the Archivist and the Deputy Archivist have died, resigned, or otherwise become unable to perform the functions and duties of the office of the Archivist:

(a) Chief Operating Officer;

(b) Chief of Management and Administration;

(c) Executive for Agency Services;

(d) Director, National Personnel Records Center; and

(e) Director, George Bush Presidential Library and Museum.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1(a)–(e) of this memorandum in an acting capacity shall, by virtue of so serving, act as Archivist pursuant to this memorandum.

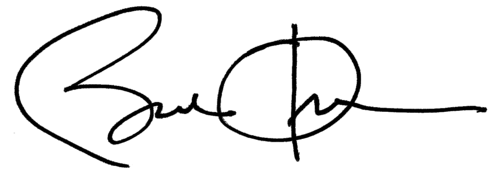
(b) No individual listed in section 1(a)–(e) of this memorandum shall act as Archivist unless that individual is otherwise eligible to so serve under the Federal Vacancies Reform Act of 1998, as amended.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Archivist.

Sec. 3. *Prior Memorandum Revoked.* The Memorandum for the Archivist of the United States of May 21, 2012 (Designation of Officers of the National Archives and Records Administration) is hereby revoked.

Sec. 4. *Judicial Review.* This memorandum 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.

Sec. 5. *Publication.* You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 23, 2016

[FR Doc. 2016–31788
Filed 12–29–16; 8:45 am]
Billing code 7515–01–P

Presidential Documents

Memorandum of December 23, 2016

Providing an Order of Succession Within the Federal Mediation and Conciliation Service

Memorandum for the Director of the Federal Mediation and Conciliation Service

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officials of the Federal Mediation and Conciliation Service, in the order listed, shall act as and perform the functions and duties of the Office of the Director of the Federal Mediation and Conciliation Service (Director), during any period in which the Director has died, resigned, or otherwise become unable to perform the functions and duties of the Office of Director:

(a) Deputy Director, Mediation Services and Field Operations;

(b) Deputy Director; and

(c) Most senior Regional Director (''most senior'' being defined as holding the longest tenure in the position of Regional Director).

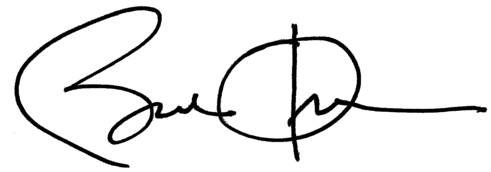
Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 of this memorandum in an acting capacity, by virtue of so serving, shall act as Director pursuant to this memorandum.

(b) No individual listed in section 1 of this memorandum shall act as Director unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Director.

Sec. 3. *General Provisions.* (a) This memorandum 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.

(b) You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 23, 2016

[FR Doc. 2016–31798
Filed 12–29–16; 8:45 am]
Billing code 6732–01–P

Presidential Documents

Memorandum of December 23, 2016

Providing an Order of Succession Within the National Endowment for the Arts

Memorandum for the Chairperson of the National Endowment for the Arts

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officials of the National Endowment for the Arts, in the order listed, shall act as the Chairperson of the National Endowment for the Arts (Chairperson) and perform the functions and duties of the office of the Chairperson during any period in which the Chairperson has died, resigned, or otherwise become unable to perform the functions and duties of the office of the Chairperson:

(a) Senior Deputy Chairman;

(b) Deputy Chairman for Management and Budget;

(c) Chief of Staff; and

(d) Director of Strategic Communications and Public Affairs.

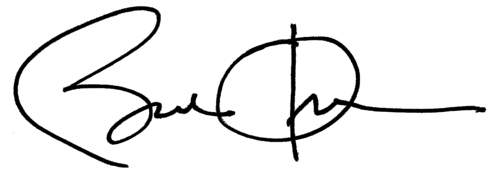
Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1(a)–(d) of this memorandum in an acting capacity shall, by virtue of so serving, act as Chairperson pursuant to this memorandum.

(b) No individual who is serving in an office listed in section 1(a)–(d) of this memorandum shall act as Chairperson unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Chairperson.

Sec. 3. *General Provisions.* (a) This memorandum 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.

(b) You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 23, 2016

[FR Doc. 2016–31801
Filed 12–29–16; 8:45 am]
Billing code 7537–01–P

Presidential Documents

Memorandum of December 23, 2016

Providing an Order of Succession Within the Social Security Administration

Memorandum for the Commissioner of the Social Security Administration

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officials of the Social Security Administration, in the order listed, shall act as and perform the functions and duties of the office of the Commissioner of Social Security (Commissioner), during any period in which both the Commissioner and Deputy Commissioner of Social Security have died, resigned, or become otherwise unable to perform the functions and duties of the office of Commissioner:

(a) Deputy Commissioner for Operations;

(b) Deputy Commissioner for Budget, Finance, Quality, and Management;

(c) Deputy Commissioner for Systems;

(d) Regional Commissioner, Atlanta;

(e) Regional Commissioner, Dallas;

(f) Regional Commissioner, San Francisco; and

(g) Regional Commissioner, Chicago.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 of this memorandum in an acting capacity, by virtue of so serving, shall act as Commissioner pursuant to this memorandum.

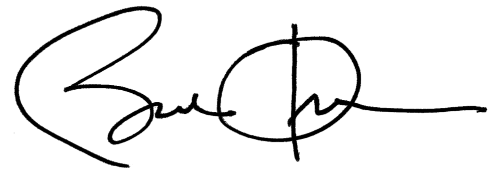
(b) No individual listed in section 1 of this memorandum shall act as Commissioner unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Commissioner.

Sec. 3. *Revocation.* The memorandum of October 17, 2014 (Providing an Order of Succession Within the Social Security Administration), is hereby revoked.

Sec. 4. *General Provisions.* (a) This memorandum 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.

(b) You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 23, 2016

[FR Doc. 2016–31811
Filed 12–29–16; 8:45 am]
Billing code 4191–02–P

Rules and Regulations

Federal Register

Vol. 81, No. 251

Friday, December 30, 2016

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 800

Fees for Official Inspection and Official Weighing Services Under the United States Grain Standards Act (USGSA)

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is announcing the fee schedule for official inspection and weighing services performed under the United States Grain Standards Act (USGSA), as amended, in order to comply with amendments to the USGSA made by the Agriculture Reauthorizations Act of 2015. The USGSA provides GIPSA with the authority to charge and collect reasonable fees to cover the costs of performing official services and the costs associated with managing the program. This action publishes the annual review of fees in Schedule A and the resulting fees that will be effective January 1, 2017.

DATES: Effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Denise Ruggles, USDA–GIPSA–FGIS–ODA; Telephone: (816) 659–8406; Email: *Denise.M.Ruggles@usda.gov.*

SUPPLEMENTARY INFORMATION: USGSA authorizes the Secretary of Agriculture to provide official grain inspection and weighing services and to charge and collect reasonable fees for performing these services. The fees collected are to cover, as nearly as practicable, GIPSA's costs for performing these services, including associated administrative and supervisory costs. The fees are in the regulations at 7 CFR 800.71.

On July 29, 2016, GIPSA published in the **Federal Register** (81 FR 49855) a final rule amending 7 CFR 800.71 in accordance with the Reauthorizations Act of 2015, which required GIPSA to calculate fees assessed on tonnage based on the 5-year rolling average of export tonnage volume (§ 800.71) and adjust all Schedule A fees annually to maintain a 3 to 6 month operating reserve for inspection and supervision services (§ 800.71).

GIPSA has conducted the annual review of the fees and operating reserve for the purposes of the annual adjustment of the fees. Accordingly, GIPSA is setting new tonnage fees which will take effect on January 1, 2017, for all field offices. GIPSA has determined that a 5 percent reduction in all Schedule A fees, including the aforementioned tonnage fees, is necessary to attain the goal of 4½ months of operating reserve.

Fee Calculations

The regulations require GIPSA annually review the national tonnage fees, local tonnage fees, and fees for service. After calculating the tonnage fees according to the regulatory formula in section 800.71(b)(1), GIPSA then reviews the amount of funds in the operating reserve at the end of the fiscal year (FY2016 in this case) to ensure that it has 4½ months of operating expenses as required by section 800.71(b)(2) of the regulations. If the operating reserve has more, or less than 4½ months of operating expenses, then GIPSA must adjust all Schedule A fees. For each $1,000,000, rounded down, that the operating reserve varies from the target of 4½ months, GIPSA will adjust all Schedule A fees by 2 percent. If the operating reserve exceeds the target, all Schedule A fees will be reduced. If the operating reserve does not meet target, all Schedule A fees will be increased. The maximum annual increase or decrease in fees is 5 percent (§ 800.71(b)(2)(i)–(ii)).

(a) Tonnage fees for the 5-year rolling average tonnage were calculated on the previous 5 fiscal years 2012, 2013, 2014, 2015, and 2016. Tonnage fees consist of the national tonnage fee and local tonnage fee and are calculated and rounded to the nearest $0.001 per metric ton. The tonnage fees are calculated as following:

(1) *National tonnage fee.* The national tonnage fee is the national program administrative costs for the previous fiscal year divided by the average yearly tons of export grain officially inspected and/or weighed by delegated States and designated agencies, excluding land carrier shipments to Canada and Mexico, and outbound grain officially inspected and/or weighed by FGIS during the previous 5 fiscal years.

$$National\ Tonnage\ Fee = \frac{FY2016\ National\ Administrative\ Costs}{5\ Year\ Rolling\ Average\ Export\ Tons}$$

Fiscal year	Metric tons
2012*	95,290,621
2013*	81,207,695
2014	117,560,767
2015	118,758,937
2016	122,330,979
5-year Rolling Average	107,029,800

*To provide uniformity in the 5-year Rolling Average calculation, fiscal years 2012 and 2013 include tons of export grain officially inspected and/or weighed by delegated States and designated agencies prior to the implementation of the fee assessment in the **Federal Register** (78 FR 22151), effective May 1, 2013.

The national program administrative costs for fiscal year 2016 were $7,214,466. The fiscal year 2017 national tonnage fee, prior to the operating reserve review, is calculated to be at $0.067 per metric ton.

(2) *Local tonnage fee.* The local tonnage fee is the field office administrative costs for the previous fiscal year divided by the average yearly tons of outbound grain officially

inspected and/or weighed by the field office during the previous 5 fiscal years.

$$Local\ Tonnage = \frac{FY2016\ Field\ Office\ Administrative\ Costs}{5\ Year\ Rolling\ Average\ Export\ Tons\ (Local)}$$

The field offices fiscal year tons for the previous 5 fiscal years and calculated 5-year rolling average are as follows:

Field office	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	5-year rolling average
New Orleans	49,507,254	42,399,760	62,862,914	65,244,517	66,077,535	57,218,396
League City	7,638,261	10,418,686	12,623,510	12,474,343	12,581,236	11,147,207
Portland	5,739,021	3,953,500	6,065,934	4,111,533	4,645,754	4,903,148
Toledo	1,276,334	1,329,718	1,802,339	2,484,604	2,030,506	1,784,700

The local field office administrative costs for fiscal year 2016 and the fiscal year 2017 calculated local field office tonnage fee, prior to the operating reserve review, are as follows:

Field office	FY 2016 local administrative costs	Calculated FY 2017 local tonnage fee
New Orleans	$2,179,027	$0.038
League City	1,380,064	0.124
Portland	417,349	0.085
Toledo	426,863	0.239

(3) *Operating reserve.* In order to maintain an operating reserve not less than 3 and not more than 6 months, GIPSA reviewed the value of the operating reserve at the end of FY2016 to ensure that an operating reserve of 4½ months is maintained.

The program operating reserve at the end of fiscal year 2016 was $18,863,026 with a monthly operating expense of $3,295,937. The target of 4.5 months of operating reserve is $14,831,717 therefore the operating reserve is greater than 4.5 times the monthly operating expenses by $4,031,311. For each $1,000,000, rounded down, above the target level, all Schedule A fees must be reduced by 2 percent. The operating reserve is $4 million above the target level resulting in a calculated 8 percent reduction. As required by 800.71(b)(2)(ii), the reduction is limited to 5 percent. Therefore, GIPSA is reducing all Schedule A fees for service in Schedule A in paragraph (a)(1) by the maximum 5 percent. All Schedule A fees for service are rounded to the nearest $0.10, except for fees based on tonnage or hundredweight.

List of Subjects in 7 CFR Part 800

Administrative practice and procedure, Exports, Grains, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, GIPSA amends 7 CFR part 800 as follows:

PART 800—GENERAL REGULATIONS

■ 1. The authority citation for part 800 continues to read as follows:

Authority: 7 U.S.C. 71–87k.

■ 2. Section 800.71(a)(1) is amended by revising Tables 1, 2, and 3 of Schedule A to read as follows:

§ 800.71 Fees assessed by the Service.

(a) * * *

(1) * * *

TABLE 1 OF SCHEDULE A—FEES FOR OFFICIAL SERVICES PERFORMED AT AN APPLICANT'S FACILITY IN AN ONSITE FGIS LABORATORY [1]

	Monday to Friday (6 a.m. to 6 p.m.)	Monday to Friday (6 p.m. to 6 a.m.)	Saturday, Sunday, and overtime [2]	Holidays
(i) Inspection and Weighing Services Hourly Rates (per service representative):				
1-year contract ($ per hour)	$38.20	$40.00	$45.80	$67.80
Noncontract ($ per hour)	67.80	67.80	67.80	67.80
(ii) Additional Tests (cost per test, assessed in addition to the hourly rate): [3]				
(A) Aflatoxin (rapid test kit method)				10.80
(B) Aflatoxin (rapid test kit method-applicant provides kit) [4]				8.90
(C) All other Mycotoxins (rapid test kit method)				19.80
(D) All other Mycotoxins (rapid test kit method-applicant provides kit) [4]				17.90

TABLE 1 OF SCHEDULE A—FEES FOR OFFICIAL SERVICES PERFORMED AT AN APPLICANT'S FACILITY IN AN ONSITE FGIS LABORATORY [1]—Continued

	Monday to Friday (6 a.m. to 6 p.m.)	Monday to Friday (6 p.m. to 6 a.m.)	Saturday, Sunday, and overtime [2]	Holidays
(E) NIR or NMR Analysis (protein, oil, starch, etc.)				2.60
(F) Waxy corn (per test)				2.60
(G) Fees for other tests not listed above will be based on the lowest noncontract hourly rate				
(H) Other services				
(*1*) Class Y Weighing (per carrier):				
(*i*) Truck/container				0.70
(*ii*) Railcar				1.60
(*iii*) Barge				2.90
(iii) Tonnage Fee (assessed in addition to all other applicable fees, only one tonnage fee will be assessed when inspection and weighing services are performed on the same carrier):				
(A) All outbound carriers serviced by the specific Field Office (per-metric ton):				
(*1*) League City				0.182
(*2*) New Orleans				0.100
(*3*) Portland				0.145
(*4*) Toledo				0.291
(*5*) Delegated States [5]				0.064
(*6*) Designated Agencies [5]				0.064

[1] Fees apply to original inspection and weighing, re-inspection, and appeal inspection service and include, but are not limited to, sampling, grading, weighing, prior to loading stowage examinations, and certifying results performed within 25 miles of an employee's assigned duty station. Travel and related expenses will be charged for service outside 25 miles as found in § 800.72(a).

[2] Overtime rates will be assessed for all hours in excess of 8 consecutive hours that result from an applicant scheduling or requesting service beyond 8 hours, or if requests for additional shifts exceed existing staffing.

[3] Appeal and re-inspection services will be assessed the same fee as the original inspection service.

[4] Applicant must provide the test kit, instrument hardware, calibration control, and all supplies required by the test kit manufacturer.

[5] Tonnage fee is assessed on export grain inspected and/or weighed, excluding land carrier shipments to Canada and Mexico.

TABLE 2 OF SCHEDULE A—SERVICES PERFORMED AT OTHER THAN AN APPLICANT'S FACILITY IN AN FGIS LABORATORY [1 2]

(i) Original Inspection and Weighing (Class X) Services:	
(A) Sampling only (use hourly rates from Table 1 of this section):	
(B) Stationary lots (sampling, grade/factor, & check loading):	
(*1*) Truck/trailer/container (per carrier)	$21.40
(*2*) Railcar (per carrier)	31.60
(*3*) Barge (per carrier)	198.60
(*4*) Sacked grain (per hour per service representative plus an administrative fee per hundredweight) (CWT)	0.08
(C) Lots sampled online during loading (sampling charge under (1)(i) of this table, plus):	
(*1*) Truck/trailer container (per carrier)	12.80
(*2*) Railcar (per carrier)	26.70
(*3*) Barge (per carrier)	135.90
(*4*) Sacked grain (per hour per service representative plus an administrative fee per hundredweight) (CWT)	0.08
(D) Other services:	
(*1*) Submitted sample (per sample—grade and factor)	12.80
(*2*) Warehouseman inspection (per sample)	22.40
(*3*) Factor only (per factor—maximum 2 factors)	6.30
(*4*) Check loading/condition examination (use hourly rates from Table 1 of this section, plus an administrative fee per hundredweight if not previously assessed) (CWT)	0.08
(*5*) Re-inspection (grade and factor only. Sampling service additional, item (1)(i) of this table)	13.90
(*6*) Class X Weighing (per hour per service representative)	67.80
(E) Additional tests (excludes sampling):	
(*1*) Aflatoxin (rapid test kit method)	31.90
(*2*) Aflatoxin (rapid test kit method—applicant provides kit) [3]	30.00
(*3*) All other Mycotoxins (rapid test kit method)	41.00
(*4*) All other Mycotoxins (rapid test kit method—applicant provides kit) [3]	39.10
(*5*) NIR or NMR Analysis (protein, oil, starch, etc.)	10.80
(*6*) Waxy corn (per test)	10.80
(*7*) Canola (per test-00 dip test)	10.80
(*8*) Pesticide Residue Testing: [4]	
(*i*) Routine Compounds (per sample)	228.90
(*ii*) Special Compounds (Subject to availability)	122.00
(*9*) Fees for other tests not listed above will be based on the lowest noncontract hourly rate from Table 1 of this section	
(ii) Appeal inspection and review of weighing service: [5]	
(A) Board Appeals and Appeals (grade and factor)	86.90
(*1*) Factor only (per factor—max 2 factors)	45.80
(*2*) Sampling service for Appeals additional (hourly rates from Table 1 of this section)	
(B) Additional tests (assessed in addition to all other applicable tests):	
(*1*) Aflatoxin (rapid test kit method)	31.90
(*2*) Aflatoxin (rapid test kit method—applicant provides kit) [3]	29.80

TABLE 2 OF SCHEDULE A—SERVICES PERFORMED AT OTHER THAN AN APPLICANT'S FACILITY IN AN FGIS LABORATORY [1 2]—Continued

(*3*) All other Mycotoxins (rapid test kit method)	50.00
(*4*) All other Mycotoxins (rapid test kit method—applicant provides kit) [3]	48.10
(*5*) NIR or NMR Analysis (protein, oil, starch, etc.)	18.80
(*6*) Sunflower oil (per test)	18.80
(*7*) Mycotoxin (per test-HPLC)	149.40
(*8*) Pesticide Residue Testing: [4]	
(*i*) Routine Compounds (per sample)	228.90
(*ii*) Special Compounds (Subject to availability)	122.00
(*9*) Fees for other tests not listed above will be based on the lowest noncontract hourly rate from Table 1 of this section.	
(C) Review of weighing (per hour per service representative)	87.70
(iii) Stowage examination (service-on-request): [4]	
(A) Ship (per stowage space) (minimum $271.00 per ship)	54.20
(B) Subsequent ship examinations (same as original) (minimum $162.60 per ship)	54.20
(C) Barge (per examination)	43.50
(D) All other carriers (per examination)	17.10

[1] Fees apply to original inspection and weighing, re-inspection, and appeal inspection service and include, but are not limited to, sampling, grading, weighing, prior to loading stowage examinations, and certifying results performed within 25 miles of an employee's assigned duty station. Travel and related expenses will be charged for service outside 25 miles as found in § 800.72(a).

[2] An additional charge will be assessed when the revenue from the services in Schedule A, Table 2, does not cover what would have been collected at the applicable hourly rate as provided in § 800.72(b).

[3] Applicant must provide the test kit, instrument hardware, calibration control, and all supplies required by the test kit manufacturer.

[4] If performed outside of normal business, 1½ times the applicable unit fee will be charged.

[5] If, at the request of the Service, a file sample is located and forwarded by the Agency, the Agency may, upon request, be reimbursed at the rate of $3.50 per sample by the Service.

TABLE 3 OF SCHEDULE A—MISCELLANEOUS SERVICES [1]

(i) Grain grading seminars (per hour per service representative) [2]	$67.80.
(ii) Certification of diverter-type mechanical samplers (per hour per service representative) [2]	67.80.
(iii) Special weighing services (per hour per service representative): [2]	
(A) Scale testing and certification	88.30.
(B) Scale testing and certification of railroad track scales	88.30.
(C) Evaluation of weighing and material handling systems	88.30.
(D) NTEP Prototype evaluation (other than Railroad Track Scales)	88.30.
(E) NTEP Prototype evaluation of Railroad Track Scale	88.30.
(F) Use of GIPSA railroad track scale test equipment per facility for each requested service. (Track scales tested under the Association of American Railroads agreement are exempt.)	529.40.
(G) Mass standards calibration and re-verification	88.30.
(H) Special projects	88.30.
(iv) Foreign travel (hourly fee) [3]	88.30.
(v) Online customized data service:	
(A) One data file per week for 1 year	529.40.
(B) One data file per month for 1 year	317.70.
(v) Samples provided to interested parties (per sample)	3.30.
(vi) Divided-lot certificates (per certificate)	2.10.
(vii) Extra copies of certificates (per certificate)	2.10.
(viii) Faxing (per page)	2.10.
(ix) Special mailing	Actual Cost
(x) Preparing certificates onsite or during other than normal business hours (use hourly rates from Table 1)	

[1] Any requested service that is not listed will be performed at $67.80 per hour.

[2] Regular business hours—Monday through Friday—service provided at other than regular business hours will be charged at 11/2 times the applicable hourly rate. (See the definition of "business day" in § 800.0(b))

[3] Foreign travel charged hourly fee of $88.30 plus travel, per diem, and related expenditures.

* * * * *

Susan B. Keith,

Acting Administrator, Grain Inspection, Packers and Stockyards.

[FR Doc. 2016–31350 Filed 12–29–16; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AMS–SC–16–0076; SC16–983–2 FIR]

Pistachios Grown in California, Arizona, and New Mexico; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim rule that implemented a recommendation from the Administrative Committee for Pistachios (Committee) to decrease the assessment rate established for pistachios grown in California, Arizona, and New Mexico for the 2016–2017 and subsequent production years from

$0.0035 to $0.0010 per pound of assessed weight pistachios handled under the marketing order (order). The Committee locally administers the order and is comprised of producers and handlers of pistachios operating within the area of production. The interim rule was necessary to allow the Committee to reduce its financial reserve while still providing adequate funding to meet program expenses.

DATES: Effective December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Peter Sommers or Jeffrey Smutny, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: *PeterR.Sommers@ams.usda.gov* or *Jeffrey.Smutny@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses;* or by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 983), regulating the handling of pistachios grown in California, Arizona, and New Mexico, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

Under the order, pistachio handlers in California, Arizona, and New Mexico are subject to assessments, which provide funds to administer the order. Assessment rates issued under the order are intended to be applicable to all assessable pistachios grown in the production area for the entire production year, and continue indefinitely until amended, suspended, or terminated. The Committee's production year begins on September 1, and ends on August 31.

In an interim rule published in the **Federal Register** on September 16, 2016, and effective on September 19, 2016, (81 FR 63679, Doc. No. AMS–SC–16–0076, SC16–983–2 IR), § 983.253 was amended by decreasing the assessment rate established for pistachios grown in the production area for the 2016–2017 and subsequent production years from $0.0035 to $0.0010 per pound. The decrease in the per pound assessment rate allows the Committee to maintain its financial reserve while still providing adequate funding to meet program expenses.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 1,152 producers of pistachios in the production area and 19 handlers subject to regulation under the marketing order. The Small Business Administration defines small agricultural producers as those having annual receipts less than $750,000, and small agricultural service firms as those whose annual receipts are less than $7,500,000. (13 CFR 121.201)

The National Agricultural Statistics Service (NASS) 2012 data on pistachio farm size indicates that there were 1,305 pistachio farms, of which 1,125 were less than 250 acres. That is, 87 percent were too small to have annual receipts of $750,000. NASS 2015 annual production data indicates that the per-acre production of pistachios was 1,160 pounds. At an average value of $2.54 per pound, each acre of pistachios could return $2,948.40. In order for a producer to have $750,000 in annual receipts, the producer would have to have at least 255.3 acres. Thus, the majority of handlers and producers in the production area may be classified as small entities.

Based on Committee data, it is estimated that about 53 percent of the handlers annually ship less than $7,500,000 worth of pistachios. Nine of the 19 regulated handlers (47 percent) received enough pistachios at an average price of $3.00 pound to be considered large handlers, leaving the percentage of small handlers at 53 percent.

This rule continues in effect the action that decreased the assessment rate established for the Committee and collected from handlers for the 2016–17 and subsequent production years from $0.0035 to $0.0010 per pound of pistachios handled. The Committee unanimously recommended 2016–17 expenditures of $922,500 and an assessment rate of $0.0010 per pound of pistachios, which is $0.0025 lower than the 2015–16 rate. The quantity of assessable pistachios for the 2016–17 production year is estimated at 750 million pounds. Thus, the $0.0010 rate should provide $750,000 in assessment income. Income derived from handler's assessments, along with interest and funds from the Committee's authorized reserve, should be adequate to cover expenses for the 2016–17 production year.

This rule continues in effect the action that decreased the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Committee's meeting was widely publicized throughout the pistachio area of production and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 12, 2016, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0278. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large pistachio handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Comments on the interim rule were required to be received on or before November 15, 2016. No comments were received. Therefore, for reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *https://www.regulations.gov/docket?D=AMS-SC-16-0076.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866, 12988, 13175, and 13563; the Paperwork Reduction Act (44 U.S.C. Chapter 35); and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (81 FR 63679, September 16, 2016) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 983

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

■ Accordingly, the interim rule amending 7 CFR part 983, which was published at 81 FR 63679 on September 16, 2016, is adopted as a final rule, without change.

Dated: December 23, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–31532 Filed 12–29–16; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 9

[NRC–2016–0171]

RIN 3150–AJ84

Update To Incorporate FOIA Improvement Act of 2016 Requirements

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to reflect changes to the Freedom of Information Act (FOIA). The FOIA Improvement Act of 2016 requires the NRC to amend its FOIA regulations to update procedures for requesting information from the NRC and procedures that the NRC must follow in responding to FOIA requests.

DATES: This final rule is effective on January 30, 2017.

ADDRESSES: Please refer to Docket ID NRC–2016–0171 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0171. Address questions about NRC dockets to Carol Gallagher, telephone: 301–415–3463, email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Stephanie Blaney, telephone: 301–415–6975, email: *Stephanie.Blaney@nrc.gov;* or Nina Argent, telephone: 301–415–5295, email: *Nina.Argent@nrc.gov.* Both are staff of the Office of the Chief Information Officer of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

The FOIA was enacted to give the public a right to access records held by the executive branch that, although not classified, were not otherwise available to them. Since its enactment in 1966, the FOIA has been amended on a number of occasions to adapt to the times and changing priorities.

On June 30, 2016, the FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538 (the Act) was enacted. The Act specifically requires all agencies to review and update their FOIA regulations in accordance with its provisions. The Act addresses a range of procedural issues, including requiring that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process. The Act also amends Exemption 5, codifies the foreseeable harm standard, and adds two new elements to agency Annual FOIA Reports.

The NRC has identified the areas where the revisions are necessary in order to comply with the Act and is amending parts 2 and 9 of title 10 of the *Code of Federal Regulations* (10 CFR) accordingly.

II. Discussion of Amendments by Section

The following paragraphs describe the specific changes adopted by this rulemaking.

Section 2.390 Public Inspections, Exemptions, Requests for Withholding

This final rule revises paragraph (a)(5) to be identical to 10 CFR 9.17(a)(5), which this final rule is also revising to include new criteria for FOIA Exemption 5. The Act amended Exemption 5 of the FOIA to provide that the deliberative process privilege does not apply to records that are 25 years or older before the date on which they are requested.

Section 9.17 Agency Records Exempt From Public Disclosure

This final rule revises paragraph (a)(5) to include new criteria for FOIA Exemption 5. The Act amended Exemption 5 of the FOIA to provide that the deliberative process privilege does not apply to records that are 25 years or older before the date on which they are requested. This final rule redesignates paragraph (c) as paragraph (d) without change and adds a new paragraph (c) to incorporate the foreseeable harm standard that the Act codified and to include clarifying language derived from the Act about the FOIA's relationship to laws prohibiting disclosure of information.

Section 9.19 Segregation of Exempt Information and Deletion of Identifying Details

This final rule revises paragraph (b)(1) to change the reference § 9.17(a) to § 9.17, to account for the foreseeable harm threshold standard in the revised § 9.17(c) that applies to the exemptions listed in § 9.17(a).

Section 9.21 Publicly-Available Records

This final rule revises paragraph (c) introductory text to include available viewing formats. This final rule revises paragraph (c)(5) to include copies of records regardless of format, as well as adding paragraphs (c)(5)(i), (c)(5)(ii), (c)(5)(ii)(A) and (c)(5)(ii)(B). This revision is to codify frequently requested records.

Section 9.25 Initial Disclosure Determination

This final rule revises paragraph (c) to include requirements to make the NRC's FOIA Public Liaison available to assist in resolving any disputes and to notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS). This final rule revises paragraph (f) to change the reference to § 9.17(a) to § 9.17, to account for the foreseeable harm threshold standard in the revised § 9.17(c) that applies to the exemptions listed in § 9.17(a).

Section 9.27 Form and Content of Responses

This final rule (1) revises paragraph (a) to include a new requirement to notify the requester of the right to seek assistance from the NRC's FOIA Public Liaison; (2) revises paragraph (b)(5) to notify the requester they now have 90 calendar days to appeal; (3) adds paragraph (b)(6) to include a new requirement to notify the requester of the right to seek assistance from the NRC's FOIA Public Liaison; and (4) adds paragraph (b)(7) to include a new requirement to notify the requester of the right to seek dispute resolution services from the NRC's FOIA Public Liaison or OGIS.

Section 9.29 Appeal From Initial Determination

This final rule revises paragraph (a) to change the length of time to appeal from 30 calendar days to 90 calendar days.

Section 9.30 Contact for Dispute Resolution Services

This final rule adds new section 10 CFR 9.30 to include contact information for obtaining dispute resolution services from OGIS and the NRC's FOIA Public Liaison.

Section 9.39 Search and Duplication Provided Without Charge

This final rule adds new paragraph (f) to include new fee limitations for search and duplication.

Section 9.43 Processing Requests for a Waiver or Reduction of Fees

This final rule revises paragraph (d) to change the length of time to appeal from 30 calendar days to 90 calendar days.

Section 9.45 Annual Report to the Attorney General of the United States and Director of the Office of Government Information Services

This final rule (1) revises the section heading to include the Director of OGIS as a recipient of the annual FOIA report; (2) revises paragraph (a) to include the Director of OGIS as a recipient of the annual FOIA report and to replace the incomplete list of required contents of the report found in paragraphs (a)(1)–(8) with a reference to 5 U.S.C. 552(e)(1), which contains the full list of required contents of the report; and (3) revises the link where you can locate the NRC's annual FOIA reports.

III. Rulemaking Procedure

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), the NRC finds good cause to waive notice and opportunity for comment on the amendments. Notice and opportunity for comment are unnecessary, because the NRC is issuing this final rule for the limited purpose of complying with specific direction in the Act requiring agencies to update their FOIA regulations in accordance with the Act, and the final rule updates the NRC's FOIA regulations only as necessary to bring them into compliance with the Act.

IV. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

IV. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

V. Paperwork Reduction Act

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

VI. Congressional Review Act

This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information, Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 9

Administrative practice and procedure, Courts, Criminal penalties, Freedom of information, Government employees, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 2 and 9:

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C.

3504 note. Section 2.205(j) also issued under Sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note).

■ 2. In § 2.390, revise paragraph (a)(5) to read as follows:

§ 2.390 Public inspections, exemptions, requests for withholding.

(a) * * *

(5) Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

* * * * *

PART 9 — PUBLIC RECORDS

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

Authority: Atomic Energy Act of 1954, sec. 161 (42 U.S.C. 2201); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); 44 U.S.C. 3504 note. Subpart A also issued under 31 U.S.C. 9701. Subpart B also issued under 5 U.S.C. 552a. Subpart C also issued under 5 U.S.C. 552b.

■ 4. In § 9.17, revise paragraph (a)(5), redesignate paragraph (c) as paragraph (d), and add new paragraph (c) to read as follows:

§ 9.17 Agency records exempt for public disclosure.

(a) * * *

(5) Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

* * * * *

(c)(1) The NRC shall withhold information under this subpart only if—

(i) The NRC reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (a) of this section; or

(ii) Disclosure is prohibited by law.

(2) Nothing in this subpart requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under 5 U.S.C. 552(b)(3).

* * * * *

§ 9.19 [Amended]

■ 5. In § 9.19(b)(1), remove ''(a)'' after ''§ 9.17''.

■ 6. In § 9.21, revise the introductory text of paragraph (c) and paragraph (c)(5) to read as follows:

§ 9.21 Publicly available records.

* * * * *

(c) The following records of NRC activities are available for public inspection in an electronic format:

* * *

(5) Copies of all records, regardless of form or format—

(i) That have been released to any person under § 9.23; and

(ii)(A) That because of the nature of their subject matter, the NRC determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(B) That have been requested 3 or more times;

* * * * *

■ 7. In § 9.25, revise paragraph (c) and in the first sentence in paragraph (f) remove ''(a)'' after ''§ 9.17''. The revision to read as follows:

§ 9.25 Initial disclosure determination.

* * * * *

(c) *Exceptional circumstances.* A requester may be notified in certain exceptional circumstances, when it appears that a request cannot be completed within the allowable time, and will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing. When notifying a requester under this paragraph, the NRC, to aid the requester, shall make available its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the agency and shall notify the requester of the requester's right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration. For purposes of this paragraph, the term ''exceptional circumstances'' does not include delays that result from the normal predictable workload of FOIA requests or a failure by the NRC to exercise due diligence in processing the request. A requester's unwillingness to agree to reasonable modification of the request or an alternative time for processing the request may be considered as factors in determining whether exceptional circumstances exist and whether the agency exercised due diligence in responding to the request.

* * * * *

■ 8. In § 9.27, revise add a second sentence to paragraph (a), in paragraph (b)(5) remove the number ''30'' and add in its place the number ''90'', and add paragraphs (b)(6) and (7).

The revision and additions to read as follows:

§ 9.27 Form and content of responses.

(a) * * * The NRC's response will notify the requester of the requester's right to seek assistance from the NRC's FOIA Public Liaison. * * *

(b) * * *

(6) A statement that the requester has a right to seek assistance from the NRC's FOIA Public Liaison; and

(7) A statement that the requester has a right to seek dispute resolution services from the NRC's FOIA Public Liaison or the Office of Government Information Services within the National Archives and Records Administration.

* * * * *

§ 9.29 [Amended]

■ 9. In § 9.29(a) remove the number ''30'' and add in its place the number ''90''.

■ 10. Add § 9.30 to read as follows:

§ 9.30 Contact for dispute resolution services.

(a) NRC's FOIA Public Liaison:

(1) By mail—11555 Rockville Pike, Rockville, MD 20852;

(2) By facsimile—301–415–5130; and

(3) By email—*FOIA.Resource@nrc.gov.*

(b) Office of Government Information Services within National Archives and Records Administration:

(1) By mail—8601 Adelphi Road-OGIS, College Park, MD 20740;

(2) By facsimile—202–741–5769; and

(3) By email—*ogis@nara.gov.*

■ 11. In § 9.39, add paragraph (f) to read as follows:

§ 9.39 Search and duplication provided without charge.

* * * * *

(f)(1) Except as described in paragraphs (f)(2), (3), and (4) of this section, if the NRC fails to comply with any time limit under §§ 9.25 or 9.29, it may not charge search fees or, in the case of requests from requesters described in § 9.33(a)(2), may not charge duplication fees.

(2) If the NRC has determined that unusual circumstances, as defined in § 9.13, apply and the NRC provided timely written notice to the requester in accordance with the Freedom of Information Act, a failure to comply with the time limit shall be excused for an additional 10 days.

(3) If the NRC has determined that unusual circumstances, as defined in § 9.13, apply and more than 5,000 pages are necessary to respond to the request, the NRC may charge search fees or, in the case of requests from requesters described in § 9.33(a)(2), may charge duplication fees, if the NRC has

provided timely written notice to the requester in accordance with the Freedom of Information Act and the NRC has discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(4) If a court has determined that exceptional circumstances exist, as defined by 5 U.S.C. 552(a)(6)(C), a failure to comply with the time limit shall be excused for the length of time provided by the court order.

§ 9.43 [Amended]

■ 12. In § 9.43(d), remove the number ''30'' and add in its place the number ''90''.

■ 13. Revise § 9.45 to read as follows:

§ 9.45 Annual report to the Attorney General of the United States and Director of the Office of Government Information Services.

(a) On or before February 1 of each year, the NRC will submit a report covering the preceding fiscal year to the Attorney General of the United States and to the Director of the Office of Government Information Services which shall include the information required by 5 U.S.C. 552(e)(1).

(b) The NRC will make its annual FOIA reports available to the public at the NRC Web site, *http://www.nrc.gov.*

Dated at Rockville, Maryland, this 15th day of December, 2016.

For the Nuclear Regulatory Commission.

Michael R. Johnson,

Acting Executive Director for Operations.

[FR Doc. 2016–31595 Filed 12–29–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 140

[NRC–2016–0164]

RIN 3150–AJ81

Increase in the Maximum Amount of Primary Nuclear Liability Insurance

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to increase the required amount [1] of primary nuclear liability insurance from $375 million to $450 million for each nuclear reactor that is licensed to operate, is designed for the production of electrical energy, and has a rated capacity of 100,000 electrical kilowatts or more. This change conforms to the provision in the Price-Anderson Amendments Act of 1988 (Pub. L. 100–408) (Price-Anderson Act) that the amount of primary financial protection required of licensees by the NRC shall be the maximum amount available at reasonable cost and on reasonable terms from private sources.

DATES: *Effective Date:* This final rule is effective on January 1, 2017.

ADDRESSES: Please refer to Docket ID NRC–2016–0164 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0164. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Natreon Jordan, Office of Nuclear Reactor Regulation, telephone: 301–415–7410, email: *Natreon.Jordan@nrc.gov;* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Discussion

The NRC's regulations in part 140 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Financial Protection Requirements and Indemnity Agreements,'' provide requirements and procedures for implementing the financial protection requirements for certain licensees and other persons under the Price-Anderson Act, incorporated as Section 170 of the Atomic Energy Act of 1954, as amended (AEA). The Price-Anderson Act states that, for each nuclear reactor that is licensed to operate, is designed for the production of electrical energy, and has a rated capacity of 100,000 electrical kilowatts or more (henceforth referred to as large operating reactors), ''the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources.'' (Section 170(b) of the AEA) This requirement of the Price-Anderson Act is implemented in the NRC's regulations at § 140.11(a)(4), ''Amounts of financial protection for certain reactors.'' The current maximum amount of primary financial protection available from private sources is $375 million. Therefore, § 140.11(a)(4) currently requires large commercial operating reactors to have and maintain primary nuclear liability insurance in the amount of $375 million.

On June 15, 2016, American Nuclear Insurers (ANI), the underwriter of American nuclear liability policies, acting on behalf of its member companies, notified the NRC that it will be increasing ''its maximum available primary nuclear liability limit from $375 million to $450 million, effective on January 1, 2017'' (ADAMS Accession No. ML16239A254). The ANI makes such adjustments on a non-periodic basis. The last such adjustment was made in 2010, and the NRC revised § 140.11 to reflect the increased maximum available amount of primary nuclear liability insurance (75 FR 16645; April 2, 2010).

[1] The title listed in the information submitted by the NRC for the *Unified Agenda* was ''Increase in the Maximum Limit of Primary Nuclear Liability Insurance.'' The title was changed here to reflect that the regulation makes reference to ''Maximum Amount.'' The use of the term ''Maximum Limit'' is an incorrect description of the statutory requirement and the regulation revision.

To implement this adjustment, in accordance with the Price-Anderson Act, the NRC is revising 10 CFR part 140 to require large operating reactors to have and maintain $450 million in primary financial protection.

The NRC is not currently revising the appendices in § 140.91, § 140.92, or § 140.93 that provide general forms of liability policies and indemnity agreements that were determined to be acceptable to the Commission. These appendices include historical insurance providers and protection amounts for primary liability insurance that are no longer in use (for example, values of $124 million and $36 million from the 1979 final rule (44 FR 20632; April 6, 1979) and values of $200 million, $155 million, and $45 million from the 1989 final rule (54 FR 24157; June 6, 1989)). However, these appendices continue to provide relevant general forms of policies and agreements.

II. Rulemaking Procedure

This final rule is being issued without prior public notice or opportunity for public comments. The Administrative Procedure Act (5 U.S.C. 553(b)(B)) does not require an agency to use the public notice and comment process ''when 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.'' In this instance, the NRC finds, for good cause, that solicitation of public comment on this final rule is unnecessary because the Price-Anderson Act requires a non-discretionary adjustment in the maximum amount required for primary nuclear liability insurance. Requesting public comment on this non-discretionary adjustment, which is required by statute, would not result in a change to the adjusted amount.

III. Section-By-Section Analysis

The following paragraphs describe the specific changes that are reflected in this final rule.

Section 140.11 Amounts of Financial Protection for Certain Reactors

In paragraph (a)(4), this final rule removes ''$375,000,000'' and replaces it with the increased maximum amount of primary nuclear liability insurance of ''$450,000,000.''

IV. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the NRC certifies that this final rule does not have a significant economic impact on a substantial number of small entities. This final rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

V. Regulatory Analysis

A regulatory analysis was not prepared for this final rule because the change in the maximum amount of nuclear liability insurance is mandated by the Price-Anderson Act.

VI. Backfit and Issue Finality

The NRC has determined that the backfit rule does not apply to this final rule. A backfit analysis is not required for this final rule because this amendment is mandated by the Price-Anderson Act.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

VIII. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

IX. Paperwork Reduction Act

This final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget (OMB), approval number 3150–0039.

Public Protection Notification

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

X. Congressional Review Act

This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects in 10 CFR Part 140

Criminal penalties, Extraordinary nuclear occurrence, Insurance, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 140.

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

■ 1. The authority citation for part 140 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 161, 170, 223, 234 (42 U.S.C. 2201, 2210, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

■ 2. In § 140.11, paragraph (a)(4) is revised to read as follows:

§ 140.11 Amounts of financial protection for certain reactors.

(a) * * *

(4) In an amount equal to the sum of $450,000,000 and the amount available as secondary financial protection (in the form of private liability insurance available under an industry retrospective rating plan providing for deferred premium charges equal to the pro rata share of the aggregate public liability claims and costs, excluding costs payment of which is not authorized by section 170o.(1)(D) of the Act, in excess of that covered by primary financial protection) for each nuclear reactor which is licensed to operate and which is designed for the production of electrical energy and has a rated capacity of 100,000 electrical kilowatts or more: Provided, however, that under such a plan for deferred premium charges for each nuclear reactor that is licensed to operate, no more than $121,255,000 with respect to any nuclear incident (plus any surcharge assessed under subsection 170o.(1)(E) of the Act) and no more than $18,963,000 per incident within one calendar year shall be charged. *Except that,* where a person is authorized to operate a combination of 2 or more nuclear reactors located at a single site, each of which has a rated capacity of 100,000 or more electrical kilowatts but not more than 300,000 electrical kilowatts with a combined rated

capacity of not more than 1,300,000 electrical kilowatts, each such combination of reactors shall be considered to be a single nuclear reactor for the sole purpose of assessing the applicable financial protection required under this section.

* * * * *

Dated at Rockville, Maryland, this 15th day of December 2016.

For the Nuclear Regulatory Commission.

Michael R. Johnson,

Acting Executive Director for Operations.

[FR Doc. 2016–31368 Filed 12–29–16; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 207, 218, 429, 431, 490, 501, 601, 820, 824, 851, 1013, 1017, and 1050

RIN 1990–AA46

Inflation Adjustment of Civil Monetary Penalties

AGENCY: Office of the General Counsel, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (''DOE'') publishes this final rule to adjust DOE's civil monetary penalties (''CMPs'') for inflation as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (collectively referred to herein as ''the Act''). This rule adjusts CMPs within the jurisdiction of DOE to the maximum amount required by the Act.

DATES: This rule is effective December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Preeti Chaudhari, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–8078.

SUPPLEMENTARY INFORMATION:

I. Background

In order to improve the effectiveness of CMPs and to maintain their deterrent effect, the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (''the Inflation Adjustment Act''), as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74) (''the 2015 Act''), requires Federal agencies to adjust each CMP provided by law within the jurisdiction of the agency. The 2015 Act requires agencies to adjust the level of CMPs with an initial ''catch-up'' adjustment through an interim final rulemaking and to make subsequent annual adjustments for inflation, notwithstanding 5 U.S.C. 553. DOE's initial catch-up adjustment interim final rule was published June 28, 2016 (81 FR 41790). DOE received no public comments in response to the interim final rule. The interim final rule is today adopted as final without amendment. The 2015 Act also provides that any increase in a CMP shall apply only to CMPs, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

In accordance with the 2015 Act, OMB issued a guidance memorandum on the implementation of the 2017 annual adjustment pursuant to the 2015 Act.[1] This final rule is issued in accordance with applicable law and the OMB guidance memorandum.

II. Method of Calculation

The method of calculating CMP adjustments applied in this final rule is required by the 2015 Act. Under the 2015 Act, annual inflation adjustments subsequent to the initial catch-up adjustment are to be based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year's October CPI–U. Pursuant to the aforementioned OMB guidance memorandum, the adjustment multiplier for 2017 is 1.01636. In order to complete the 2017 annual adjustment, each CMP is multiplied by the 2017 adjustment multiplier. Under the 2015 Act, any increase in CMP must be rounded to the nearest multiple of $1.

III. Summary of the Final Rule

The following list summarizes DOE authorities containing CMPs, and the penalties before and after adjustment.

DOE Authority containing civil monetary penalty	Before adjustment	After adjustment
10 CFR 207.7	$10,000	$10,164.
10 CFR 218.42	21,661	22,015.
10 CFR 429.120	433	440.
10 CFR 431.382	433	440.
10 CFR 490.604	8,386	8,523.
10 CFR 501.181	—88,613	—90,063.
	—8/mcf	—8/mcf.
	—35/bbl	—36/bbl.
10 CFR 601.400 and App A	—minimum 18,936	—minimum 19,246
	—maximum 189,361	—maximum 192,459.
10 CFR 820.81	197,869	201,106.
10 CFR 824.1 and App A	141,402	143,715.
10 CFR 824.4 and App A	141,402	143,715.
10 CFR 851.5 and App B	91,830	93,332.
10 CFR 1013.3	10,781	10,957.
10 CFR 1017.29	254,645	258,811.
10 CFR 1050.303	19,305	19,621.
50 U.S.C. 2731[2]	8,655	8,797.

[1] The guidance memorandum was issued on December 16, 2016, provides the 2017 adjustment multiplier, and addresses how to apply it.

[2] Implemented by 10 CFR 820.81, 10 CFR 851.5, and appendix B to 10 CFR part 851.

IV. Final Rulemaking

The 2015 Act requires that annual adjustments for inflation subsequent to the initial ''catch-up'' adjustment be made notwithstanding 5 U.S.C. 553.

V. Regulatory Review

A. Executive Order 12866

This rule has been determined not to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. National Environmental Policy Act

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of Appendix A to Subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment. As discussed above, the 2015 Act requires that annual inflation adjustments subsequent to the initial catch-up adjustment be made notwithstanding 5 U.S.C. 553. Because a notice of proposed rulemaking is not required for this action pursuant to 5 U.S.C. 553, or any other law, no regulatory flexibility analysis has been prepared for this final rule.

D. Paperwork Reduction Act

This final rule imposes no new information collection requirements subject to the Paperwork Reduction Act.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 201 excepts agencies from assessing effects on State, local or tribal governments or the private sector of rules that incorporate requirements specifically set forth in law. Because this rule incorporates requirements specifically set forth in 28 U.S.C. 2461 note, DOE is not required to assess its regulatory effects under Section 201. Unfunded Mandates Reform Act sections 202 and 205 do not apply to today's action because they apply only to rules for which a general notice of proposed rulemaking is published. Nevertheless, DOE has determined that this regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the public sector.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and 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. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

L. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 207

Administrative practice and procedure, Energy, Penalties.

10 CFR Part 218

Administrative practice and procedure, Penalties, Petroleum allocation.

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practices and procedure, Confidential business information, Energy conservation, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 490

Administrative practice and procedure, Energy conservation, Penalties.

10 CFR Part 501

Administrative practice and procedure, Electric power plants, Energy conservation, Natural gas, Petroleum.

10 CFR Part 601

Government contracts, Grant programs, Loan programs, Penalties.

10 CFR Part 820

Administrative practice and procedure, Government contracts, Penalties, Radiation protection.

10 CFR Part 824

Government contracts, Nuclear materials, Penalties, Security measures.

10 CFR Part 851

Civil penalty, Hazardous substances, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

10 CFR Part 1013

Administrative practice and procedure, Claims, Fraud, Penalties.

10 CFR Part 1017

Administrative practice and procedure, Government contracts, National Defense, Nuclear Energy, Penalties, Security measures.

10 CFR Part 1050

Decorations, medals, awards, Foreign relations, Government employees, Government property, Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 20, 2016.

Steven Croley,

General Counsel.

For the reasons set forth in the preamble, DOE amends chapters II, III, and X of title 10 of the Code of Federal Regulations as set forth below.

PART 207—COLLECTION OF INFORMATION

■ 1. The authority citation for part 207 continues to read as follows:

Authority: 15 U.S.C. 787 *et seq.;* 15 U.S.C. 791 *et seq.;* E.O. 11790, 39 FR 23185; 28 U.S.C. 2461 note.

■ 2. Section 207.7 is amended by revising the first sentence of paragraph (c)(1) to read as follows:

§ 207.7 Sanctions.

* * * * *

(c) * * * (1) Any person who violates any provision of this subpart or any order issued pursuant thereto shall be subject to a civil penalty of not more than $10,164 for each violation. * * *

* * * * *

PART 218—STANDBY MANDATORY INTERNATIONAL OIL ALLOCATION

■ 3. The authority citation for part 218 continues to read as follows:

Authority: 15 U.S.C. 751 *et seq.;* 15 U.S.C. 787 *et seq.;* 42 U.S.C. 6201 *et seq.;* 42 U.S.C. 7101 *et seq.;* E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 4. Section 218.42 is amended by revising paragraph (b)(1) to read as follows:

§ 218.42 Sanctions.

* * * * *

(b) * * * (1) Any person who violates any provision of this part 218 or any order issued pursuant thereto shall be subject to a civil penalty of not more than $22,015 for each violation.

* * * * *

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 5. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 6. Section 429.120 is amended by revising the first sentence to read as follows:

§ 429.120 Maximum civil penalty.

Any person who knowingly violates any provision of § 429.102(a) may be subject to assessment of a civil penalty of no more than $440 for each violation. * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 7. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 8. Section 431.382 is amended by revising paragraph (b) to read as follows:

§ 431.382 Prohibited acts.

* * * * *

(b) In accordance with sections 333 and 345 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $440 for each violation.

* * * * *

PART 490—ALTERNATIVE FUEL TRANSPORTATION PROGRAM

■ 9. The authority citation for part 490 continues to read as follows:

Authority: 42 U.S.C. 7191 *et seq.;* 42 U.S.C. 13201, 13211, 13220, 13251 *et seq;* 28 U.S.C. 2461 note.

■ 10. Section 490.604 is amended by revising paragraph (a) to read as follows:

§ 490.604 Penalties and Fines.

(a) *Civil Penalties.* Whoever violates § 490.603 of this part shall be subject to a civil penalty of not more than $8,523 for each violation.

* * * * *

PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

■ 11. The authority citation for part 501 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 8301 *et seq.;* 42 U.S.C. 8701 *et seq.;* E.O. 12009, 42 FR 46267; 28 U.S.C. 2461 note.

■ 12. Section 501.181 is amended by revising paragraph (c)(1) to read as follows:

§ 501.181 Sanctions.

* * * * *

(c) * * * (1) Any person who violates any provisions of the Act (other than section 402) or any rule or order thereunder will be subject to the following civil penalty, which may not exceed $90,063 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of up to $8 for each MCF of natural gas or up to $36 for each barrel of oil used in excess of that authorized in the exemption.

* * * * *

PART 601—NEW RESTRICTIONS ON LOBBYING

■ 13. The authority citation for part 601 continues to read as follows:

Authority: 31 U.S.C. 1352; 42 U.S.C. 7254 and 7256; 31 U.S.C. 6301–6308; 28 U.S.C. 2461 note.

■ 14. Section 601.400 is amended by revising paragraphs (a), (b) and (e) to read as follows:

§ 601.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B to this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

* * * * *

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $19,246, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $19,246 and $192,459, as determined by the agency head or his or her designee.

* * * * *

■ 15. Appendix A to part 601 is amended by:

■ a. Revising the last sentence of the second undesignated paragraph, in paragraph (3) of the section entitled, ‘‘Certification for Contracts, Grants, Loans, and Cooperative Agreements’’; and

■ b. Revising the last sentence of the third undesignated paragraph, in the section entitled, ‘‘Statement for Loan Guarantees and Loan Insurance’’.

The revisions read as follows:

Appendix A to Part 601—Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

* * * * *

(3) * * *

* * * Any person who fails to file the required certification shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

Statement for Loan Guarantees and Loan Insurance

* * * * *

* * * Any person who fails to file the required statement shall be subject to a civil penalty of not less than $19,246 and not more than $192,459 for each such failure.

PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

■ 16. The authority citation for part 820 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282(a); 7191; 28 U.S.C. 2461 note; 50 U.S.C. 2410.

■ 17. Section 820.81 is amended by revising the first sentence to read as follows:

§ 820.81 Amount of penalty.

Any person subject to a penalty under 42 U.S.C. 2282a shall be subject to a civil penalty in an amount not to exceed $201,106 for each such violation. * * *

PART 824—PROCEDURAL RULES FOR THE ASSESSMENT OF CIVIL PENALTIES FOR CLASSIFIED INFORMATION SECURITY VIOLATIONS

■ 18. The authority citation for part 824 continues to read as follows:

Authority: 42 U.S.C. 2201, 2282b, 7101 *et seq.,* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 19. Section 824.1 is amended by revising the second sentence to read as follows:

§ 824.1 Purpose and scope.

* * * Subsection a. provides that any person who has entered into a contract or agreement with the Department of Energy, or a subcontract or subagreement thereto, and who violates (or whose employee violates) any applicable rule, regulation or order under the Act relating to the security or safeguarding of Restricted Data or other classified information, shall be subject to a civil penalty not to exceed $143,715 for each violation. * * *

■ 20. Section 824.4 is amended by revising paragraph (c) to read as follows:

§ 824.4 Civil penalties.

* * * * *

(c) The Director may propose imposition of a civil penalty for violation of a requirement of a regulation or rule under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $143,715 for each violation.

* * * * *

PART 851—WORKER SAFETY AND HEALTH PROGRAM

■ 21. The authority citation for part 851 continues to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.;* 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 22. Section 851.5 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 851.5 Enforcement.

(a) A contractor that is indemnified under section 170d. of the AEA (or any subcontractor or supplier thereto) and that violates (or whose employee violates) any requirement of this part shall be subject to a civil penalty of up to $93,332 for each such violation. * * *

* * * * *

■ 23. Appendix B to part 851 is amended by:

■ a. Revising the last sentences of paragraphs (b)(1) and (2) in section VI; and

■ b. Revising paragraph 1.(e)(1) in section IX.

The revisions read as follows:

Appendix B to Part 851—General Statement of Enforcement Policy

* * * * *

VI. Severity of Violations

* * * * *

(b) * * *

(1) * * * A Severity Level I violation would be subject to a base civil penalty of up to 100% of the maximum base civil penalty of $93,332.

(2) * * * A Severity Level II violation would be subject to a base civil penalty up

to 50% of the maximum base civil penalty ($46,666).

* * * * *

IX. Enforcement Actions

* * * * *

1. Notice of Violation

* * * * *

(e) * * *

(1) DOE may assess civil penalties of up to $93,332 per violation per day on contractors (and their subcontractors and suppliers) that are indemnified by the Price-Anderson Act, 42 U.S.C. 2210(d). *See* 10 CFR 851.5(a).

* * * * *

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

■ 24. The authority citation for part 1013 continues to reads as follows:

Authority: 31 U.S.C. 3801–3812; 28 U.S.C. 2461 note.

■ 25. Section 1013.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

§ 1013.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $10,957 for each such claim.

* * * * *

(b) * * *

(1) * * *

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $10,957 for each such statement.

* * * * *

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

■ 26. The authority citation for part 1017 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 42 U.S.C. 2168; 28 U.S.C. 2461 note.

■ 27. Section 1017.29 is amended by revising paragraph (c) to read as follows:

§ 1017.29 Civil penalty.

* * * * *

(c) *Amount of penalty.* The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed $258,811 for each violation.

* * * * *

PART 1050—FOREIGN GIFTS AND DECORATIONS

■ 28. The authority citation for part 1050 continues to read as follows:

Authority: The Constitution of the United States, Article I, Section 9; 5 U.S.C. 7342; 22 U.S.C. 2694; 42 U.S.C. 7254 and 7262; 28 U.S.C. 2461 note.

■ 29. Section 1050.303 is amended by revising the last sentence in paragraph (d) to read as follows:

§ 1050.303 Enforcement.

* * * * *

(d) * * * The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $19,621.

[FR Doc. 2016–31035 Filed 12–29–16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 7

[Docket ID OCC–2016–0022]

RIN 1557–AD93

Industrial and Commercial Metals

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Final rule.

SUMMARY: The OCC is finalizing a rule to prohibit national banks and federal savings associations from dealing or investing in industrial or commercial metals.

DATES: This final rule is effective April 1, 2017.

FOR FURTHER INFORMATION CONTACT: Casey Scott Laxton, Counsel, or Margo Dey, Counsel, Securities and Corporate Practices Division, (202) 649–5510; Carl Kaminski, Special Counsel, Legislative and Regulatory Activities Division, (202) 649–5490; or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, 400 7th Street SW., Washington, DC 22019.

SUPPLEMENTARY INFORMATION:

I. Background

In September 2016, the OCC issued a Notice of Proposed Rulemaking (NPRM) to prohibit national banks from dealing or investing in industrial or commercial metals.[1] The OCC proposed to: (i) Exclude industrial and commercial metals from the terms ''exchange,'' ''coin,'' and ''bullion'' in the ''powers clause'' of the National Bank Act at 12 U.S.C. 24(Seventh); and (ii) provide that dealing or investing in industrial or commercial metal is not part of, or incidental to, the business of banking. The proposed prohibitions were generally consistent with recommendations made by the U.S. Senate Permanent Subcommittee on Investigations in 2014,[2] as well as recommendations described in a September 2016 report to the U.S. Congress and the Financial Stability Oversight Council (FSOC) prepared by the OCC, the Board of Governors of the Federal Reserve System (''Board''), and the Federal Deposit Insurance Corporation pursuant to section 620 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[3]

A national bank may engage in activities that are part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh). Section 24(Seventh) lists several activities that are part of the business of banking; for example, it expressly provides that national banks may buy and sell exchange, coin, and bullion. In addition to these enumerated powers, section 24(Seventh) authorizes national banks to exercise all such incidental powers as shall be necessary to carry on the business of banking. National banks also are authorized to engage in any other activities not expressly enumerated in the statute that the Comptroller of the Currency

[1] 81 FR 63428 (Sept. 15, 2016).

[2] ''Wall Street Bank Involvement with Physical Commodities,'' U.S. Senate Permanent Subcommittee on Investigations, *available at: http://www.hsgac.senate.gov/download/report-wall-street-involvement-with-physical-commodities* (''PSI Report'').

[3] ''Report to Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act,'' at 86–90 (September 2016), *available at: https://www.occ.gov/news-issuances/news-releases/2016/nr-ia-2016–107a.pdf* (''620 Study''). Section 620 of the Dodd-Frank Act required the federal banking agencies to conduct a study and prepare a report, including recommendations, on the types of activities and investments permissible for banking entities, the associated risks, and how banking entities mitigate those risks. In a parallel action, the Board also issued a proposed rule in September 2016. The proposed Board rule addressed the physical commodities activities and investments of banking holding companies and financial holding companies, including copper. *Risk-Based Capital and Other Regulatory Requirements for Activities of Financial Holding Companies Related to Physical Commodities and Risk-Based Capital Requirements for Merchant Banking Investments,* 81 FR 67220 (Sept. 30, 2016).

reasonably determines are part of the business of banking.[4]

In Interpretive Letter 693,[5] issued approximately twenty-one years ago, the OCC authorized national banks to buy and sell copper on the grounds that trading copper was becoming increasingly similar to trading gold, silver, platinum, and palladium. The letter observed that copper was traded in liquid markets; that it was traded in a form standardized as to weight and purity; and that the bank seeking authority to engage in the activity traded copper under policies and procedures similar to those that governed the bank's trading of precious metals. The letter concluded that national banks could buy and sell copper under the express authority to buy and sell coin and bullion and as part of or incidental to the business of banking. The scope of the authorization in Interpretive Letter 693 was sufficiently broad to permit national banks to buy and sell copper in the form of cathodes, which are used for industrial purposes.

In the NPRM, the OCC proposed to reconsider the interpretation set forth in Interpretive Letter 693.

Now, the OCC is finalizing the NPRM and revising its regulations to prohibit national banks from dealing and investing in a metal (or alloy), including copper, in a form primarily suited to industrial or commercial use (industrial or commercial metal).[6] The OCC has added a divestiture period to the final rule, provided clarifying language to the dealing and investing prohibition for national banks, and clarified federal savings associations' (FSA) authority to engage in activity that is not dealing or investing, but is otherwise finalizing the NPRM as proposed. The final rule: (i) Excludes industrial and commercial metals from the terms ''exchange,'' ''coin,'' and ''bullion'' in 12 U.S.C. 24(Seventh); and (ii) provides that dealing or investing in industrial or commercial metal is not part of, or incidental to, the business of banking. Examples of metals and alloys in a form primarily suited for industrial or commercial use include copper cathodes, aluminum T-bars, and gold jewelry. For the reasons stated in this preamble, the OCC has concluded that dealing or investing in these metals is not appropriate for national banks. The final rule supersedes Interpretive Letter 693.[7]

The final rule also applies to FSAs. The Home Owners' Loan Act does not expressly authorize FSAs to buy or sell exchange, coin, and bullion.[8] While FSAs have incidental authority to buy and sell precious metals in certain cases and to sell gold and silver coins minted by the U.S. Treasury, the OCC has not identified any precedent authorizing FSAs to buy and sell any industrial or commercial metal.[9] The OCC does not interpret FSAs' powers to buy and sell metals to be broader than those of national banks.[10] To avoid doubt, and to further integrate national bank and FSA regulations, the final rule prohibits FSAs from dealing or investing in industrial or commercial metal.[11]

II. Summary of the Comments on the Notice of Proposed Rulemaking

The OCC received four comments on the NPRM. Two comments were from financial industry trade associations and two were from individuals. While the comments generally were supportive of the NPRM, the trade association commenters requested that the OCC confirm the permissibility of certain lending and leasing transactions involving physical metals and expressed concern about the potential impact of the rulemaking on the liquidity of the copper market. A detailed discussion of the commenters' concerns and the OCC's response follows.

A. Prohibition on Dealing and Investing for Industrial and Commercial Metal (Including Copper)

Two commenters offered general views on the proposed dealing and investing prohibition for industrial and commercial metal, including copper, under the proposed rule. One was generally supportive of the NPRM's treatment of copper cathodes as an industrial and commercial metal. This commenter noted the proposal was consistent with banks' treatment of copper, as banks currently buy and sell copper based on its value for industrial and commercial purposes rather than as a store of value. The commenter also offered additional support for the rulemaking, noting that banks that own copper are exposed to large fluctuations in copper prices, encounter potential conflicts of interest between house positions and client positions, and may be able to manipulate copper markets through large physical positions. This commenter asserted that the proposed treatment is appropriate because bank copper trading activities more closely resemble commercial enterprises rather than a banking business. The commenter pointed to the PSI Report and 620 Study to support these comments.

The second commenter expressed concern that the OCC has not demonstrated a compelling reason to change its 1995 copper interpretation. The commenter argued that the reasons the OCC approved copper activities in Interpretive Letter 693 are still valid today and that the OCC should not pursue the rulemaking in the absence of a compelling need or corresponding regulatory benefit. After carefully considering these comments, the OCC continues to believe that dealing or investing in copper cathodes, and other industrial or commercial metal, is not appropriate for national banks. As the OCC explained in the NPRM, events subsequent to Interpretive Letter 693 have confirmed copper is a base metal and thus, should be distinguished from precious metals that are not held in industrial or commercial form.[12] For example, in 2000, the London Metals Exchange (''LME'') introduced a futures contract on a base metal index containing copper, aluminum, and

[4] NationsBank of N.C., N.A. v. Var. Ann. Life. Ins. Co. (VALIC), 513 U.S. 251, 258–59 (1995).

[5] 1995 WL 788816 (Nov. 14, 1995).

[6] The OCC considers the definition of *industrial or commercial metal* to include a warehouse receipt for such metal.

[7] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (agency reconsiderations of prior interpretations entitled to judicial deference so long as the agency adequately explains the reasons for the change); Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983) (''agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' '').

[8] *See* 12 U.S.C. 1464(c).

[9] *See, e.g.,* OTS Op. Ch. Couns. P–2006–1 (Mar. 6, 2006), 2006 WL 6195026 (engaging in precious metal transactions on behalf of customers); Gold Bullion Coin Transactions, 51 FR 34950 (Oct. 1, 1986); Letter from Jack D. Smith, Deputy General Counsel, Federal Home Loan Bank Board, 1988 WL 1021651 (May 18, 1988). All precedents (orders, resolutions, determinations, agreements, regulations, interpretive rules, interpretations, guidelines, procedures, and other advisory materials) made, prescribed, or allowed to become effective by the former Office of Thrift Supervision or its Director that apply to FSAs remain effective until the OCC modifies, terminates, sets aside, or supersedes those precedents. 12 U.S.C. 5414(b).

[10] *See* OTS Op. Ch. Couns. P–2006–1 (Mar. 6, 2006), 2006 WL 6195026 (permissibility of FSA metal activity is evaluated under a four-part test referencing the activities of national banks).

[11] The final rule indirectly applies to federal branches and agencies of foreign banks because they operate with the same rights and privileges (and subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations) as national banks. 12 CFR 28.13(a)(1). The final rule also indirectly applies to insured state banks and state savings associations. *See* 12 U.S.C. 1831a, 1831e.

[12] 81 FR 63430, n.21.

zinc.[13] In 2006, the LME followed with ''mini'' futures for copper, aluminum and zinc. By contrast, firms have launched exchange-traded funds (ETFs) that invest solely in gold, silver, palladium, platinum, or some combination thereof, indicating a widespread belief that these metals are a store of value. The OCC notes there are no copper ETFs. In addition, the OCC understands that national banks that trade copper treat it as a base metal and trade it alongside aluminum and zinc rather than gold and silver. Finally, the OCC considered the issues and risks identified in the PSI Report with respect to physical copper.[14] The commenter's observations do not negate the information provided in the NPRM and these facts demonstrate that the OCC has adequately described its reasons for changing its 1995 interpretation.

B. Physical Holdings

The preamble to the NPRM explained that the OCC did not consider the proposed rule to prohibit national banks from buying or selling metal through a transitory title transfer entered into as part of a customer-driven financial intermediation business.[15] The OCC explained that metal owned through a transitory title transfer typically does not entail physical possession of a commodity; the ownership occurs solely to facilitate the underlying transaction and lasts only for a moment in time. However, the OCC invited comment on whether transitory title transfers involving metals present risks that warrant treating such transactions as physical holdings.

Three commenters addressed transitory title transfers. Two commenters generally supported the OCC's proposed treatment of transitory title transfers. One of these commenters agreed with the assertion in the NPRM that there is no physical possession of the metal in transitory title transfers. This commenter noted that the risks of legal liability typically associated with physical commodity positions are not present in transitory title transfers and that these transactions more closely resemble customer-driven, cash-settled commodity derivatives than physical positions. Another commenter also supported the treatment of transitory title transfers, but suggested the final rule text should limit transitory title transfers to customer-driven financial intermediation transactions that are part of the business of banking. A third commenter disagreed that transitory title transfers are different from dealing and investing in physical metal just because the bank holds the metal for a legal instant. As discussed in detail below, the OCC continues to believe that transitory title transfers do not entail physical possession of industrial and commercial metals. The OCC also notes that relevant precedent already provides that transitory title transfers must be part of a customer-driven financial intermediation business.[16] Therefore, the OCC is finalizing the rule as proposed.

In addition to addressing transitory title transfers, one of the commenters also requested that the OCC confirm that interests in unallocated metal accounts are not physical holdings under the final rule. The commenter identified various activities in which national banks are engaged that could involve an interest in an unallocated metals account. The OCC notes that these activities are fact specific, and determinations about fact-specific activities need to be evaluated on a case-by-case basis. Therefore, the OCC believes it is appropriate to address the applicability of the final rule to these activities on a case-by-case basis. National banks with questions regarding the permissibility of transactions that involve unallocated metals accounts should discuss the issue with the OCC. The OCC is willing to entertain requests for such determinations, consistent with its historical practice of providing interpretive opinions in cases where there is doubt about the permissibility of particular activities.

C. Reverse Repurchase Agreements

The NPRM explained that the OCC views national banks' lending authority to include reverse repurchase agreements that are the functional and economic equivalent of secured loans.[17] Banks may use commodity reverse repurchase agreements to finance customer inventory.[18] Using a standard reverse repurchase agreement for metal to provide financing for a bank customer rather than a traditional bank loan ordinarily does not indicate dealing or investing in the metal. However, the NPRM noted that the facts and circumstances of a particular transaction may warrant a different conclusion. For example, if a bank incurs commodity price risk or pledges, sells, or rehypothecates metal acquired under reverse repurchase agreements, the NPRM provided that the OCC may view the transaction to be dealing or investing in the metal. The OCC invited comment on the treatment of reverse repurchase agreements under the proposed rule.

Two commenters addressed the treatment of reverse repurchase agreements. One suggested the OCC prohibit all reverse repurchase agreements where there is commodity market or liquidity risk. This commenter wrote that a prohibition is a better approach than a facts and circumstances review in light of limited OCC resources. The other commenter asserted that OCC should confirm that these types of reverse repurchase agreements are permissible activities not affected by the rule. This commenter noted that the reuse of the collateral is a long-standing practice in asset-based financing and therefore pledging, selling, or rehypothecating metal owned under a reverse repurchase agreement should not be viewed as indicia of dealing activity.

The OCC continues to have concerns that reverse repurchase agreements that involve commodity price risk or that involve pledging, selling, or rehypothecating metal could be structured in some circumstances in a manner that constitutes dealing or investing activity. The OCC recognizes, as a commenter suggested, that banks may enter into hedges to mitigate price risk that exists at the conclusion of certain reverse repurchase agreements and may pledge collateral for the purpose of funding its customer financing activities. Structuring a transaction in these ways could, in some circumstances, reduce indicia of investing or dealing activity. However, the OCC does not believe it is appropriate to conclude that all reverse repurchase agreements that involve commodity price risk or pledging, etc. of collateral are permissible. Therefore, the OCC continues to believe that it is appropriate to evaluate reverse repurchase agreements that involve commodity price risk or pledging, etc. of collateral on a facts and circumstances basis, as appropriate. This approach will allow the OCC an opportunity to evaluate transactions in context and to consider relevant facts before reaching a determination as to whether a transaction involves dealing or investing. The OCC is therefore declining to make the changes the commenters have requested.

D. Other Permissible Transactions

The proposed rule identified two incidental authorities under which

[13] The LME describes itself as ''the world centre for industrial metals trading.'' *See https://www.lme.com/.*

[14] *See, e.g.,* PSI Report at 362–396.

[15] 81 FR 63431.

[16] Interpretive Letter 1073, 26 OCC Q.J. 46, 2007 WL 5122911 (Oct. 19, 2006).

[17] 81 FR 63431.

[18] 12 CFR 211.4(a)(7).

acquiring and selling metal would remain permissible for national banks: first, collateral foreclosure activities designed to mitigate loan losses; [19] second, nominal physical hedges of customer-driven commodity derivatives. The OCC also explained in the preamble to the NPRM that a bank may buy and sell metal in conjunction with certain leasing authorities.[20]

One commenter addressed the proposed treatment of nominal hedging activities. This commenter suggested that the OCC require banks to disclose hedging amounts to the OCC. This commenter also suggested that the OCC require the hedge be designed to reduce risk in order to prevent commodity speculation. The OCC notes that it monitors bank hedging activity through its regular course of bank supervision. Additionally, banks that engage in commodity hedging activities already must do so in accordance with applicable law, including requirements that the hedge be designed to reduce risk.[21] For these reasons, the OCC does not believe that the changes this commenter suggested are necessary.

Another commenter asked that the OCC modify the final rule to expressly permit certain metals-based financing activities. The commenter described several metal leasing and metal consignment transactions. As explained in the NPRM and below, banks may not buy and sell industrial or commercial metal for the purposes of dealing or investing in that metal. However, banks may continue to buy and sell industrial or commercial metal under other incidental authorities that do not involve dealing or investing. To the extent a bank proposes to engage in a metals-based transaction that presents an interpretive issue(s) under the authorities provided for in 12 U.S.C. 24(Seventh), the OCC will address permissibility on a facts and circumstances basis. The OCC may issue interpretive analysis, as appropriate.

E. Existing Holdings

The OCC solicited comment in the NPRM on the treatment of existing holdings of industrial and commercial metals. Specifically, the OCC asked whether five years to divest non-conforming assets, with the possibility of a five-year extension, would be an appropriate period of time. The OCC also asked whether there were compelling reasons to grandfather existing industrial and commercial metal holdings indefinitely.[22]

Two commenters addressed the issue of existing holdings of industrial and commercial metal. One commenter argued industrial and commercial metal held before the conformance date should be grandfathered because doing so would limit negative effects on copper markets and bank customers. This commenter also asked that the text of the rule include a minimum of five years to conform to the prohibition, arguing this would minimize the impact of the rule. Another commenter did not support allowing the banks additional time to divest their physical metals holdings.

National banks do not currently engage in significant dealing or investing activities in relation to physical industrial and commercial metal. Nor do national banks currently hold significant stores of industrial and commercial metal. Therefore, the OCC finds no compelling reason to grandfather existing activities. However, the OCC does believe that a short divestiture period would be appropriate. Given national banks' limited industrial and commercial metal activities, the OCC concludes that a full five-year divestiture period is not necessary. The OCC is therefore including a provision in the final rule that requires national banks to divest existing holdings of industrial and commercial metal acquired through dealing or investing activities as soon as practicable, but not later than one year from the effective date of the rule.[23] This provision enables the OCC to grant up to four separate one-year extensions of this divestiture period if the bank has made a good faith effort to dispose of the metal and the bank's retention of the metal is not inconsistent with its safe and sound operation. The OCC notes that the approach of granting a divestiture period with the possibility of an extension is consistent with the OCC's treatment of other types of nonconforming assets.[24] This divestiture provision applies only to existing holdings; national banks may not acquire additional holdings of industrial and commercial metal through dealing or investing activities during, or after, the divestiture period.

F. Impact of the Rule

Three commenters discussed the impact of the proposed rule. Two commenters noted, very generally, that they expect the rule to increase cost for customers if finalized as proposed. One of these commenters also suggested the proposal would have a negative impact on the copper market as a whole, asserting that the costs of the rule will not be minimal. This commenter also argued there would be no regulatory benefit to this prohibition. Another commenter said the NPRM would reduce financial risk and conflicts of interests for banks while also allowing the OCC to impose limits on copper and other industrial and commercial metals.

As noted above, national banks do not currently engage in significant dealing or investing activities in relation to physical industrial and commercial metal. Because these markets tend to be highly competitive, we expect that the removal of OCC-supervised institutions as just one class of potential investors/dealers will not have a material effect on these markets. Furthermore, as explained in more detail below, national banks may continue to buy and sell industrial and commercial metal under certain incidental authorities. The OCC expects these limited permissible activities will allow banks to continue to serve customers with interests in commercial and industrial metals in capacities that do not involve dealing or investing activities.

III. Description of the Final Rule

A. Industrial or Commercial Metal Is Not ''exchange, coin, and bullion''

As noted above, the National Bank Act authorizes national banks to buy and sell exchange, coin, and bullion. In this final rule, the OCC is interpreting these terms to exclude metals in a form primarily suited to industrial or commercial use.

Banking Circular 58 (BC–58) [25] sets forth general guidelines that apply to national banks' coin and bullion activities. It defines ''coin'' as ''coins held for their metallic value which are minted by a government, or exact restrikes of such coins minted at a later date by or under the authority of the issuing government.'' Contemporaneous OCC interpretive letters elaborated that ''coin'' referred only to media of exchange.[26] BC–58 defines ''bullion'' as

[19] 81 FR 63433.

[20] 81 FR 63431.

[21] *See, e.g.,* Interpretive Letter 684 (Aug. 4, 1995) 1995 WL 550219; OCC Bulletin 2015–3 (Aug. 4, 2015); 12 CFR 44.3(b) and 44.5(a) (Volcker Rule requirement that hedges be designed to reduce or otherwise significantly mitigate one or more specific identifiable risks).

[22] 81 FR 63432.

[23] The final rule provides a divestiture period for both national banks and FSAs. The OCC does not expect that a divestiture period will be necessary for FSAs and most national banks. However, in order to ensure an orderly asset liquidation process for all institutions that hold metal subject to this prohibition, the divestiture provision is available to both national banks and FSAs.

[24] *See, e.g.,* 12 U.S.C. 29 (holding period for other real estate owned).

[25] BC–58 (Rev.) (Nov. 3, 1981). The OCC published the original version in 1974.

[26] Interpretive Letter 326 (Jan. 17, 1985), 1985 WL 202590; Interpretive Letter 252 (Oct. 26, 1982), 1982

''uncoined gold or silver in bar or ingot form.'' These definitions do not encompass industrial or commercial metal.

Interpretive letters published after BC–58 interpreted national banks' authority to buy coin and bullion to include other precious metals, namely platinum and palladium. Consistent with BC–58's definition of ''coin,'' the OCC in 1987 found that legal tender platinum coins held for their metallic value were ''coin.'' [27] That same letter prohibited dealing in platinum bars. However, in 1991, the OCC concluded that market developments warranted treating platinum bars as bullion.[28] The OCC also found trading in platinum bars to be incidental to trading in platinum coins.[29] For similar reasons, the OCC concluded palladium was coin and bullion and national banks could trade and deal in palladium as part of the business of banking.[30] In support of its position, the OCC noted that the London Platinum and Palladium Market had linked platinum and palladium for market making and regulatory purposes and that most of the Market's members were banks.

However, other interpretive letters recognized that not every precious metal is coin or bullion. Jewelry, the OCC determined, is not.[31]

The OCC has long concluded that ''exchange, coin, and bullion'' does not encompass industrial or commercial metal. The OCC believes this conclusion is consistent with the National Bank Act and current market practice. For example, in the mid-19th century, when Congress passed the National Bank Act, ''bullion'' meant metal suitable for coining, not metal suitable for making wires.[32] The contemporary understanding of ''bullion'' is broader—most currency is no longer made of precious metal—but the contemporary understanding does distinguish bullion from industrial or commercial metal. For example, modern bullion markets trade precious metals by the kilogram.[33] By contrast, industrial and commercial metals markets trade base metals in quantities suitable for industrial or commercial use.[34] In general, gold, silver, platinum, and palladium are bullion today because they:

• Trade in troy ounces or grams rather than metric tons; [35]
• Trade in pure forms; [36]
• Trade in a form suitable for coining;
• Trade as precious metals in the world's major organized markets, including the London bullion markets; and
• Are considered currency by the International Organization for Standardization.[37]

Gold, silver, platinum, and palladium in industrial or commercial form are not exchange, coin, or bullion.

B. Dealing or Investing in Industrial or Commercial Metal Is Neither Part of, nor Incidental to, the Business of Banking

Interpretive Letter 693 concluded that national banks could buy and sell copper (including industrial copper) as a part of or incidental to the business of banking. The OCC has reviewed the bases for the conclusion in Interpretive Letter 693 that buying and selling industrial copper is part of the business of banking, including developments in copper markets that followed this letter. For the following reasons, the OCC has determined that buying and selling copper—or any other metal—in industrial or commercial form for the purpose of dealing or investing in that metal is not part of the business of banking.

When the OCC issued Interpretive Letter 693 in 1995, the agency noted increasing similarity between transactions involving copper and those transactions already conducted by national banks with respect to gold, silver, platinum and palladium (precious metals). This increasing similarity informed the OCC's view at that time that buying and selling copper, including dealing and investing, was part of, or incidental to, the business of banking. However, copper markets have not increased in similarity to precious metal markets.[38] Instead, as noted in detail above, copper is generally traded as a base metal.[39]

The OCC believes that dealing or investing in industrial or commercial metals, including base and precious metals in this form, is not the functional equivalent of dealing or investing in coin and bullion. The paradigmatic example of functional equivalence is that a lease is in economic substance a secured loan.[40] But the significant differences between dealing in industrial or commercial metals and dealing in coin and bullion demonstrate that the former is not, in economic substance, the same as the latter. Most importantly, industrial and commercial metals trade in base metal markets by the ton in cathode or other industrial form, while coin and bullion trade in precious metal markets by the troy ounce or kilogram in bar or ingot form.

WL 54157; Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (Feb. 18, 1982), 1982 WL 170844. *But see* Letter from Richard V. Fitzgerald, Deputy Chief Counsel (Nov. 4, 1983), 1983 WL 145720 (concluding that national banks could purchase and sell the Department of Treasury's commemorative Olympic coins based on their metallic value even though it was unlikely that the coins would be used as a medium of exchange).

[27] Letter from William J. Stolte, Chief National Bank Examiner (July 29, 1987), 1987 WL 149775.

[28] Interpretive Letter 553 (May 2, 1991), 1991 WL 340660 (noting that (i) the financial press considered platinum coins and bars to be bullion, and (ii) a state statute defined ''bullion'' to include platinum).

[29] *Id.*

[30] Interpretive Letter 685 (Aug. 4, 1995), 1995 WL 550220.

[31] *See* No-Objection Letter 88–8 (May 26, 1988), 1988 WL 284872 (selling gold and silver jewelry is impermissible general merchandising); Letter from Madonna K. Starr, Attorney (Oct. 3, 1986), 1986 WL 144029 (limited design jewelry is not exchange, coin, or bullion).

[32] *See* Act of June 22, 1874, 18 Stat. 202 (authorizing the transfer from the U.S. bullion fund of refined gold bars bearing the United States stamp of fineness, weight, and value, or bars from any melt of foreign coin or bullion of standard equal to or above that of the United States); Act of Feb. 12, 1873 § 31, 17 Stat. 429 (''The bullion thus placed in the hands of the melter and refiner shall be subjected to the several processes which may be necessary to form it into ingots of the legal standard, and of a quality suitable for coinage.'').

[33] *See, e.g.,* London Bullion Market Association, *The Good Delivery Rules for Gold and Silver Bars* 11 (Mar. 2015), *available at http://www.lbma.org.uk/assets/market/gdl/GD_Rules_15_Final%2020160512.pdf;* London Platinum & Palladium Market, ''The London/Zurich Good Delivery List,'' *http://www.lppm.com/good-delivery/* (visited July 19, 2016).

[34] The LME describes itself as the ''world centre for the trading of industrial metals—more than three quarters of all non-ferrous metal futures business is transacted on [its] platforms.'' LME, ''About us,'' *http://www.lme.com/about-us* (visited July 19, 2016). The LME trades aluminum, aluminum alloys, copper, lead, nickel, tin, and zinc. LME, ''Metals,'' *http://www.lme.com/metals* (visited July 19, 2016).

[35] *See, e.g.,* Bloomberg, ''Gold, Silver, and Industrial Metals Prices,'' *http://www.bloomberg.com/markets/commodities/futures/metals.*

[36] *See, e.g.,* London Bullion Market Association, *The Good Delivery Rules for Gold and Silver Bars* 6 (Mar. 2015) (minimum fineness for gold is 99.5 percent and for silver is 99.9 percent); London Platinum & Palladium Market, ''The London/Zurich Good Delivery List,'' *http://www.lppm.com/good-delivery/* (minimum fineness for platinum and palladium is 99.95 percent).

[37] ISO 4217 (Aug. 1, 2015), *available at http://www.currency-iso.org/dam/downloads/lists/list_one.xls.*

[38] Events subsequent to Interpretive Letter 693 have confirmed copper's status as a base metal. In 2000, the LME introduced a future on a base metal index containing copper, aluminum, lead, nickel, tin, and zinc. Then, in 2006, it introduced ''mini'' futures for copper, aluminum, and zinc. Similarly, many firms have launched ETFs that invest solely in gold, silver, palladium, platinum, or some combination thereof, indicating a widespread belief that these metals are a store of value. However, there is no copper ETF. Finally, the OCC understands that national banks that trade copper treat it as a base metal and trade it alongside aluminum and zinc rather than gold and silver.

[39] *See generally* PSI Report at 364 (2014) (identifying banks, trading firms, analysts, and exchanges that treat copper as a base metal for trading and risk management purposes).

[40] *See M&M Leasing Corp.* v. *Seattle First Nat'l Bank,* 563 F.2d 1377 (9th Cir. 1977).

In addition, banks' risk management systems distinguish between precious metals and base metals.

The OCC has also considered other factors identified in relevant precedent for determining whether dealing in or investing in industrial or commercial metal is part of the business of banking.[41] The OCC does not believe that analysis under these factors supports a conclusion that this activity is part of the business of banking. For example, the OCC has not seen evidence that this activity strengthens a bank by benefiting its customers or its business.[42] Nor is the OCC aware of any state-chartered banks dealing in or investing in industrial or commercial metal.[43] Indeed, the OCC has not identified any precedent authorizing that activity for state banks. Such activity would suggest dealing or investing in commercial metals may be part of the business of banking.

As described above, under 12 U.S.C. 24(Seventh), a national bank has the power to exercise all such incidental powers as shall be necessary to carry on the business of banking. An activity is incidental to the business of banking if it is convenient or useful to an activity that is part of the business of banking.[44]

The OCC believes that dealing or investing in industrial or commercial metal is not incidental to the business of banking. Some customers may wish to trade industrial or commercial metal with national banks. However, because few banks buy or sell industrial or commercial metal in the ordinary course of business, it does not appear that dealing or investing in industrial or commercial metal significantly enhances national banks' ability to offer banking products and services, including those related to precious metals. Moreover, dealing or investing in industrial or commercial metal does not appear to enable national banks to use capacity acquired for banking operations or otherwise avoid economic loss or waste. Therefore, the OCC concludes national banks may not deal or invest in industrial or commercial metal under their incidental powers.

C. Transactions in Industrial or Commercial Metal That May Be Permissible

National banks do have incidental authority to buy and sell industrial or commercial metal in limited cases. Buying or selling industrial or commercial metal could be incidental to lending activities. For example, a mining company could post a copper cathode as collateral for a loan. Pursuant to the national bank's authority to acquire property in satisfaction of debt previously contracted, the bank could seize and then sell the copper to mitigate loan losses if the borrower defaulted.[45] National banks also have incidental authority to buy and sell nominal amounts of industrial or commercial metal to hedge customer-driven commodity derivatives.[46] The final rule does not prohibit these purchases and sales because they are not dealing or investing.[47]

Similarly, national banks may buy and sell industrial or commercial metal as part of their leasing business. 12 U.S.C. 24(Seventh); 12 U.S.C. 24(Tenth); 12 CFR 23.4. A car, for example, contains metal in a commercial form, but buying a car to lease it is not dealing or investing in commercial metal. Rather, a lease, like a reverse repurchase transaction, is a secured loan in a different form. National banks may also buy and sell industrial or commercial metals to install pipes and electrical wiring in their physical premises. 12 U.S.C. 29(First); 12 CFR 7.1000. This activity is clearly not dealing or investing in industrial or commercial metal.

In certain situations, national banks may buy and sell industrial and commercial metal as reverse repurchase agreements that are the functional and economic equivalent of secured loans.[48] In a reverse repurchase agreement, a bank extends credit by simultaneously buying collateral from a client and agreeing to sell the collateral back to the client at a future date. The difference between the sale and purchase price is effectively the interest the client pays for the extension of credit. If the reverse repurchase agreement counterparty defaults, the bank can mitigate its losses by selling the collateral without first foreclosing on it. Financing customer inventory is a traditional bank activity; using reverse repurchase agreements rather than loans to provide the financing is merely a different way of providing financing.[49] Financing customer inventory using reverse repurchase agreements in itself does not indicate dealing or investing in the metal. However, pledging, selling, or rehypothecating metal acquired under reverse repurchase agreements could suggest dealing or investing activity. So, too, could assuming commodity price risk. For example, an agreement in which the counterparty sells a metal at a certain price to the bank and then repurchases the metal at a price that depends on the metal's then-current market price could indicate dealing or investing activity: The bank is assuming the metal's price risk and, in some circumstances, could act to benefit from spot market price appreciation of the metal. On the other hand, setting the repurchase price at the sale price plus a spread based on the time value of money is equivalent to a secured loan. The determination of whether a reverse repurchase agreement that varies from this secured loan structure is dealing or investing is highly dependent upon the facts of each transaction. National banks with questions regarding the permissibility of reverse repurchase agreements that involve characteristics identified in this discussion should discuss the issue with the OCC. The

[41] *See, e.g.,* Merchants' Nat'l Bank v. State Nat'l Bank, 77 U.S. 604, 648 (1871) (holding that national banks could certify checks because the activity had ''grown out of the business needs of the country.'').

[42] Currently, national banks' dealing and investments in industrial or commercial metal are limited, suggesting that the business needs of the U.S. economy are not meaningfully affected by national banks' dealing in industrial or commercial metal. Nor is there evidence that the amount of revenue from industrial or commercial metal dealing and investing meaningfully improve national banks' financial strength. In any case, the prospect for additional revenue alone is not sufficient to deem an activity to be part of the business of banking. *See* VALIC, 513 U.S. at 258 n.2. *See also* No-objection Letter 88–8 (May 26, 1988), 1988 WL 284872 (concluding that it is impermissible for a national bank to make substantial profits from the sale of merchandise).

[43] *See* Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 49–50 (1940).

[44] Interpretive Letter 1071 (Sept. 6, 2006), 26 OCC Q.J. 46, 2007 WL 5122909 (citing *Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427, 431–32 (1st Cir. 1972)).

[45] *Cf.* Cooper v. Hill, 94 F. 582 (8th Cir. 1899) (foreclosure of a mine); *First Nat'l Bank of Parker* v. *Peavy Elevator Co.,* 10 S.D. 167, 170 (1897) (foreclosure of grain seed and subsequent sale).

[46] Interpretive Letter 684 (Aug. 4, 1995) (permitting physical delivery of commodities as hedges for customer-driven, non-speculative transactions), 1995 WL 550219; OCC Bulletin 2015–35, Quantitative Limits on Physical Commodity Transactions (Aug. 4, 2015) (explaining that ''nominal'' means 5 percent of the bank's short positions in a particular commodity). The final rule explicitly provides that national banks may continue to buy and sell physical metal to hedge a derivative. A similar provision is not necessary for FSAs because they do not engage in this activity. *See* 620 Study at 88; OCC Bulletin 2015–35, n. 1.

[47] *Cf. First Nat'l Bank* v. *Nat'l Exch. Bank,* 92 U.S. 122, 128 (1875) (''In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner* v. *Bank U.S.,* 8 Wheat. 351 [22 U.S. 338 (1823)], where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions.'').

[48] *See* 12 CFR 211.4(a)(7)

[49] Under the National Bank Act, credit exposures from repurchase and reverse repurchase agreements are loans and extensions of credit subject to a national bank's lending limits. 12 U.S.C. 84(b)(1)(C). We note that Section 610 of the Dodd-Frank Act expanded the definition of ''loans and extensions of credit'' for purposes of lending limits to include credit exposure arising from repurchase agreements and reverse repurchase agreements, among other transactions. The OCC amended its lending limits regulation, 12 CFR 32, to implement the statutory change made by the Dodd-Frank Act.

OCC is willing to entertain requests for such determinations, consistent with its historical practice of providing interpretive opinions in cases where there is doubt about the permissibility of particular activities.

The final rule does not prohibit national banks from buying and selling metal through transitory title transfers entered into as part of a customer-driven financial intermediation business.[50] Interpretive Letter 1073 [51] provides that national banks may hedge metal derivative transactions on a portfolio basis with over-the-counter derivative transactions that settle in cash or transitory title transfer. Interpretive Letter 1073 also provides that a national bank may engage in transitory title transfers in metals for the accommodation of customers. The OCC concluded in Interpretive Letter 1073 that transitory title transfers involving metals do not entail the physical possession of commodities.[52] The OCC's analysis in this letter noted that transitory title transfers do not involve the customary activities relating to, or risks attendant to, commodity ownership, such as storage costs, insurance, and environmental protection. For these reasons, OCC believes that transitory title transfers do not constitute physical possession of commodities and therefore does not consider transitory title transfers to be dealing or investing in industrial or commercial metal for purposes of the final rule.[53] The OCC recognizes that banks may have questions about the permissibility of specific transitory title transfer transactions. The fact-specific nature of these issues merits a case-by-case review to determine the permissibility of the transaction. The OCC will continue to review requests for interpretive opinions on the permissibility of individual transactions proposed by a bank. Should the OCC become aware of additional risks that suggest transitory title transfer activity presents risks more closely akin to the risks of physical metal holdings, the OCC may reconsider the treatment of transitory title transfer transactions.

D. Divestiture Period

The final rule prohibits banks from dealing or investing in industrial or commercial metal. However, in response to a request from a commenter, the final rule provides a divestiture period for banks that acquired industrial or commercial metal through dealing or investing in that metal before the effective date of the rule.[54] Under the divestiture provision, banks must dispose of such metal as soon as practicable, but not later than one year from the effective date of the regulation. The OCC may grant up to four separate one-year extensions of this divestiture period for a national bank that makes a good faith effort to dispose of the metal and the bank's retention of the metal is not inconsistent with its safe and sound operation. The divestiture provision applies only to existing holdings; national banks may not acquire additional holdings of industrial and commercial metal through dealing or investing activities during, or after, the divestiture period.

This divestiture period is generally consistent with the OCC's approach to other nonconforming assets. Banks with questions about the permissibility of activities or holdings involving industrial or commercial metal should ask the OCC for a review of the specific holding or activity.

IV. Regulatory Analysis

Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501–3520, the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. This final rule does not introduce any new collections of information, therefore, it does not require a submission to OMB.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* (RFA), requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include banking entities with total assets of $550 million or less) or to certify that the rule will not have a significant economic impact on a substantial number of small entities.

As of December 31, 2015, the OCC supervised 1,032 small entities.[55] Although the rule applies to all OCC-supervised small entities, and thus affects a substantial number of small entities, no small entities supervised by the OCC currently buy or sell metal in a physical form primarily suited to commercial or industrial use for the purpose of dealing or investing in that metal. Thus, the rule will not have a substantial impact on any OCC-supervised small entities.

Therefore, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of OCC-supervised small entities.

Unfunded Mandates Reform Act of 1995 Determination

The OCC analyzed the final rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532). Under this analysis, the

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[50] For purposes of the final rule, the OCC considers a transitory title transfer to be back-to-back contracts providing for the receipt and immediate transfer of title to the metal. This means that a bank holds title to the metal for no more than a legal instant. *See* Interpretive Letter 962 (Apr. 21, 2003), 2003 WL 21283155 (''[T]ransitory title transfers preclude actual delivery by passing title down the chain from the initial seller to the ultimate buyer in a series of instantaneous back-to-back transactions. Each party in the chain has title for an instant but does not take actual physical delivery (other than the ultimate buyer which, in no case, will be the Bank.'')).

[51] 26 OCC Q.J. 46, 2007 WL 5122911 (Oct. 19, 2006).

[52] *See also* OCC Bulletin 2015–35 (Aug. 4, 2015) (noting that a physical commodity that a bank acquired and then immediately sold by transitory title transfer would not be included in the bank's physical inventory of that commodity).

[53] In contrast to transitory title transfers, the OCC considers a commodity held by warehouse receipt for more than a legal instant to entail physical possession of the commodity. *See* OCC Bulletin 2015–35 (''[A] bank that satisfies certain conditions may engage in physical commodity transactions (for example, by buying or selling title to a commodity via a warehouse receipt or bill of lading) to manage the risks of commodity derivatives.''); Interpretive Letter 684 (Aug. 4, 1995), 1995 WL 550219 (recognizing physical possession of a commodity by warehouse receipt). The OCC notes that the customary activities relating to, or risks attendant to, commodity ownership by warehouse receipt are distinguishable from those involving transitory title transfer. For example, Interpretive Letter 684 provides that the OCC expects a bank engaged in physical commodity hedging, either through warehouse receipt or ''pass-through'' delivery, to adopt and maintain ''safeguards designed to manage the risks associated with storing, transporting, and disposing of commodities of which the bank has taken delivery, including policies and procedures designed to ensure that the bank has adequate levels of insurance (including insurance for environmental liabilities) which, after deductions, are commensurate with the risks assumed.''

[54] The final rule provides a divestiture period for both national banks and FSAs. The OCC does not expect that a divestiture period will be necessary for FSAs and most national banks. However, in order to ensure an orderly liquidation process for all institutions that hold metal subject to this prohibition, the divestiture provision is available to both national banks and FSAs.

[55] The OCC calculated the number of small entities using the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $550 million and $38.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counted the assets of affiliated financial institutions when determining whether to classify a national bank or FSA as a small entity. The OCC used December 31, 2015, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the SBA's *Table of Size Standards.*

OCC considered whether the rule includes a federal mandate that may result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation).

Although the final rule would apply to all OCC-supervised institutions, very few of these institutions are currently involved in activities involving dealing or investing in copper or other metals in a physical form primarily suited to commercial or industrial use.

While the final rule may prevent OCC-supervised institutions from realizing potential gains from prohibited investments in physical metals, the rule also may protect them from realizing potential losses from investments in physical metals. The OCC is not able to estimate these potential gains or losses because they will depend on future fluctuations in the prices of the various physical metals. However, the OCC does expect OCC-supervised institutions to be able to achieve comparable returns in alternative non-prohibited investment opportunities. Thus, the OCC estimates that the opportunity cost of the final rule will be near zero.

The final rule may impose one-time costs on affected institutions with respect to the disposal of current physical metal inventory that a bank may not deal in or invest in under the rule. This cost will depend to some extent on the amount of physical metal inventory that affected institutions must dispose of. Given the divestiture period in the final rule, a gradual sell-off should not affect market prices and the affected institutions would receive fair value for their metals. Under these circumstances, the OCC estimates that the disposal costs will also be minimal.

Finally, by establishing that buying and selling physical metal in commercial or industrial form is generally not part of the business of banking, the rule implies that customers of OCC-supervised institutions will have to identify another reliable source of supply of physical metals and that OCC-supervised institutions will be less able to compete with non-bank metals dealers. Given how technology has made the physical metals markets more accessible, the OCC expects bank customers will face minimal costs associated with identifying another supplier of physical metals. The OCC also expects that losing the ability to compete with non-bank metal dealers will not significantly detract from the strength of OCC-supervised institutions, especially given that the final rule would recognize several business-of-banking incidental exceptions to the prohibition on buying and selling physical metal. These permissible activities should enable OCC-supervised institutions to continue to provide metals related services to bank customers that do not involve dealing or investing in commercial and industrial metals.

For the reasons described above, the OCC has determined that the final rule would not result in expenditures by state, local, and Tribal governments, or by the private sector, of $100 million or more. Accordingly, the OCC has not prepared a written statement to accompany the final rule.

List of Subjects in 12 CFR Part 7

Banks, banking, Computer technology, Credit, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

For the reasons set forth in the preamble, OCC amends 12 CFR part 7 as follows:

PART 7—ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 71, 71a, 92, 92a, 93, 93a, 371, 371a, 481, 484, 1463, 1464, 1818, and 5412(b)(2)(B).

■ 2. Add § 7.1022 to subpart A to read as follows:

§ 7.1022 National banks' authority to buy and sell exchange, coin, and bullion.

(a) In this section, *industrial or commercial metal* means metal (including an alloy) in a physical form primarily suited to industrial or commercial use, for example, copper cathodes.

(b) *Scope of authorization.* Section 24(Seventh) of the National Bank Act authorizes national banks to buy and sell exchange, coin, and bullion. Industrial or commercial metal is not exchange, coin, and bullion within the meaning of this authorization.

(c) *Buying and selling metal as part of or incidental to the business of banking.* Section 24(Seventh) authorizes national banks to engage in activities that are part of, or incidental to, the business of banking. Buying and selling industrial or commercial metal for the purpose of dealing or investing in that metal is not part of or incidental to the business of banking pursuant to section 24(Seventh). Accordingly, national banks may not acquire industrial or commercial metal for purposes of dealing or investing.

(d) *Other authorities not affected.* This section shall not be construed to preclude a national bank from acquiring or selling metal in connection with its incidental authority to foreclose on loan collateral, compromise doubtful claims, or avoid loss in connection with a debt previously contracted. This section also shall not be construed to preclude a national bank from buying and selling physical metal to hedge a derivative for which that metal is the reference asset so long as the amount of the physical metal used for hedging purposes is nominal.

(e) *Nonconforming holdings.* National banks that hold industrial or commercial metal as a result of dealing or investing in that metal shall dispose of such metal as soon as practicable, but not later than one year from the effective date of this regulation. The OCC may grant up to four separate one-year extensions to dispose of industrial or commercial metal if a national bank makes a good faith effort to dispose of the metal and retention of the metal for an additional year is not inconsistent with the safe and sound operation of the bank.

■ 3. Add § 7.1023 to subpart A to read as follows:

§ 7.1023 Federal savings associations, prohibition on industrial or commercial metal dealing or investing.

(a) In this section, *industrial or commercial metal* means metal (including an alloy) in a physical form primarily suited to industrial or commercial use, for example, copper cathodes.

(b) Federal savings associations may not deal or invest in industrial or commercial metal.

(c) *Other authorities not affected.* This section shall not be construed to preclude a federal savings association from acquiring or selling metal in connection with its authority to foreclose on loan collateral, compromise doubtful claims, or avoid loss in connection with a debt previously contracted.

(d) *Nonconforming holdings.* Federal savings associations that hold industrial or commercial metal as a result of dealing or investing in that metal shall dispose of such metal as soon as practicable, but not later than one year from the effective date of this regulation. The OCC may grant up to four separate one-year extensions to dispose of industrial or commercial metal if a federal savings association makes a good faith effort to dispose of the metal and retention of the metal for an additional year is not inconsistent with safe and sound operation of the association.

Dated: December 15, 2016.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2016–31572 Filed 12–29–16; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3142; Directorate Identifier 2015–NM–003–AD; Amendment 39–18728; AD 2016–25–02]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that published in the **Federal Register**. That AD applies to certain The Boeing Company Model 787–8 airplanes. As published, the amendment number specified in the preamble and regulatory text is incorrect. This document corrects that error. In all other respects, the original document remains the same.

DATES: This final rule is effective January 20, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 20, 2017 (81 FR 90955, December 16, 2016).

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

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

SUPPLEMENTARY INFORMATION: Airworthiness Directive 2016–25–02 (81 FR 90955, December 16, 2016), requires installing markers to limit the hydraulic system fluid used to a specific brand, doing hydraulic fluid tests of the hydraulic systems, replacing hydraulic system fluid if necessary, and doing all applicable related investigative and corrective actions for certain The Boeing Company Model 787–8 airplanes.

Need for the Correction

As published, the amendment number specified in the preamble and regulatory text is incorrect. The incorrectly specified number was Amendment 39–18725; the correct number is Amendment 39–18728.

Related Service Information Under 1 CFR Part 51

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

Correction of Publication

This document corrects an error and correctly adds the AD as an amendment to 14 CFR 39.13. Although no other part of the preamble or regulatory information has been corrected, we are publishing the entire rule in the **Federal Register**.

The effective date of this AD remains January 20, 2017.

Since this action only corrects an amendment number, it has no adverse economic impact and imposes no additional burden on any person. Therefore, we have determined that notice and public procedures are unnecessary.

List of Subjects in 14 CFR Part 39

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

Adoption of the Correction

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 [Corrected]

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

2016–25–02 The Boeing Company: Amendment 39–18728; Docket No. FAA–2015–3142; Directorate Identifier 2015–NM–003–AD.

(a) Effective Date

This AD is effective January 20, 2017.

(b) Affected ADs

None.

(c) Applicability

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

(d) Subject

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

(e) Unsafe Condition

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

(f) Compliance

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

(g) Marker Installation

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

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

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

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

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

(i) Credit for Previous Actions

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

(j) Alternative Methods of Compliance (AMOCs)

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

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

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

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

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

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

(k) Related Information

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

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(4) and (l)(5) of this AD.

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on January 20, 2017 (81 FR 90955, December 16, 2016).

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

(ii) Reserved.

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

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

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

Issued in Renton, Washington, on December 22, 2016.

Robert D. Breneman,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31693 Filed 12–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3753; Directorate Identifier 2015–NE–26–AD; Amendment 39–18739; AD 2016–25–13]

RIN 2120–AA64

Airworthiness Directives; Safran Helicopter Engines, S.A. (Formerly Turbomeca S.A.) Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2016–04–12, that applies to certain Safran Helicopter Engines, S.A. (formerly Turbomeca S.A.) Arriel 2B, 2B1, 2C, 2C1, 2C2, 2D, 2E, 2S1, and 2S2 turboshaft engines. AD 2016–04–12 required spectrometric oil analysis (SOA) inspection of the engine accessory gearbox (AGB), and, depending on the results, removal of the engine AGB. This AD requires initial and repetitive wear inspections of the engine AGB cover. This AD was prompted by a report of an uncommanded in-flight shutdown (IFSD) of an Arriel 2S2 engine caused by rupture of the 41-tooth gear, which forms part of the bevel gear in the engine AGB. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective February 3, 2017.

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

ADDRESSES: For service information identified in this final rule, contact Safran Helicopter Engines, S.A. 40220 Tarnos, France; phone: 33 0 5 59 74 40 00; fax: 33 0 5 59 74 45 15. You may view this service information at the FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–3753.

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–2015–3753; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the mandatory continuing airworthiness information (MCAI), regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Philip Haberlen, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7770; fax: 781–238–7199; email: *philip.haberlen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2016–04–12, Amendment 39–18406 (81 FR 12583, March 10, 2016), (''AD 2016–04–12''). AD 2016–04–12 applied to the specified products. The NPRM published in the **Federal Register** on June 17, 2016 (81 FR 39601). The NPRM proposed to require initial and repetitive spectrometric oil analysis (SOA) of the AGB, and wear inspections of the engine AGB cover. However, this AD only mandates wear inspections of the engine AGB cover and does not add requirements beyond the scope of the NPRM.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (81 FR 39601, June 17, 2016).

Since we issued AD 2016–04–12, the European Aviation Safety Agency (EASA) has issued MCAI European Aviation Safety Agency AD 2016–0055R1, dated October 11, 2016, to only specify that periodic wear inspections of the engine AGB cover are necessary. This AD removes the proposed requirements for initial and repetitive SOA of the AGB, which reduces the costs of compliance in this AD.

Also since we issued AD 2016–04–12, Safran Helicopter Engines, S.A. has issued Mandatory Service Bulletin (MSB) No. 292 72 2861, Version D, dated September 23, 2016. The MSB only requires performing periodic wear inspections of the engine AGB cover.

Conclusion

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

Related Service Information Under 1 CFR Part 51

Safran Helicopter Engines, S.A. has issued MSB No. 292 72 2861, Version D, dated September 23, 2016. The MSB describes procedures for performing periodic wear inspections of the engine AGB cover. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 250 engines installed on helicopters of U.S. registry. We also estimate that it will take 1 hour to perform the engine AGB cover wear inspection. The average labor rate is $85 per hour. Required parts for the wear inspection cost about $3,100 per engine. We estimate that 5 engines will require AGB replacement at a cost of $44,397 per engine. We also estimate that it will take about 2 hours to replace the engine AGB. Based on these figures, we estimate the cost of this AD on U.S. operators to be $1,019,085.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (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) AD 2016–04–12, Amendment 39–18406 (81 FR 12583, March 10, 2016), and adding the following new AD:

2016–25–13 Safran Helicopter Engines, S.A. (Type Certificate previously held by Turbomeca S.A.): Amendment 39–18739; Docket No. FAA–2015–3753; Directorate Identifier 2015–NE–26–AD.

(a) Effective Date

This AD is effective February 3, 2017.

(b) Affected ADs

This AD supersedes AD 2016–04–12, Amendment 39–18406 (81 FR 12583, March 10, 2016).

(c) Applicability

This AD applies to Safran Helicopter Engines, S.A. Arriel 2B, 2B1, 2C, 2C1, 2C2, 2D, 2E, 2S1, and 2S2 turboshaft engines with an engine accessory gearbox (AGB), part number 0292120650, with a machined front casing.

(d) Unsafe Condition

This AD was prompted by a report of an uncommanded in-flight shutdown (IFSD) of an Arriel 2S2 engine caused by rupture of the 41-tooth gear, which forms part of the bevel gear in the engine AGB. We are issuing this AD to prevent failure of the engine AGB, uncommanded IFSD, damage to the engine, and damage to the helicopter.

(e) Compliance

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

(1) Initial Wear Inspection

(i) For all affected engines, perform a wear inspection of the engine AGB cover before the engine AGB, module M01, exceeds 850 engine hours (EH) since new or since last overhaul (SLO), or within 50 EHs after April 14, 2016, or before the next flight after the effective date of this AD, whichever occurs latest.

(ii) Reserved.

(2) Repetitive Wear Inspection Intervals

(i) For Arriel 2E engines, repeat the engine AGB cover wear inspection within every 800 EH since last inspection (SLI).

(ii) For all affected engines, except for Arriel 2E engines, repeat the engine AGB cover wear inspection within every 600 EH SLI.

(3) Inspection Criteria

(i) Use paragraph 2.4.2 of Safran Helicopter Engines, S.A. Mandatory Service Bulletin (MSB) No. 292 72 2861, Version D, dated September 23, 2016, to do the inspections required by paragraphs (e)(1) and (e)(2) of this AD.

(ii) Reserved.

(4) Corrective Actions Based on the Results of the Most Recent Wear Inspection

(i) If the wear measured from the most recent wear inspection is 0.15 mm or less, no further action is required. However, you must still comply with the repetitive inspection requirements of paragraph (e)(2) of this AD.

(ii) If the most recent wear inspection was performed while the engine was in service, and the wear is greater than 0.15 mm, do the following:

(A) If the wear measured from the most recent wear inspection is greater than 0.15 mm, but 0.30 mm or less, remove the engine AGB from service within 200 EH SLI and replace with a part eligible for installation.

(B) If the wear measured from the most recent wear inspection is greater than 0.30 mm, but 0.40 mm or less, remove the engine AGB from service within 25 EH SLI and replace with a part eligible for installation.

(C) If the wear measured from the most recent wear inspection is greater than 0.40 mm, remove the engine AGB from service before further flight and replace with a part eligible for installation.

(iii) If the most recent wear inspection was performed on the engine during an engine shop visit, and the wear is greater than 0.15 mm, remove the engine AGB before further flight and replace with a part eligible for installation.

(f) Credit for Previous Action

If you have previously performed a wear inspection of the engine AGB cover prior to the effective date of this AD in accordance with the instructions given in Turbomeca MSB No. 292 72 2861, Version C, dated March 9, 2016, or Turbomeca MSB No. 292 72 2861, Version B, dated February 2, 2016, then you may take credit for that wear inspection as the ''most recent'' wear inspection for the purposes of paragraph (e)(4) of this AD.

(g) Definition

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

(h) Alternative Methods of Compliance (AMOCs)

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

(i) Related Information

(1) For more information about this AD, contact Philip Haberlen, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7770; fax: 781–238–7199; email: *philip.haberlen@faa.gov.*

(2) Refer to MCAI European Aviation Safety Agency AD 2016–0055R1, dated October 11, 2016, for more information. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov/document?D=FAA-2015-3753-0006.*

(j) Material Incorporated by Reference

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

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

(i) Safran Helicopter Engines, S.A. Mandatory Service Bulletin No. 292 72 2861, Version D, dated September 23, 2016.

(ii) Reserved.

(3) For Safran Helicopter Engines, S.A. service information identified in this AD, contact Safran Helicopter Engines, S.A. 40220 Tarnos, France; phone: 33 0 5 59 74 40 00; fax: 33 0 5 59 74 45 15.

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

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

Issued in Burlington, Massachusetts, on November 29, 2016.

Colleen M. D'Alessandro,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2016–31695 Filed 12–29–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 11 and 101

[Docket No. FDA–2011–F–0172]

RIN 0910–AG57

Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; extension of compliance date.

SUMMARY: The Food and Drug Administration (FDA or we) is extending the compliance date for the final rule requiring disclosure of certain nutrition information for standard menu items in certain restaurants and retail food establishments. The final rule appeared in the **Federal Register** of December 1, 2014, and on May 5, 2016, we stated in the **Federal Register** that the enforcement of the final rule would begin on May 5, 2017. We are taking this action to clarify and confirm that the compliance date for the final rule is May 5, 2017.

DATES: *Effective date:* This final rule is effective December 30, 2016. *Compliance date:* Covered establishments must comply with the rule published December 1, 2014 (79 FR 71156) by May 5, 2017.

FOR FURTHER INFORMATION CONTACT: Ashley Rulffes, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2371, email: *ashley.rulffes@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of December 1, 2014 (79 FR 71156), we published a final rule requiring disclosure of certain nutrition information for standard menu items in certain restaurants and retail food establishments. The final rule, which is now codified at § 101.11 (21 CFR 101.11), implements provisions of section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)(H)) and:

- Defines terms, including terms that describe criteria for determining whether an establishment is subject to the rule;
- establishes which foods are subject to the nutrition labeling requirements and which foods are not subject to these requirements;
- requires that calories for standard menu items be declared on menus and menu boards that list such foods for sale;
- requires that calories for standard menu items that are self-service or on display be declared on signs adjacent to such foods;
- requires that written nutrition information for standard menu items be available to consumers who ask to see it;
- requires, on menus and menu boards, a succinct statement concerning suggested daily caloric intake (succinct statement), designed to help the public understand the significance of the calorie declarations;
- requires, on menus and menu boards, a statement regarding the availability of the written nutrition information (statement of availability);
- establishes requirements for determination of nutrient content of standard menu items;
- establishes requirements for substantiation of nutrient content determined for standard menu items, including requirements for records that a covered establishment must make available to FDA within a reasonable period of time upon request; and
- establishes terms and conditions under which restaurants and similar retail food establishments not otherwise subject to the rule could elect to be subject to the requirements by registering with FDA.

In the preamble to the final rule (79 FR 71156 at 71239 through 71241), we stated that the rule would be effective on December 1, 2015, and also provided a compliance date of December 1, 2015, for covered establishments. The final rule (at § 101.11(a)) defines ''covered establishment'' as a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership, *e.g.,* individual franchises) and offering for sale substantially the same menu items, as well as a restaurant or similar retail food establishment that is voluntarily registered to be covered under § 101.11(d).

II. Extending the Compliance Date

In the **Federal Register** of July 10, 2015 (80 FR 39675), in response to requests from affected entities, we announced our decision to extend the compliance date for the final rule to December 1, 2016. The final rule requirements are intended to ensure that consumers are provided accurate, clear, and consistent nutrition information for foods sold in covered establishments in a direct and accessible manner to enable consumers to make informed and healthful dietary choices. We stated in that extension that allowing adequate time for covered establishments to fully implement the final rule's requirements, as described in the requests, would help accomplish the primary objective of the final rule and is in the public interest.

On December 18, 2015, the President signed the Consolidated Appropriations Act, 2016 (Pub. L. 114–113). Section 747 of the Consolidated Appropriations Act states that none of the funds made available under the Consolidated Appropriations Act may be used to implement, administer, or enforce the final rule entitled ''Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments'' until 1 year after the date we publish a Level 1 guidance with respect to nutrition labeling of standard menu items in restaurants and similar retail food establishments.

In the **Federal Register** of May 5, 2016 (81 FR 27067), we announced the availability of the Level 1 guidance document and stated that enforcement of the final rule published December 1, 2014, would commence on May 5, 2017 (81 FR 27067 at 27068). While FDA made clear that we would not begin enforcing menu labeling requirements prior to May 5, 2017, we did not at that time formally make a change to the compliance date through rulemaking.

Therefore, through this final rule, we are clarifying and confirming that the compliance date for the final rule entitled ''Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments,'' codified at § 101.11, is May 5, 2017.

III. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule provides more flexibility by further extending the compliance date for the ''Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments'' final rule (79 FR 71156) (menu labeling final rule), we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

This rule extends the compliance date of the menu labeling final rule by approximately 5 months: From December 1, 2016, to May 5, 2017. The estimated costs and benefits accrued in any given year that the menu labeling rule is in effect, relative to the first year of compliance, does not change; however, because the compliance date is being extended by 5 months, the discounted value of both total costs and total benefits decreases. The principal benefit of this final rule will be the reduction in costs associated with extending the compliance date by 5 months. The principal cost of this final rule will be the reduction in benefits associated with extending the compliance date by 5 months. Extending the compliance date of the menu labeling final rule by 5 months reduces the annualized net benefits (discounted at 3 percent) approximately 3 percent, from $457 million to $442 million. While average annualized net benefits decrease by $15 million, they are still positive. We note that this extension of the compliance date will not have an actual effect on the cost or benefits of the menu labeling rule, because, under section 747 of the Consolidated Appropriations Act, 2016, FDA was not authorized to spend funds to ''implement, administer, or enforce'' the rule until May 5, 2017, a year after the date on which published a Level 1 guidance with respect to nutrition labeling of standard menu items in restaurants and similar retail food establishments. We are presenting the benefits and costs of the menu labeling final rule, which takes effect according to the dates in this rule.

The full analysis of economic impacts is available in the docket for this final rule (Ref. 1) and at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

IV. Paperwork Reduction Act

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

V. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Reference

The following reference is on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA, ''Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date,'' 2015. Available at: *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31597 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 888

[Docket No. FDA–2014–N–1205]

Orthopedic Devices; Reclassification of Pedicle Screw Systems, Henceforth To Be Known as Thoracolumbosacral Pedicle Screw Systems, Including Semi-Rigid Systems

AGENCY: Food and Drug Administration, HHS.

ACTION: Final order.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final order to reclassify pedicle screw systems, a preamendments class III device (regulated under product code NKB), into class II (special controls), renaming the device ''thoracolumbosacral pedicle screw systems''; reclassify dynamic stabilization systems, a subtype of pedicle screw systems regulated under product code NQP when used as an adjunct to fusion, into class II (special controls), renaming this device subtype ''semi-rigid systems''; and clarify the device identification of pedicle screw systems to more clearly delineate between rigid pedicle screw systems and semi-rigid systems. FDA is finalizing this action based on a reevaluation of information pertaining to the device type.

DATES: This order is effective on December 30, 2016. See further discussion in section V, ''Implementation Strategy.''

FOR FURTHER INFORMATION CONTACT: Constance P. Soves, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1437, Silver Spring, MD 20993, 301–796–6951, *Constance.Soves@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), the Medical Devices Technical Corrections Act (Pub. L. 108–214), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), and the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513(d) of the FD&C Act, devices that were in commercial distribution before the enactment of the 1976 amendments, May 28, 1976 (generally referred to as preamendments devices), are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as ''postamendments devices'') are automatically classified by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 Code of Federal Regulations (CFR) part 807).

A preamendments device that has been classified into class III and devices found substantially equivalent by means of premarket notification (510(k)) procedures to such a preamendments device or to a device within that type (both the preamendments and substantially equivalent devices are referred to as preamendments class III devices) may be marketed without submission of a premarket approval application (PMA) until FDA issues a final order under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval.

Under section 515(i)(2) of the FD&C Act, FDA has the authority to issue an administrative order revising the proposed classification of a device for which FDA has classified as a class III device and for which no administrative order has been issued calling for PMAs under section 515(b) of the FD&C Act, so that the device is classified into class I or class II, after issuance of a proposed order, a meeting of a device classification panel, and consideration of the comments of a proposed order. In determining whether to revise the proposed classification of a device or to require a device to remain in class III, FDA applies the criteria set forth in section 513(a) of the FD&C Act. Section 513(a)(1)(B) of the FD&C Act defines class II devices as those devices for which the general controls in section 513(a)(1)(A) by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls to provide a reasonable assurance of safety and effectiveness of a device.

On July 9, 2012, FDASIA was enacted. Section 608(a) of FDASIA amended section 513(e) of the FD&C Act, changing the mechanism for reclassifying a device from rulemaking to an administrative order.

Section 513(e) of the FD&C Act provides that FDA may, by administrative order, reclassify a device based upon ''new information.'' FDA can initiate a reclassification under section 513(e) or an interested person may petition FDA to reclassify a preamendments device. The term ''new information,'' as used in section 513(e), includes information developed as a result of a reevaluation of the data before the Agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, *e.g., Holland-Rantos Co.* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard,* 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the Agency is an appropriate basis for subsequent action where the reevaluation is made in light of newly available authority (see *Bell,* 366 F.2d at 181; *Ethicon, Inc.* v. *FDA,* 762 F.Supp. 382, 388–391 (D.D.C. 1991)), or in light of changes in ''medical science'' (*Upjohn,* 422 F.2d at 951). Whether data before the Agency are old or new data, the ''new information'' to support reclassification under section 513(e) must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the FD&C Act and 21 CFR 860.7(c)(2). (See, *e.g., General Medical Co.* v. *FDA,* 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Mfrs. Ass'n* v. *FDA,* 766 F.2d 592 (D.C. Cir. 1985), cert. denied, 474 U.S. 1062 (1986).)

FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the ''valid scientific evidence'' upon which the Agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, *e.g.,* the contents of a pending PMA. (See section 520(c) of the FD&C Act (21 U.S.C. 360j(c)).)

Section 513(e)(1) of the FD&C Act sets forth the process for issuing a final reclassification order. Specifically, prior to the issuance of a final order reclassifying a device, the following must occur: (1) Publication of a proposed order in the **Federal Register**; (2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments to a public docket.

FDA published a proposed order to propose different classifications for rigid pedicle screw systems and semi-rigid systems (SRSs) in the **Federal Register** of November 12, 2014 (79 FR 67105) (2014 Proposed Order). Moreover, as explained in section II of the 2014 Proposed Order, on May 22, 2013, FDA held a classification meeting of the Orthopedic and Rehabilitation Devices Panel (the 2013 Panel) to discuss pedicle screw systems, which include rigid pedicle screw systems and SRSs. FDA received and has considered all the comments on the 2014 Proposed Order, as discussed in section III. Therefore, FDA has met the requirements under sections 513(e)(1) and 515(i)(2) of the FD&C Act.

II. Device Description

Pedicle screw systems consist of multiple component devices made from a variety of materials that allow the surgeon to build an implant system to fit the patient's anatomical and physiological requirements. Such a spinal implant assembly may consist of a combination of hooks, screws, longitudinal members (*e.g.,* plates, rods, plate/rod combinations), transverse or cross connectors, and interconnection mechanisms (*e.g.,* rod-to-rod connectors, offset connectors). Rigid pedicle screw systems provide immediate rigid fixation to the spinal column as an adjunct to spinal fusion procedures.

Since the 1998 classification (63 FR 40025, July 27, 1998), changes in technological characteristics have occurred, leading to the emergence of a new type of pedicle screw system, SRSs, previously referred to as dynamic stabilization systems (DSSs). SRSs are a subset of the pedicle screw systems regulated under § 888.3070 (21 CFR 888.3070). SRSs are defined as systems that contain one or more non-uniform and/or non-metallic longitudinal elements (*e.g.,* polymer cords, moveable screw heads, springs) that allow more motion or flexibility (*e.g.,* bending, rotation, translation) compared to rigid systems and do not provide immediate rigid fixation to the spinal column as an adjunct to spinal fusion procedures.

In the 2014 Proposed Order, FDA proposed to modify the identification language from the way it is presently written in § 888.3070(a) and sought comments on the means of providing distinction between rigid pedicle screw systems and pedicle screw systems that allow more motion or flexibility. As discussed in section III, FDA received several comments suggesting that § 888.3070 separate SRSs, which may allow for more flexibility than traditional rigid pedicle screw systems but still facilitate fusion, from truly ''dynamic'' systems that are intended for non-fusion use. Truly dynamic systems intended for non-fusion use are postamendments devices that are outside the scope of this regulatory action. FDA agrees with these comments and has modified the identification language from the way it is presently written in § 888.3070(a) to include SRSs.

FDA has also, on its own initiative, renamed ''pedicle screw spinal system'' as ''thoracolumbosacral pedicle screw system'' to clearly distinguish these devices from posterior cervical screw systems, which are not intended to be covered by § 888.3070.

III. Public Comments in Response to the Proposed Order

In response to the 2014 Proposed Order, FDA received 15 comments from industry, trade organizations, professional societies, and individuals. Certain comments are grouped together under a single number because the subject matter of the comments is similar. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was submitted. The comments that follow are grouped into those that pertain to rigid pedicle screw systems and those that pertain to SRSs.

A. Rigid Pedicle Screw Systems

Of the 15 comments received, several specifically referenced the proposal to reclassify rigid pedicle screw systems when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of degenerative disc disease (DDD) and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment). Some commenters agreed with the recommendation to reclassify these as class II devices (special controls), most of whom specifically stated that they agreed with the Agency that general and special controls can provide reasonable assurance of the safety and effectiveness of rigid pedicle screw systems.

(Comment 1) Some commenters did not agree with the proposal to reclassify rigid pedicle screw systems to class II (special controls). One comment stated that labeling special controls are not appropriate risk mitigations and that clinical data should be required for these devices. Another comment noted that adverse events have been identified for rigid pedicle screw systems, and the final comment noted varied results in clinical literature, specifically citing a 1990 study by Matsuzaki et al. that found a 5.7 percent screw breakage rate (Ref. 1).

(Response 1) FDA disagrees that rigid pedicle screw systems for treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) should remain in class III. The Agency believes the labeling special controls proposed to inform users of the technological features of the device (including identification of device materials and the principles of device operation), intended use and indications for use (including levels of fixation), identification of magnetic resonance compatibility status, cleaning and sterilization instructions, and detailed instructions of each surgical step (including device removal) are appropriate to help mitigate the identified risks to health that may result from improper use of rigid pedicle screw systems. The Agency does not believe clinical data are necessary for rigid pedicle screw systems indicated for treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment). Clinical data from use of rigid pedicle screw systems for these indications were presented to the 2013 Panel to support reclassification to class II. Furthermore, non-clinical methods used to evaluate these devices have been demonstrated to adequately mitigate risks to health. FDA still retains the ability to request appropriate performance testing, including clinical data for individual devices with a different indication for use and/or different technological features that do not raise different questions of safety and effectiveness as compared to a predicate device, to demonstrate that the individual devices are as safe and effective as the predicate device, if necessary. FDA acknowledges that rigid pedicle screw systems, like all medical devices, have risks to health, as evidenced by the adverse events noted by one commenter, and the breakage rate identified in the 1990 Matsuzaki et al. study cited by another commenter (Ref. 1). On May 22, 2013, FDA held the 2013 Panel meeting to discuss the current classification of rigid pedicle screw systems for treatment of degenerative disc disease and spondylolisthesis other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment, which are currently class III indications (Ref. 2). FDA is not aware of evidence that indicates there is a higher rate of screw fracture for the class III indications, which is the focus of this reclassification effort, compared to the class II indications. The 2013 Panel discussed the adverse events and clinical literature associated with rigid pedicle screw systems for all indications, and recommended that traditional, rigid pedicle screw systems as an adjunct to fusion for the treatment of DDD and spondylolisthesis other than severe grades 3 or 4, or degenerative spondylolisthesis with objective evidence of neurologic impairment be reclassified as class II (special controls).

FDA agrees with the 2013 Panel's recommendation for reclassification. The Agency believes, as stated in the 2014 Proposed Order, that the risks of rigid pedicle screw systems as an adjunct to fusion for the treatment of DDD and spondylolisthesis other than severe grades 3 or 4, or degenerative spondylolisthesis with objective evidence of neurologic impairment, are sufficiently understood based on valid scientific evidence, which enables FDA to establish special controls to provide reasonable assurance of safety and effectiveness of rigid pedicle screw systems.

(Comment 2) One commenter provided an additional recommendation for the identification language for rigid pedicle screw systems. Specifically, to more completely characterize components that may be used as a part of these systems, the commenter suggested adding sublaminar wires and cables to the list of components of these systems.

(Response 2) FDA disagrees with this proposed edit to the identification language. These additional components, while often used in conjunction with pedicle screw systems, are classified under a separate classification regulation and, therefore, are not appropriate to include under § 888.3070. However, in review of this information, FDA acknowledges that hooks (currently listed in the identification language for pedicle screw systems) are also classified under a separate classification regulation. Therefore, the Agency has also taken the opportunity to remove ''hooks'' from the revised identification language for rigid pedicle screw systems.

(Comment 3) One commenter recommended removing design characteristics as a special control because this should be a requirement of all premarket notifications. This commenter also recommended removing the word ''rigid'' from the identification.

(Response 3) FDA disagrees with the recommendation of this commenter to remove design characteristics as a special control. FDA considers this special control critical to help differentiate technological features for rigid pedicle screw systems from SRSs. Similarly, inclusion of the word ''rigid'' in the identification language is necessary to distinguish between these and SRSs.

(Comment 4) One commenter recommended revising the biocompatibility special control to state ''compliance with biocompatibility standards.''

(Response 4) FDA disagrees with this comment and has determined that it is most appropriate not to reference consensus standards within special controls because relevant standards are subject to change over time. The special controls as worded allow for additional mechanisms by which manufacturers can meet the requirements to ensure conformity.

(Comment 5) One commenter recommended removing ''wear'' from the list of potential means by which a device could fail.

(Response 5) The risk of wear was raised at the 2013 Panel, specifically in the context of SRSs. FDA still considers there to be a potential for wear in traditional rigid systems as well and, therefore, has elected not to modify the definition of device failure accordingly.

(Comment 6) One commenter suggested editorial revisions to the risks and descriptive text associated with risks as outlined in the 2014 Proposed Order.

(Response 6) These edits were not considered to substantively change the intended meaning of the risks and associated mitigations and, therefore, FDA will not accept these suggested edits in this final order.

(Comment 7) One commenter provided several proposed edits that would impact § 888.3070(b)(1). Additionally, this commenter provided other editorial recommendations to the language from the 2014 Proposed Order.

(Response 7) While FDA agrees with the proposed modifications that would impact § 888.3070(b)(1), these will require a separate regulatory action because this section of the regulation is outside the scope of the call for information under section 515(i) of the FD&C Act. Edits that were proposed to the language from the 2014 Proposed Order did not materially impact the language within this final order.

In reviewing the 2014 Proposed Order, the comments received, and the 2013 Panel's recommendations, FDA is also making minor modifications to the identification for thoracolumbosacral pedicle screw systems. The identification for rigid pedicle screw systems will be revised from ''longitudinal members (*e.g.,* plates, rods, plate/rod combinations)'' to ''longitudinal members (*e.g.,* plates, rods including dual diameter rods, plate/rod combinations)'' as the latter statement clarifies that dual diameter rods would be considered to be part of rigid systems rather than as ''non-uniform longitudinal elements'' specified under the definition of SRSs.

B. SRSs

1. Identification

In the 2014 Proposed Order, FDA solicited comments to revise the identification language for pedicle screw spinal systems to distinguish between rigid pedicle screw systems and DSSs (now termed SRSs).

(Comment 8) While most commenters did not specifically comment on the proposed up-classification of SRSs to class III, approximately half of the comments suggested revisions to the definition of SRSs. These suggestions propose separating SRSs, which may allow for more flexibility than traditional rigid pedicle screw systems but still facilitate fusion, from truly ''dynamic'' systems that are intended for non-fusion use. Truly dynamic systems are postamendments devices that are outside the scope of this regulatory action.

(Response 8) FDA agrees with these comments and will henceforth refer to these systems as SRSs in this final order under § 880.3070(b)(3).

(Comment 9) Several commenters provided alternative identification language to FDA's initially proposed definition of DSSs, now termed SRSs, which was as follows: ''Dynamic stabilization systems are defined as systems that contain one or more non-uniform and/or non-metallic longitudinal elements (*e.g.,* polymer cords, moveable screw heads, springs) that allow more motion or flexibility (*e.g.,* bending, rotation, translation) compared to rigid pedicle screw systems and do not provide immediate rigid fixation to the spinal column as an adjunct [to] fusion.'' While most commenters agreed with the language that these systems ''allow more motion or flexibility,'' there were several comments that disagreed with the technological features called out within this definition (*i.e.,* non-uniform and/or non-metallic). For example, one commenter provided the case that an undersized metallic rod may allow for more flexibility than a larger non-metallic rod. Similar arguments were also made at the 2013 Panel, where the challenges of defining these systems based upon technological characteristics were also discussed. Accordingly, several commenters proposed modifications to the identification language of these systems based solely on intended use (*i.e.,* not intended for immediate rigid fixation, or intended to allow more motion or flexibility compared to rigid systems). Two commenters did not specifically provide alternate language; however, these commenters provided data from clinical and non-clinical studies to support the argument that rods manufactured from polyetheretherketone (PEEK) perform similarly to traditional metallic rods (Refs. 3 to 5). Qi et al. demonstrated that subjects undergoing single posterolateral fusion with either titanium rods or PEEK rods showed no difference in adjacent segment disease, spinal alignment, or clinical outcomes (Ref. 3). A biomechanical study by Sengupta et al. shows similar restriction in range of motion for PEEK rods compared to both the traditional metallic rods and another SRS device (Ref. 4). Kurtz et al. collected and analyzed explanted PEEK and traditional metallic rods and concluded that the PEEK rod retrievals showed similar wear patterns compared to traditional rigid rods (Ref. 5). These commenters also used terminology to distinguish these types of systems (*i.e.,* ''semi-rigid systems''), which are used as an adjunct to fusion, from ''non-rigid'' or ''flexible'' systems, which are ''intended for dynamic stabilization'' of the spine. An additional commenter also cited a cadaver study, which similarly showed that PEEK rods resulted in comparable stability to traditional metallic systems (Ref. 6).

(Response 9) In response to these comments, FDA has revised this identification to remove reference to ''non-metallic'' components and has also captured devices with less stiff materials (*i.e.,* ''features that allow more motion or flexibility compared to rigid systems''). FDA has also elected to alter the terminology used to identify these systems that ''allow more motion or flexibility'' when used as an adjunct to fusion as SRSs. This is also consistent with comments made at the 2013 Panel, in which the distinction between ''semi-rigid'' and ''dynamic'' systems was discussed. The features that may result in a device being classified as an SRS may include, but are not limited to, polymer cords, moveable screw heads, or springs. ''Dynamic stabilization systems'' for use in non-fusion procedures remain a postamendments class III device requiring PMAs.

2. Classification

In the 2014 Proposed Order, which was issued pursuant to sections 513(e)(1) and 515(i)(2) of the FD&C Act, FDA initially recommended that SRSs be classified into class III and require PMAs. Some commenters agreed with FDA's class III recommendation and other commenters proposed that SRSs be classified into class II.

(Comment 10) One comment agreed that SRSs for non-fusion uses should remain in class III, but SRSs used as an adjunct to fusion should be classified as class II. The commenter described that ''[w]e believe that this matter arose after two [SRS] products from two different manufacturers were recalled in 2008 and 2009. These two recalled devices created FDA concern over the entire category of [SRS], calling into question whether preclinical testing alone is sufficient to predict clinical outcomes for these devices. Other SRSs have not been recalled, nor are there significant safety concerns with these other [SRSs].'' Another commenter conducted a Medical Device Reporting (MDR) analysis, which separated out PEEK rods from other SRSs to demonstrate a similarity in reporting of adverse events associated with PEEK rods to that of traditional metallic rods.

Commenters specifically recommend that PEEK, or carbon-fiber reinforced PEEK, should remain in class II. This is based on several reported studies that demonstrate similarities in safety profiles and effectiveness outcomes for these devices as compared to devices incorporating traditional metallic rods, as also described previously in Comment 9 (Refs. 3 to 5). Two non-clinical literature articles provided in response to the proposed order demonstrate similar behavior between systems with PEEK rods and those with titanium rods.

Commenters also provided references to clinical studies using SRSs (Refs. 7 to 9). Each of these studies demonstrates fusion rates within a range deemed to be clinically acceptable in single- or multilevel posterolateral fusion using PEEK rod constructs.

(Response 10) Based on these comments to the proposed order and to corroborate findings from the literature following the 2013 Panel meeting, FDA conducted an additional MDR analysis of SRSs excluding the two recalled systems, as well as an MDR analysis of PEEK rods alone.

A search of the Manufacturer and User Facility Device Experience database was conducted to identify the relevant MDRs and identify the types of adverse events reported for pedicle screw spinal systems on or before October 17, 2016. Results from this MDR analysis demonstrated that the same types of adverse events are present in the same relative incidence for SRS devices as noted in traditional rigid pedicle screw systems (*i.e.,* the most common adverse events are device breakage, revision, and pain in all groups). FDA believes this evidence demonstrates that SRS devices have the same risks to health as rigid pedicle screw systems.

FDA additionally conducted an independent survey of literature published after the 2013 Panel related to the use of SRSs as an adjunct to fusion to assess current surgical practice and reported treatment outcome. FDA's literature search captured the articles identified previously in the comments as well as articles pertaining to additional SRS designs that have been cleared for marketing in the United States (Refs. 10 and 11). While only a subset of the 16 SRSs that have currently been determined to be substantially equivalent are represented in the literature, a wide range of currently cleared SRS designs is represented by this subset. The data demonstrated similar safety profiles for SRSs compared to traditional rigid pedicle screw systems. The adverse events reported in the literature for SRSs are similar to those cited in the Executive Summary for the 2013 Panel Meeting for traditional rigid pedicle screw systems used in currently class III indications that we proposed to reclassify to Class II rods (Ref. 2). Typical adverse events included pseudarthrosis, reoperation, screw loosening, and screw breakage. There were no reports of breakage of the longitudinal members of any of the SRSs studied.

The fusion rates of SRSs compare favorably to fusion rates of traditional systems for treatment of low-grade spondylolisthesis and DDD, which range from 78 to 100 percent and which the 2013 Panel deemed to be clinically acceptable to support reclassification for these indications (see the 2013 Panel Executive Summary for additional information (Ref. 2)). Based upon the currently available information, FDA agrees with the Panel's assessment that a fusion rate within the range of 78 to 100 percent would be clinically acceptable. Although the information presented to the 2013 Panel was limited in both the number of subjects and the number of SRSs represented, additional information that FDA received and considered after the 2013 Panel meeting supports FDA's determination that there is sufficient information to revise the proposed classification of SRSs from class III to II. FDA believes that the range of fusion rates found clinically acceptable by the 2013 Panel could serve as a performance parameter for providing reasonable assurance of safety and effectiveness for the device type based on the valid scientific evidence but due to some variability (*e.g.,* design and material used) among individual devices, FDA has determined that clinical data are needed to demonstrate that each device with its specific characteristics (*e.g.,* design and material used) and conditions of use meets that parameter. FDA believes that fusion rates higher than the current clinically acceptable range may be achieved with improvement in technology and, thus, may consider that factor in evaluating clinical data submitted from firms.

Based upon the information provided in response to the proposed order, and including additional analyses of the literature and MDRs since the 2013 Panel, FDA has determined that the risks to health are not substantially different from traditional rigid pedicle screw spinal systems. As discussed previously and in the 2014 Proposed Order, FDA agreed with the 2013 Panel that there is valid scientific evidence on the safety of rigid pedicle screw systems. FDA has also determined, as discussed previously, that an evaluation of additional MDR data and additional clinical literature provide valid scientific evidence regarding the safety of SRS devices for fusion (Refs. 3 to 11).

Whereas non-clinical performance testing appropriately mitigates the risks to health for rigid pedicle screw systems, non-clinical special controls are not sufficient to mitigate the risks to health, specifically, the risk of pseudarthrosis resulting in additional surgical procedures, for SRS devices. Non-clinical performance testing (such as standardized test methods or biomechanical testing of cadaveric specimens) does not adequately differentiate between different SRS technologies nor predict the ability to achieve spinal fusion with a particular SRS. While some SRSs can be tested using the typical bench testing as a means of comparing performance of traditional rigid pedicle screw systems (*e.g.,* per ASTM F1717–15, ''Standard Test Methods for Spinal Implant Constructs in a Vertebrectomy Model''), this testing may result in lower bending stiffness for SRSs than similarly sized uniform metallic rods (Ref. 12). Testing in accordance with ASTM F1717–15 is not typically used to evaluate SRS technologies as significant modifications to the test standards are often necessary to conduct the test. Given that the systems have not typically been tested in accordance with the accepted consensus standard and as standardized acceptance criteria for SRS technologies undergoing this testing have not been developed, it is challenging to solely use the results of non-clinical performance testing for comparison purposes to rigid pedicle screw systems.

While clinical data as a special control was not specifically mentioned in the comments, the 2013 Panel discussed the ability for clinical data to distinguish between successful and unsuccessful SRS device designs. FDA believes that clinical performance data would adequately mitigate the risks to health for SRS devices, particularly the risk of pseudarthrosis resulting in additional surgical procedures. In addition, there is sufficient valid scientific evidence showing that the device type is effective for use as an adjunct to fusion, when the fusion rate is within a clinically acceptable range, as discussed previously. FDA therefore believes there is sufficient information to establish special controls that, in addition to general controls, can provide a reasonable assurance of safety and effectiveness for SRSs. Table 1 summarizes how FDA believes the risks to health identified for SRSs can be mitigated by special controls, including clinical performance data.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES FOR SRSS

Identified risks to health	Mitigation method
Device failure	Design characteristics; Non-clinical performance testing; Labeling.
Failure of bone implant interface	Design characteristics; Biocompatibility evaluation; Non-clinical performance testing; Labeling.
Tissue injury	Labeling.
Adverse tissue reaction	Design characteristics; Biocompatibility evaluation; Sterility; Labeling.
Device malposition	Labeling.
Pseudarthrosis	Non-clinical performance testing; Clinical performance testing; Labeling.

As discussed in FDA's response to Comment 1, the risks to health and associated mitigation measures for rigid pedicle screw systems remain unchanged from those listed in table 1 of the 2014 Proposed Order.

3. SRS as Class II Device

As stated previously, FDA has reevaluated all of the valid scientific evidence for SRSs in finalizing this order. As described in the proposed order and in section I of this order, FDA has satisfied the requirements under section 515(i)(2) of the FD&C Act for revising the proposed classification for SRSs. Under section 515(i)(2) of the FD&C Act, FDA has the authority to issue an administrative order revising the proposed classification of a device for which FDA has classified as a class III device and for which no administrative order has been issued calling for PMAs under section 515(b) of the FD&C Act, so that the device is classified into class I or class II, after issuance of a proposed order, a meeting of a device classification panel, and consideration of the comments of a proposed order. In determining whether to revise the proposed classification of a device or to require a device to remain in class III, FDA applies the criteria set forth in section 513(a) of the FD&C Act. Section 513(a)(1)(B) of the FD&C Act defines class II devices as those devices for which the general controls in section 513(a)(1)(A) by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls to provide a reasonable assurance of safety and effectiveness of a device.

FDA has reviewed all of the initial procedures, scientific information presented at the 2013 Panel meeting, comments received from both the 2014 Proposed Order and 2009 Final Order under section 515(i)(1) of the FD&C Act calling for information on preamendment devices (74 FR 16214, April 9, 2009) for consideration of the classification of SRS devices under section 513(a) of the FD&C Act and has initiated revision of the proposed classification of the device under section 515(i)(2) of the FD&C Act.

The discussion at the 2013 Panel for SRSs was limited, as acknowledged by 2013 Panel members, by the small number of studies available at that time and reports in the MDRs regarding SRSs for fusion. Given limitations of the available data, in literature and MDR analysis, the 2013 Panel concluded that insufficient evidence was available to establish special controls. Although FDA recommended, and the 2013 Panel agreed, that a call for PMAs was the necessary measure to mitigate the risks to health for SRSs and ensure a reasonable assurance of safety and effectiveness, FDA has since reassessed the scientific evidence based upon comments received and additional information, reevaluating the scientific evidence presented at the 2013 Panel meeting to reconsider FDA's prior position regarding the necessary controls to provide reasonable assurance of safety and effectiveness for SRSs. Based on FDA's reevaluation of the available body of evidence, FDA has determined that sufficient information exists regarding the risks and benefits of SRSs for FDA to determine that general and special controls can provide reasonable assurance of the safety and effectiveness of the device type and, thus, revising the proposed classification for these devices from class III to II under section 515(i)(2) of the FD&C Act is appropriate.

Also, at the 2013 Panel meeting, the panel did discuss the feasibility of clinical data as being able to potentially distinguish between successful and non-successful SRS designs, without specifically discussing what level of data would be necessary. After further review of the scientific literature and comments, FDA believes that clinical performance data as a special control would adequately mitigate the risks to health for SRS devices, particularly the risk of pseudarthrosis resulting in additional surgical procedures (see response to Comment 10 in section II.B.2).

Upon reevaluation of the scientific evidence and additional information, FDA has determined that SRS devices do not have the degree of risk of illness or injury designed to be eliminated or reduced by requiring the device to have an approved PMA under section 515(b)(2) of the FD&C Act. In addition, the level of scientific evidence evaluated has allowed FDA to determine that SRSs can be classified as class II with the establishment of special controls because sufficient valid scientific evidence exists to determine that general controls, in combination with special controls, are sufficient to provide a reasonable assurance of safety and effectiveness. FDA has determined that revision of the proposed classification of SRSs under section 515(i)(2) of the FD&C Act will allow these devices to be classified in class II subject to a clinical performance data special control. As a result, instead of calling for PMAs for SRSs, FDA is finalizing this order to revise the proposed classification for SRS devices from class III to class II (special controls) following reassessment of all relevant scientific evidence and comments received from the 2014 Proposed Order. FDA believes the clinical performance data special control and other special controls, together with general controls, are sufficient to provide a reasonable assurance of safety and effectiveness for SRS devices.

IV. The Final Order

Under sections 513(e) and 515(i) of the FD&C Act, FDA is adopting its findings as published in the preamble to the proposed order with the modifications discussed in section II of this final order. FDA is issuing this final order to reclassify rigid pedicle screw systems and to revise classification of SRSs when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) when used as an adjunct to fusion from class III to class II and establish special controls for all SRSs by revising part 888. Rigid pedicle screw systems when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) and SRSs for any indication must comply with the special controls identified in this order (see Section V, ''Implementation Strategy'').

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the devices. FDA has determined that premarket notification is necessary to provide reasonable assurance of safety and effectiveness of rigid pedicle screw systems and SRSs when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment). Therefore, these device types are not exempt from premarket notification requirements.

Following the effective date of this final order, firms marketing rigid pedicle screw systems when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) and SRSs for any indication must comply with the special controls set forth in this order (see section V, ''Implementation Strategy'').

V. Implementation Strategy

The special controls identified in this final order are effective as of the date of publication of this order, December 30, 2016. Both rigid pedicle screw systems and SRSs covered by this order must comply with the special controls following the effective date of the order. Specifically, devices subject to the special controls in this order include rigid pedicle screw systems intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment), and SRSs for any indication. However, FDA does not intend to enforce compliance with the special controls for currently legally marketed SRSs covered by this order until June 28, 2018. The 30-month enforcement discretion period was selected based on the following factors: (1) The 2014 Proposed Order initially called for PMAs containing clinical performance data to be submitted within a 30-month timeframe, and thus the request in this final order for 510(k) amendments, which include submission of clinical performance data as a special control, maintains the same expectation of sponsors; and (2) the effectiveness endpoint of fusion for SRSs is generally assessed at 1 to 2 years post-implantation, and thus if a new study were to be initiated to collect clinical performance data, FDA would expect the 30-month period to be appropriate for SRS and allow sponsors sufficient time to enroll patients, conduct the study, and analyze the data.

For those manufacturers who wish to continue to offer for sale currently legally marketed SRSs covered by this order, FDA expects them to submit an amendment to their previously cleared 510(k)s for the devices by June 28, 2018 that demonstrates compliance with the special controls. This approach is consistent with prior final orders for reclassifications of preamendment devices in which special controls requiring submission of clinical performance data were issued. An amendment to a 510(k) will be added to the 510(k) file but will not serve as a basis for a new substantial equivalence review. A submitted 510(k) amendment in this context will be used solely to demonstrate to FDA that an SRS system is in compliance with the special controls. If a 510(k) amendment for the device is not submitted by June 28, 2018 or if FDA determines that the amendment does not demonstrate compliance with the special controls, then this compliance policy would not apply, and FDA would intend to enforce compliance with these requirements. In that case, the device is deemed adulterated under section 501(f)(1)(B) of the FD&C Act (21 U.S.C. 351(f)(1)(B)) as of the date of FDA's determination of noncompliance or June 28, 2018, whichever is sooner.

For rigid pedicle screw systems intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) and SRSs for any indication that have not been legally marketed prior to December 30, 2016, or models that have been legally marketed but are required to submit a new 510(k) under 21 CFR 807.81(a)(3) because the device is about to be significantly changed or modified, manufacturers must obtain 510(k) clearance, among other relevant requirements, and demonstrate compliance with the special controls included in this final order, before marketing the new or changed device.

VI. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. Paperwork Reduction Act of 1995

This final order refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, have been approved under OMB control number 0910–0120 and the collections of information under 21 CFR part 801 have been approved under OMB control number 0910–0485.

VIII. Codification of Orders

Prior to the amendments by FDASIA, section 513(e) of the FD&C Act provided for FDA to issue regulations to reclassify devices. Although section 513(e) as amended requires FDA to issue final orders rather than regulations, FDASIA also provides for FDA to revoke previously promulgated regulations by order. FDA will continue to codify classifications and reclassifications in the CFR. Changes resulting from final orders will appear in the CFR as changes to codified classification determinations or as newly codified orders. Therefore, pursuant to section 513(e)(1)(A)(i) of the FD&C Act, as amended by FDASIA, in this final order, we are revoking the requirements in § 888.3070 related to the classification of rigid pedicle screw systems and SRSs when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) as class III devices. We are codifying the reclassification of rigid pedicle screw systems and SRSs when intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of DDD and spondylolisthesis (other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment) into class II (special controls). In addition, as set forth in the 2014 Proposed Order, FDA has separated SRSs, a subtype of pedicle screw systems, from rigid pedicle screw systems in the identification section of the classification regulation (§ 888.3070(a)) and has established a separate subpart of the classification regulation (§ 888.3070(b)(3)), which is applicable to all SRSs regardless of indication.

IX. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

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10. Ormond, D.R., L. Albert Jr., and K. Das, ''Polyetheretherketone (PEEK) Rods in Lumbar Spine Degenerative Disease: A Case Series,'' *Journal of Spine Disorders & Techniques,* in press, 2012 (later published in 2016 under *Clinical Spine Surgery,* 29(7):E371–E375, 2016).
11. Yang, M., C. Li, Z. Chen, et al., ''Short Term Outcome of Posterior Dynamic Stabilization System in Degenerative Lumbar Diseases,'' *Indian Journal of Orthopaedics,* 48(6):574–581, 2014.
12. ASTM F1717–15, ''Standard Test Methods for Spinal Implant Constructs in a Vertebrectomy Model,'' July 2015; available at: *https://www.astm.org/Standards/F1717.htm.*

List of Subjects in 21 CFR Part 888

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 888 is amended as follows:

PART 888—ORTHOPEDIC DEVICES

■ 1. The authority citation for part 888 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 888.3070 is amended by revising the section heading and paragraphs (a) and (b)(2), adding paragraph (b)(3), and removing paragraph (c).

The revisions and addition read as follows:

§ 888.3070 Thoracolumbosacral pedicle screw system.

(a) *Identification.* (1) Rigid pedicle screw systems are comprised of multiple components, made from a variety of materials that allow the surgeon to build an implant system to fit the patient's anatomical and physiological requirements. Such a spinal implant assembly consists of a combination of screws, longitudinal members (*e.g.,* plates, rods including dual diameter rods, plate/rod combinations), transverse or cross connectors, and interconnection mechanisms (*e.g.,* rod-to-rod connectors, offset connectors).

(2) Semi-rigid systems are defined as systems that contain one or more of the following features (including but not limited to): Non-uniform longitudinal elements, or features that allow more motion or flexibility compared to rigid systems.

(b) * * *

(2) Class II (special controls), when a rigid pedicle screw system is intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion in the treatment of degenerative disc disease and spondylolisthesis other than either severe spondylolisthesis (grades 3 and 4) at L5–S1 or degenerative spondylolisthesis with objective evidence of neurologic impairment. These pedicle screw systems must comply with the following special controls:

(i) The design characteristics of the device, including engineering schematics, must ensure that the geometry and material composition are consistent with the intended use.

(ii) Non-clinical performance testing must demonstrate the mechanical function and durability of the implant.

(iii) Device components must be demonstrated to be biocompatible.

(iv) Validation testing must demonstrate the cleanliness and sterility of, or the ability to clean and sterilize, the device components and device-specific instruments.

(v) Labeling must include the following:

(A) A clear description of the technological features of the device including identification of device materials and the principles of device operation;

(B) Intended use and indications for use, including levels of fixation;

(C) Identification of magnetic resonance (MR) compatibility status;

(D) Cleaning and sterilization instructions for devices and instruments that are provided non-sterile to the end user; and

(E) Detailed instructions of each surgical step, including device removal.

(3) Class II (special controls), when a semi-rigid system is intended to provide immobilization and stabilization of spinal segments in the thoracic, lumbar, and sacral spine as an adjunct to fusion for any indication. In addition to complying with the special controls in paragraphs (b)(2)(i) through (v) of this section, these pedicle screw systems must comply with the following special controls:

(i) Demonstration that clinical performance characteristics of the device support the intended use of the product, including assessment of fusion compared to a clinically acceptable fusion rate.

(ii) Semi-rigid systems marketed prior to the effective date of this reclassification must submit an amendment to their previously cleared premarket notification (510(k)) demonstrating compliance with the special controls in paragraphs (b)(2)(i) through (v) and paragraph (b)(3)(i) of this section.

Dated: December 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31670 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Parts 1, 7, and 31

[TD 9807]

RIN 1545–BL68

Information Returns; Winnings From Bingo, Keno, and Slot Machines

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6041 regarding the filing of information returns to report winnings from bingo, keno, and slot machine play. The rules update the existing requirements regarding the filing, form, and content of such information returns; allow for an additional form of payee identification; and provide an optional aggregate reporting method. The final regulations affect persons who pay winnings of $1,200 or more from bingo and slot machine play, $1,500 or more from keno, and recipients of such payments.

DATES: These regulations are effective on December 30, 2016.

FOR FURTHER INFORMATION CONTACT: David Bergman, (202) 317–6845 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations in Title 26 of the Code of Federal Regulations under section 6041 of the Internal Revenue Code. The final regulations replace the existing information reporting requirements under § 7.6041–1 of the Temporary Income Tax Regulations under the Tax Reform Act of 1976 for persons who make reportable payments of bingo, keno, or slot machine winnings. The new requirements are set forth in a new § 1.6041–10 of the regulations. Because the new requirements replace the existing requirements, the regulations under § 7.6041–1 are being removed.

On March 4, 2015, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–132253–11) in the **Federal Register**, 80 FR 11600, containing proposed regulations that would update the existing rules and add rules for electronically tracked slot machine play, payee identification, and an optional aggregate reporting method.

A public hearing was held on June 17, 2015, and five speakers provided testimony. In addition, over 14,000 written public comments were received. After careful consideration of the written comments and statements made during the hearing, the proposed regulations are adopted as modified by this Treasury Decision.

Explanation and Summary of Comments

All of the 14,000 written comments on the notice of proposed rulemaking were considered and are available at regulations.gov or upon request. Many of these comments addressed similar issues and expressed similar points of view. These comments are summarized in this preamble. Comments pertaining to parimutuel gambling in the case of horse races, dog races, and jai alai are being considered in a separate regulations project under section 3402(q).

Filing Requirement, Form, and Content of the Information Return

Commentators supported the proposed rules regarding filing requirements and the form and content of the information returns required to be filed. Accordingly, the Treasury Department and the IRS conclude that the final regulations should adopt the filing requirements without modification.

Electronically Tracked Slot Machine Play

The proposed regulations created rules for electronically tracked slot machine play, which was defined in proposed § 1.6041–10(b)(1) as slot machine play where an electronic player system controlled by the gaming establishment (such as through the use of a player's card or similar system) records the amount a specific individual wins and wagers on slot machine play. Section 1.6041–10(b)(2)(i)(D) of the proposed regulations provided that gambling winnings for electronically tracked slot machine play are required to be reported if (1) the total amount of winnings netted against the total amount of wagers during the same session of play was $1,200 or more, and (2) at least one single win during the session was $1,200 or more without regard to the wager. A ''session'' of play was determined with reference to a calendar day. The changes were intended to facilitate reporting by payees on their individual income tax returns under the proposed safe harbor in Notice 2015–21, 2015–12 I.R.B. 765.

Some commentators expressed concern regarding the feasibility of the proposed rules given existing technology and recommended that the proposed rules not be adopted. Commentators stated that one of the purposes of electronic player systems was for marketing and customer loyalty and that current systems should not be used as a mandatory method for tracking winnings and wagers for purposes of tax reporting. Moreover, commentators stated that the use of electronic player systems for tax reporting may chill customer use and have a negative effect on customer relations. In addition, some commentators stated that their electronic player systems lack the necessary controls to be used for tax reporting, and that implementing such controls may be costly and labor-intensive. Based on these comments, the final regulations do not adopt the proposed rules for electronically tracked slot machine play.

Payee Identification Requirements

The proposed regulations retain the rule in § 7.6041–1(c)(3) of the Temporary Income Tax Regulations that the payor must obtain two forms of identification from the payee to verify the payee's identity. However, § 1.6041–10(f) of the proposed regulations modifies the rules for acceptable identification by requiring that one of the forms of identification include the payee's photograph and by providing that the payor may accept a properly completed Form W–9 in lieu of identification that includes the payee's social security number. The proposed regulations provide that payors may rely on this provision prior to publication of final regulations in the **Federal Register**.

Most commentators supported the proposed rules regarding the types of identification that can be relied on to verify a payee's identity. In particular, commentators supported the provision that allows a Form W–9 to be used as an acceptable means of verifying a payee's identity in lieu of identification that includes the payee's social security number. This rule is consistent with procedures currently used by many payors to address the fact that, today, most forms of identification that payees carry with them do not contain a social security number.

Other commentators suggested that the list of examples of acceptable forms of government-issued identification be expanded to include tribal member identification cards issued by a federally recognized Indian tribe. Some commentators also suggested that an exception from the photo identification requirement be provided for tribal identification cards presented at tribal government gaming facilities because many tribal identification cards do not contain photographs.

In response to the comments received, the list of examples of acceptable government-issued identification has been expanded in § 1.6041–10(e)(1) of the final regulations to include tribal member identification cards issued by a federally recognized Indian tribe. In addition, in response to comments, § 1.6041–10(d)(2) of the final regulations provides an exception to the photo identification requirement if one of the forms of identification is a tribal identification card presented at a gaming establishment owned or licensed by the tribal government that issued the tribal member identification card.

Optional Aggregate Reporting Method and Session

Section 1.6041–10(h) of the proposed regulations provides a new rule for an optional aggregate reporting method. Under § 7.6041–1(a), reporting of gambling winnings from bingo, keno, and slot machine play is required each time a payor makes a payment of reportable gambling winnings (*i.e.,* a payment that meets the reporting threshold). The aggregate reporting method allows a payor who makes more than one payment of reportable gambling winnings to the same payee from the same type of game during a ''session'' to report the aggregate amount of such reportable gambling winnings on one Form W–2G, provided the payor satisfies certain recordkeeping requirements set forth in the regulations. Under § 1.6041–10(b)(3) of the proposed regulations, a ''session'' is generally defined as a period of play that begins when a patron places the first wager on a particular type of game at a gaming establishment and ends when the patron places his or her last wager on the same type of game before the end of the same calendar day at the same gaming establishment. This aggregate reporting method may be used at the payor's option. The proposed regulations provide that payors may rely on this provision prior to publication of final regulations in the **Federal Register**.

Commentators were generally supportive of the proposed optional aggregate reporting method but did suggest some changes. Accordingly, the final regulations adopt the proposed optional aggregate reporting method with some modifications.

First, the period for purposes of the aggregate reporting method in the final regulations is not referred to as a ''session.'' Rather, in § 1.6041–10(g) of the final regulations, the period used for purposes of the aggregate reporting method is now referred to as an ''information reporting period.'' The proposed regulations' definition of a ''session'' was intended to mirror the concept of ''session'' set forth in the safe harbor for the determination of wagering gains and losses from electronically tracked slot machine play that was published in a Notice and draft Revenue Procedure on the same date as the proposed regulations. Notice 2015–21. The Treasury Department and the IRS are still considering the income tax reporting rules in this area, and the draft Revenue Procedure has not been finalized. Therefore, to avoid confusion, the aggregate reporting method rules in § 1.6041–10(g) of the final regulations have been modified so that the period during which reporting may be aggregated is referred to as the ''information reporting period'' rather than as a ''session.''

Second, commentators suggested that rather than a calendar day, payors should have the option of using the 24-hour period known commonly in the industry as the ''gaming day'' for purposes of the aggregate reporting method. The comments explained that the period of a ''gaming day'' is used by gaming establishments for financial accounting, gaming control board, and other regulatory purposes, and allows each establishment the flexibility to define a day for these purposes by taking into account peak gaming times. The ''gaming day'' period is also utilized in complying with anti-money laundering reporting obligations. According to the comments, a gaming day is a 24-hour period that ends at a time during which the gaming establishment is closed or when business is slowest, typically between 3 a.m. and 6 a.m. The comments indicate that allowing payors to use the same period for purposes of information reporting as for other regulatory purposes will enhance the benefits of aggregate reporting for payors by not having a different reporting period for tax reporting, and by allowing aggregate reports to be generated during non-peak gaming times.

To give payors more flexibility, the final regulations adopt these suggestions and provide a flexible ''information reporting period'' as the period to be used for aggregate reporting. Under § 1.6041–10(b)(2) of the final regulations, an ''information reporting period'' is either a ''calendar day'' or a ''gaming day,'' so long as that period is applied uniformly by the payor to all payees during the calendar year. A payor may adopt a different ''information reporting period'' from one calendar year to the next, but may not change the ''information reporting period'' in the middle of a calendar year. Changes to a payor's ''information reporting period'' from one calendar year to the next must be implemented on January 1. In addition, the final regulations provide that on December 31st, all open information reporting periods must end at 11:59 p.m. in order to end by the end of the calendar year. This rule is necessary to maintain calendar year federal income tax reporting that is the bedrock of the information reporting regime and that is required by section 6041. Section 1.6041–10(b)(2)(iii) of the final regulations provides that if a ''gaming day'' is adopted for a calendar year, the information reporting period for

December 31st ends at 11:59 p.m. on December 31, and the information reporting period for January 1st begins at 12 a.m. on January 1, regardless of the number of hours of the December 31st and January 1st information reporting periods.

Third, commentators noted that the proposed regulations did not specifically define ''gaming establishment,'' and how to deal with common ownership between various casinos. Section 1.6041–10(b)(2)(iv) of the final regulations defines the term ''gaming establishment'' as a business entity of a payor of reportable gambling winnings with respect to bingo, keno, or slot machine play, and includes all gaming establishments owned by the payor using the same employer identification number (EIN) issued to such payor in accordance with section 6109.

Finally, commentators requested that the proposed recordkeeping requirements with respect to aggregate reporting be updated to reflect the actual credentials held by various casino representatives. These recordkeeping requirements require that payors maintain a record of every payment that will be reported using the aggregate reporting method and that each entry in the record be verified by a designated casino representative. Section § 1.6041–10(g)(3)(vii) of the proposed regulations requires that the designated individual provide a gaming license number. The final regulations do not require that a gaming license number be provided. Instead, § 1.6041–10(g)(3)(vii) of the final regulations requires that the person authorized by the applicable gaming regulatory control authority to ensure accuracy in reporting provide his or her unique identification number.

Reporting Thresholds

The proposed rules maintained the reporting thresholds of $1,200 for bingo and slot machine play and $1,500 for keno in § 7.6041–1(a), but invited comments on the feasibility of reducing these thresholds. Commentators overwhelmingly opposed the idea of reducing these reporting thresholds. Payors opposed lowering the thresholds because it would result in more reporting, which would increase compliance burdens for the industry. In fact, many commentators suggested that rather than reducing the current thresholds, they should be increased to account for inflation. These final regulations do not change the existing reporting thresholds for bingo, keno, and slot machine play.

Netting Wagers

The proposed regulations retain the rules in § 7.6041–1(b) that, in determining whether the reporting threshold is satisfied, the amount of winnings from bingo and slot machine play is not reduced by the amount of the wager, but the amount of winnings from one keno game is reduced by the amount of the wager in that one game. Commentators were divided as to whether uniform application of netting the wager against the winnings was feasible, citing compliance cost and labor concerns. In light of these concerns, the Treasury Department and the IRS conclude that the existing approach, as described in the proposed regulations, should be retained. Accordingly, § 1.6041–10(b)(1)(i) of the final regulations provides that reportable gambling winnings in the case of bingo and slot machine play are not determined by netting the wager against the winnings, but reportable gambling winnings in the case of keno are determined by netting the wager in that one game against the winnings from that game.

Definition of Slot Machine and Reportable Gambling Winnings

For purposes of information reporting, proposed § 1.6041–10(b)(4) defines a slot machine as a device that, by application of the element of chance, may deliver or entitle the person playing or operating the device to receive cash, premiums, merchandise, or tokens, whether or not the device is operated by inserting a coin, token, or similar object. One commentator suggested that the definition of slot machines be changed to adopt either of the definitions that has been adopted by the states of New Jersey or Nevada, both of which define slot machines more broadly. Other commentators suggested that the definition of slot machine in the proposed regulations is too broad because it could include technologic aids to Class II gaming as defined under the Indian Gaming Regulatory Act, 25 U.S.C. 2701–2721, such as electronic bingo or electronic pull-tabs.

As discussed in the preamble of the proposed regulations, the definition of slot machine in proposed § 1.6041–10(b)(4) is intended to be consistent with the definition of slot machine in § 44.4402–1(b)(1) of the Wagering Tax Regulations. Having consistent definitions benefits tax administration and may prevent unintended confusion that could arise from having different definitions for federal tax purposes. Because the Treasury Department and the IRS conclude that, on balance, the proposed definition of slot machine is the most appropriate definition, the final regulations adopt the proposed definition of the term ''slot machine'' without modification.

Section 1.6041–10(b)(2)(i) of the proposed regulations provides that all winnings from all cards played during one bingo game are combined and that all winnings from all ''ways'' on a multi-way keno ticket are combined. In addition, § 1.6041–10(b)(2)(ii) of the proposed regulations provides that winnings from different types of games are not combined to determine whether the reporting thresholds are satisfied, and that bingo, keno, and slot machine play are all different types of games. Commentators did not oppose inclusion of these rules in the definition of reportable gambling winnings in the proposed regulations. Accordingly, the final regulations adopt these aspects of the definition of reportable gambling winnings without modification.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required.

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this rule merely provides guidance as to the filing of information reporting returns for payors who make reportable payments of bingo, keno, or slot machine winnings and who are required by section 6041 to make returns reporting those payments. The requirement for payors to make information returns is imposed by statute and not these regulations. In addition, this rule reduces the existing burden on payors to comply with the statutory requirement by simplifying the process for payors to verify payees' identities with a broader range of documents that are more readily available, and also by allowing payors to reduce the number of information returns they issue if they adopt the new aggregate reporting methodology. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the regulations' impact on small businesses, and no comments were received.

Drafting Information

The principal author of these regulations is David Bergman of the Office of Associate Chief Counsel (Procedure & Administration).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 7

Temporary income tax regulations under the Tax Reform Act of 1976.

26 CFR Part 31

Employment Taxes and Collection of Income Tax at Source.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 7, and 31 are amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.6041–10 is added to read as follows:

§ 1.6041–10 Return of information as to payments of winnings from bingo, keno, and slot machine play.

(a) *In general.* Every person engaged in a trade or business (as defined in § 1.6041–1(b)) and who, in the course of such trade or business, makes a payment of reportable gambling winnings (defined in paragraph (b)(1) of this section) must make an information return with respect to such payment. Unless the provisions of paragraph (g) of this section (regarding aggregate reporting) apply, a separate information return is required with respect to each payment of reportable gambling winnings.

(b) *Definitions*—(1) *Reportable gambling winnings.* (i) For purposes of this section, the term reportable gambling winnings is defined as follows:

(A) For bingo, the term ''reportable gambling winnings'' means winnings of $1,200 or more from one bingo game, without reduction for the amount wagered. All winnings received from all wagers made during one bingo game are combined (for example, all winnings from all cards played during one bingo game are combined).

(B) For keno, the term ''reportable gambling winnings'' means winnings of $1,500 or more from one keno game reduced by the amount wagered on the same keno game. All winnings received from all wagers made during one keno game are combined (for example, all winnings from all ''ways'' on a multi-way keno ticket are combined).

(C) For slot machine play, the term ''reportable gambling winnings'' means winnings of $1,200 or more from one slot machine play, without reduction for the amount wagered.

(ii) Winnings and wagers from different types of games are not combined to determine if the reporting threshold is satisfied. Bingo, keno, and slot machine play are different types of games.

(iii) Winnings include the fair market value of a payment in any medium other than cash.

(iv) The amount wagered in the case of a free play is zero.

(2) *Information reporting period*—(i) *In general.* For purposes of paragraph (g) of this section, the ''information reporting period'' begins when a patron places the first wager on a particular type of game at a gaming establishment, as defined in paragraph (b)(2)(iv) of this section, and ends when the patron places his or her last wager on the same type of game at the same gaming establishment before the end of the ''information reporting period.'' An information reporting period is a 24-hour period. A payor may select a calendar day (as defined in paragraph (b)(2)(ii) of this section) or a gaming day (as defined in paragraph (b)(2)(iii) of this section) as the information reporting period for purposes of the aggregate reporting method in paragraph (g) of this section. For purposes of this paragraph (b)(2), time is determined by the time zone of the location where the patron places the wager. A payor must use the same information reporting period (a calendar day or gaming day) to report all ''reportable gambling winnings'' paid during the calendar year. Once selected, a payor may not change its information reporting period during a calendar year. Any changes to a payor's information reporting period from one calendar year to another must be implemented on January 1.

(ii) *Calendar day.* A calendar day is determined with reference to a period beginning at 12 a.m. and ending no later than 11:59 p.m. of the same calendar day.

(iii) *Gaming day*—(A) *In general.* A gaming day is a 24-hour period other than a calendar day (as defined in paragraph (b)(2)(ii) of this section) selected by the payor, subject to the special rules for December 31 and January 1 in paragraphs (b)(2)(iii)(B) and (C) of this section.

(B) *Special rule for December 31.* For purposes of paragraph (b)(2)(iii) of this section, the gaming day that begins on December 31 of any calendar year ends at 11:59 p.m. on December 31, regardless of the time on December 31 on which that gaming day began.

(C) *Special rule for January 1.* For purposes of paragraph (b)(2)(iii) of this section, the gaming day of January 1 begins at 12:00 a.m. on January 1, regardless of the time and calendar day on which that gaming day ends, and may extend beyond 24 hours.

(iv) *Gaming establishment.* For purposes of this section, a gaming establishment is a business entity of a payor of reportable gambling winnings with respect to bingo, keno, or slot machine play, and includes all gaming establishments owned by such payor using the same employer identification number (EIN) issued to such payor in accordance with section 6109.

(v) *Examples.* The following examples illustrate the provisions of paragraph (b)(2) of this section.

Example 1. Casino R uses the aggregate reporting method under paragraph (g) of this section to report certain reportable gambling winnings. For other regulatory purposes, Casino R uses a gaming day that begins at 3 a.m. and ends at 2:59 a.m. the following calendar day. Casino R chooses to use its gaming day as its information reporting period for purposes of paragraph (b)(2) of this section during Year 1. Accordingly, the information reporting period for purposes of paragraph (g) of this section for each day during Year 1 begins at 3 a.m. and ends at 2:59 a.m. the following day. The information reporting period for December 31 of Year 1 begins at 3 a.m. on December 31 of Year 1 and ends at 11:59 p.m. on December 31 of Year 1. The information reporting period for January 1 of Year 2 begins at 12 a.m. on January 1 of Year 2 and ends at 2:59 a.m. on January 2 of Year 2.

Example 2. The facts are the same as Example 1, except Casino R uses a calendar day as its information reporting period for purposes of paragraph (b)(2) of this section during Year 1. Accordingly, the information reporting period for purpose of paragraph (g) of this section for each day during Year 1 begins at 12 a.m. and ends at 11:59 p.m. on the same day.

Example 3. Casino R uses the aggregate reporting method under paragraph (g) of this section to report certain reportable gambling winnings. For other regulatory purposes, Casino R uses a gaming day that begins at 9:00 p.m. and ends at 8:59 p.m. the following calendar day. Casino R chooses to use its gaming day as its information reporting period for purposes of paragraph (b)(2) of this section during Year 1. Accordingly, the information reporting period for purposes of paragraph (g) of this section for each day during Year 1 begins at 9:00 p.m. and ends at 8:59 p.m. the following day. The information reporting period for December 31 of Year 1 begins at 9:00 p.m. on December 30 and ends at 8:59 p.m. on December 31. A second information reporting period for December 31 then begins at 9:00 p.m. on December 31 and ends at 11:59 p.m. on December 31. The information reporting period for January 1 of Year 2 begins at 12:00 a.m. on January 1 and ends at 8:59 p.m. on January 1 of Year 2.

Example 4. Casino R uses the aggregate reporting method under paragraph (g) of this section to report certain reportable gambling winnings. In Year 1, Casino R chooses to use a ''gaming day'' that begins at 3 a.m. and ends at 2:59 a.m. the following day as its information reporting period. During the course of Year 1, Casino R decides that it would like to change its information reporting period to instead begin at 5 a.m. and end at 4:59 a.m. the following day. Casino R must wait until January 1 of Year 2 to implement such a change. On January 1 of Year 2, Casino R's information reporting period will begin at 12 a.m. and end at 4:59 a.m. on January 2. On December 31 of Year 2, Casino R's information reporting period will begin at 5 a.m. and end at 11:59 p.m.

(3) *Slot machine.* The term ''slot machine'' means a device that, by application of the element of chance, may deliver, or entitle the person playing or operating the device to receive cash, premiums, merchandise, or tokens whether or not the device is operated by insertion of a coin, token, or similar object.

(c) *Prescribed form; time and place for filing the return.* The return described in paragraph (a) of this section is a Form W–2G, ''Certain Gambling Winnings.'' The Form W–2G must be filed with the appropriate Internal Revenue Service location designated in the instructions to the form on or before February 28 (March 31, if filed electronically) of the year following the calendar year in which the reportable gambling winnings were paid. See section 6011 and § 1.6011–2 for requirements to file electronically.

(d) *Information included on the return*—(1) *In general.* Each return required by paragraph (a) of this section must contain:

(i) The name, address, and taxpayer identification number of the payor;

(ii) The name, address, and taxpayer identification number of the payee;

(iii) A general description of the two types of identification (as described in paragraph (e) of this section), one of which must have the payee's photograph on it (except in the case of tribal member identification cards in certain circumstances as described in paragraph (d)(2) of this section) that the payor relied on to verify the payee's name, address, and taxpayer identification number;

(iv) The date and amount of payment;

(v) The type of wagering transaction (bingo, keno, or slot machine play);

(vi) In the case of a bingo or keno game, any number, color, or other designation assigned to the game for which the payment is made;

(vii) In the case of slot machine play, the identification number of the slot machine(s) (for example, location and asset number);

(viii) Any other information required by the forms, instructions, revenue procedures, or other applicable guidance published in the Internal Revenue Bulletin.

(2) *Special rule for tribal member identification cards.* A tribal member identification card need not contain the payee's photograph to meet the identification requirement described in paragraph (d)(1)(iii) of this section if:

(i) The payee is a member of a federally recognized Indian tribe;

(ii) The payee presents the payor with a tribal member identification card issued by a federally recognized Indian tribe stating that the payee is a member of such tribe; and

(iii) The payor is a gaming establishment (as described in paragraph (b)(2)(iv) of this section) owned or licensed (in accordance with 25 U.S.C. 2710) by the tribal government that issued the tribal member identification card referred to in (d)(2)(ii).

(3) *Special rule for optional aggregate reporting method.* In the case of aggregate reporting under paragraph (g) of this section, the amount of the payment in paragraph (d)(1)(iv) of this section is the aggregate amount of payments of reportable gambling winnings from the same type of game (bingo, keno, or slot machine play) made to the same payee during the same information reporting period (as defined in paragraph (b)(2) of this section). Unless otherwise provided in forms, instructions, or other guidance, in the case of aggregate reporting under paragraph (g) of this section, the information required by paragraphs (d)(1)(v) through (viii) of this section must be maintained by the payor as described in paragraph (g)(3) of this section.

(e) *Identification.* The following items are treated as identification for purposes of paragraph (d)(1)(iii) of this section—

(1) Government-issued identification (for example, a driver's license, passport, social security card, military identification card, tribal member identification card issued by a federally recognized Indian tribe, or voter registration card) in the name of the payee; and

(2) A Form W–9, ''Request for Taxpayer Identification Number and Certification,'' signed by the payee, that includes the payee's name, address, taxpayer identification number, and other information required by the form. A Form W–9 is not acceptable for this purpose if the payee has modified the form (other than pursuant to instructions to the form) or if the payee has deleted the jurat or other similar provisions by which the payee certifies or affirms the correctness of the statements contained on the form.

(f) *Furnishing a statement to the payee.* Every payor required to make a return under paragraph (a) of this section must also make and furnish to each payee, with respect to each payment of reportable gambling winnings, a written statement that contains the information that is required to be included on the return under paragraph (d) of this section. The payor must furnish the statement to the payee on or before January 31st of the year following the calendar year in which payment of the reportable gambling winnings is made. The statement will be considered furnished to the payee if it is provided to the payee at the time of payment or if it is mailed to the payee on or before January 31st of the year following the calendar year in which payment was made.

(g) *Aggregate reporting of bingo, keno, and slot machine winnings*—(1) *In general.* In lieu of filing a separate information return for each payment of reportable gambling winnings as required by paragraph (a) of this section, a payor may use the aggregate reporting method (defined in paragraph (g)(2) of this section) to report reportable gambling winnings from bingo, keno, or slot machine play. A payor using the aggregate reporting method to file information returns under paragraph (a) of this section must also furnish statements to the payee under paragraph (f) of this section using the aggregate reporting method.

(2) *Aggregate reporting method defined.* (i) The aggregate reporting method is a method of reporting more than one payment of reportable gambling winnings from the same type of game (bingo, keno, or slot machine play) made to the same payee during the same information reporting period (as defined in this paragraph (b)(2) of this section) on one information return or statement.

(ii) A payor may use the aggregate reporting method for payments to some payees and not others, at its own discretion. In addition, with respect to a single payee, the payor may use the aggregate reporting method to report winnings from one type of game, but not for winnings from another type of game.

(iii) Failure to report some reportable gambling winnings from a particular type of game during one information reporting period to a particular payee under the aggregate reporting method (for whatever reason, including because the winnings are not permitted to be reported using the aggregate reporting method under paragraph (g)(4) of this section) will not disqualify the payor from using the aggregate reporting method to report other reportable gambling winnings from that type of game during that information reporting period to that payee. The payor may stop using the aggregate reporting method for a particular payee or for all payees before the end of the payor's information reporting period for any reason.

(3) *Recordkeeping under the aggregate reporting method.* A payor using the aggregate reporting method must maintain a record of every payment of reportable gambling winnings from the same type of game made to the same payee during the information reporting period that will be reported using the aggregate reporting method. Every individual that the payor has determined is responsible for an entry in the record must confirm the information in the entry by signing the record in a manner that will enable the signature to be associated with the relevant entry. Each payment of a reportable gambling winning made to the same payee and reported under the aggregate reporting method must have its own entry in the record, however, the information required by paragraphs (d)(1)(i) through (iii) of this section is not required to be recorded more than one time per information reporting period. A payor that uses the aggregate reporting method must retain a copy of the record in its files. The record (which may be electronic provided the requirements set forth in forms, instructions, or guidance published in the Internal Revenue Bulletin are met) must include the following information about each payment:

(i) The payee's signature confirming the information in the record;

(ii) The information required under paragraph (d) of this section;

(iii) The time of the win resulting in the reportable gambling winnings;

(iv) The total amount of reportable gambling winnings with respect to all payments to the payee during the information reporting period;

(v) The amount of reportable gambling winnings with respect to each particular payment;

(vi) The method of payment to the payee (for example, cash, check, voucher, credit, token, or chips); and

(vii) The name and unique identification number of the individual who the payor has determined is responsible for ensuring that the entry with respect to the reportable gambling winnings (including the general description of two types of identification used to verify the payee's name, address, and taxpayer identification number) is complete and accurate and who is authorized to perform that function by the applicable gaming regulatory control authority. Such individual may or may not be the same individual who prepared the entry.

(4) *When the aggregate reporting method may not be used.* A payor cannot use the aggregate reporting method if—

(i) The payment is to a foreign person, as described in section 1.6041–10(h);

(ii) The payor knows or has reason to know that the person making the wager is not the person entitled to the winnings or is not the only person entitled to the winnings (regardless of whether the person making the wager furnishes a Form 5754, ''Statement by Person(s) Receiving Gambling Winnings''); or

(iii) Backup withholding under section 3406(a) applies to the payment.

(5) *Examples.* The following examples illustrate the provisions of this section. For each example, assume that for purposes of the aggregate reporting method in paragraph (g) of this section, Casino R's ''information reporting period'' for all calendar years is a gaming day that begins at 3 a.m. and ends at 2:59 a.m. the following day (except for January 1 and December 31) and that individuals C, D, and E are U.S. persons.

Example 1. On Day 1, between 7 a.m. and 4 p.m., C places five wagers at casino R on five different slot machines. The first two wagers result in no win. The third wager results in a $1,500 win. The fourth wager results in a $2,500 win. The fifth wager results in an $800 win:

(i) Under paragraph (b)(1)(i)(C) of this section, there are reportable gambling winnings from the slot machine play of $4,000 ($1,500 + $2,500). The $800 win is not a reportable gambling winning from slot machine play because it does not equal or exceed the $1,200 threshold.

(ii) Because all of the amounts were won on the same type of game (even though each of the winnings occurred on different machines) during the same information reporting period, R is permitted to use the aggregate reporting method under this paragraph (g). If R decides not to use the aggregate reporting method, a separate Form W–2G would have to be filed and furnished for the payment of reportable gambling winnings of $1,500 and for the payment of reportable gambling winnings of $2,500. However, if R decides to use the aggregate reporting method, R may report total reportable gambling winnings from slot machine play of $4,000 ($1,500 + $2,500) on one Form W–2G.

Example 2. Assume the same facts as *Example 1,* except that in addition to the winnings described in *Example 1,* at 5 a.m. on Day 2, C wins $3,250 from one slot machine play at casino R. Even though C played the same type of game (slot machine play) on Day 1 and Day 2, under paragraph (b)(2) of this section, the win at 5 a.m. on Day 2 is a win during a separate information reporting period. Under paragraph (g)(2)(i) of this section, the $3,250 of reportable gambling winnings on Day 2 cannot be aggregated with the reportable gambling winnings of $4,000 from Day 1 on a single Form W–2G. Accordingly, if R uses the aggregate reporting method, R must file two Forms W–2G with respect to C's reportable gambling winnings on Day 1 and Day 2. R must report $4,000 of reportable gambling winnings from slot machine play paid to C on Day 1 on the first Form W–2G, and $3,250 of reportable gambling winnings from slot machine play paid to C on Day 2 on the second Form W–2G.

Example 3. On December 31 of Year 1 at 4:00 p.m., C wins $10,000 from one slot machine play at casino R. At 12:30 a.m. on January 1 of Year 2, C wins $4,000 from one slot machine play at casino R. Under paragraphs (b)(2)(iii)(B) and (C) of this section, the win at 4 p.m. on December 31 of Year 1 and the win at 12:30 a.m. on January 1 of Year 2 are wins during different information reporting periods. Under paragraph (g)(2)(i) of this section, the $4,000 of reportable gambling winnings on January 1 cannot be aggregated with the reportable gambling winnings of $10,000 from December 31 on a single Form W–2G. Accordingly, if R uses the aggregate reporting method, R must file two Forms W–2G with respect to C's reportable gambling winnings on Day 1 and Day 2. R must report $10,000 of reportable gambling winnings from slot machine play paid to C on December 31 on the first Form W–2G and $4,000 of reportable gambling winnings from slot machine play paid to C on January 1 on the second Form W–2G.

Example 4. Assume the same facts as example 3, except that C also wins $5,000 from one slot machine play at 3:30 p.m. on January 1 and $7,000 from one slot machine play at 1:30 a.m. on January 2. Under the special rule of paragraph (b)(2)(iii) of this section, the ''information reporting period'' begins at 12:00 a.m. on January 1 and extends until the start of the next information reporting period, in this case 2:59 a.m. on January 2. Under paragraph (b)(1)(C) of this section, Casino R will pay C a total of $26,000 ($10,000 + $4,000 + $5,000 + $7,000) in reportable gambling winnings; however, $10,000 must be reported in Year 1, and $16,000 must be reported in Year 2. Because all of the amounts won in Year 2 were won on the same type of game and during the same information reporting period, R is permitted to use the aggregate reporting method under this paragraph (g). If R decides to use the aggregate reporting method, R may report $10,000 of reportable gambling winnings from slot machine play paid to C on December 31 on the first Form W–2G and $16,000 of total reportable gambling winnings from slot machine play paid to C on January 1 on the second Form W–2G.

Example 5. At 2 p.m. on Day 1, D won $2,000 (after reducing the amount of the win by the amount wagered) playing one keno game at casino R. D provides R with his driver's license. The driver's license has D's photograph on it, as well as D's name and address. The driver's license does not include D's social security number. D cannot remember his social security number and has no other identification at the time with his social security number on it. D does not provide R with his social security number before R pays the winnings to D. Because D cannot remember his social security number, D cannot complete and sign a Form W–9. R deducts and withholds $560 (28 percent of $2,000) under the backup withholding provisions of section 3406(a) and pays the remaining $1,440 in winnings to D. D returns to casino R and at 6 p.m. on Day 1 wins $1,500 (after reducing the amount of the win by the amount wagered) in one keno game. D provides R with his driver's license as well as D's social security card. R generally uses the aggregate reporting method and in all cases where it is used, R complies with the requirements of this paragraph (g). At 8 p.m. and 10 p.m. on Day 1, D wins an additional $1,800 and $1,700 (after reducing the amount of the win by the amount wagered), respectively, from two different keno games. For each of these two wins, an employee of R obtains the information from D required by this paragraph (g):

(i) Under paragraph (b)(1)(i)(B) of this section, each of D's wins from the four games of keno on Day 1 ($2,000, $1,500, $1,800, and $1,700) are reportable gambling winnings. Because D's first win on Day 1 was at 2 p.m. and D's last win on Day 1 was at 10 p.m., all of D's reportable gambling winnings from keno are won during the same information reporting period. Because R satisfies the requirements of paragraph (g)(2)(i), R may use the aggregate reporting method to report D's reportable gambling winnings from keno. However, pursuant to paragraph (g)(4)(iii) of this section, the $2,000 payment made to D at 2 p.m. cannot be reported under the aggregate reporting method because that payment was subject to backup withholding. Accordingly, if R uses the aggregate reporting method under this paragraph (g), R will have to file two Forms W–2G with respect to D's reportable gambling winnings from keno on Day 1. On the first Form W–2G, R will report $2,000 of reportable gambling winnings and $560 of backup withholding with respect to the 2 p.m. win from keno, and, on the second Form W–2G, R will report $5,000 of reportable gambling winnings from keno (representing the three payments of $1,500, $1,800, and $1,700 that D won between 6 p.m. and 10 p.m. on Day 1).

Example 6. In one information reporting period on Day 1, E won five reportable gambling winnings from five different bingo games at a casino R. R generally uses the aggregate reporting method and in all cases where it is used, R complies with the requirements of this paragraph (g). Although E signed the entry in the record R maintains for payment of the first four reportable gambling winnings, E refuses to sign the entry in the record for the fifth payment of reportable gambling winnings. R may use the aggregate reporting method for the first four payments of reportable gambling winnings to E. However, because the entry in the record for the fifth payment of reportable gambling winnings does not include E's signature, as required by paragraph (g)(3)(i) of this section, that payment may not be reported under the aggregate reporting method. Accordingly, if R uses the aggregate reporting method under paragraph (g) of this section, R must prepare two Forms W–2G as follows: On the first Form W–2G, R must report the first four payments of reportable gambling winnings from bingo made to E on Day 1. On the second Form W–2G, R must report the fifth payment of reportable gambling winnings from bingo made to E on Day 1.

(h) *Payments to foreign persons.* See § 1.6041–4 regarding payments to foreign persons. See § 1.6049–5(d) for determining whether the payee is a foreign person.

(i) *Effective/applicability date.* Section 1.6041–10(b)(2), concerning payor-selected ''information reporting periods,'' applies to payments of reportable gambling winnings from bingo, keno, or slot machine play made on or after January 1 of the year following the date these regulations are published in the **Federal Register**. All other sections contained herein apply to payments of reportable gambling winnings from bingo, keno, or slot machine play made on or after December 30, 2016.

(j) *Cross-references for certain gambling winnings.* For provisions relating to backup withholding for winnings from bingo, keno, and slot machine play and other reportable gambling winnings, see § 31.3406(g)–2(d). For provisions relating to withholding and reporting for gambling winnings from lotteries, sweepstakes, wagering pools, and other wagering transactions, including a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai, see § 31.3402(q)–1.

PART 7—TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1976

■ **Par. 3.** The authority citation for part 7 continues to read in part as follows:

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

§ 7.6041–1 [Removed]

■ **Par. 4.** Section 7.6041–1 is removed.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Par. 5.** The authority citation for part 31 continues to read in part as follows:

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

§ 31.3406(g)–2 [Amended]

■ **Par. 6.** In § 31.3406(g)–2, paragraph (d)(3) is amended by removing the citation ''§ 7.6041–1'' and adding the citation ''§ 1.6041–10'' in its place.

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 13, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–31575 Filed 12–29–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2016–0939]

Liberty Island Safety Zone; Fireworks Display in Captain of the Port New York Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone within the Captain of the Port New York Zone on the specified date and time. This action is necessary to ensure the safety of vessels and spectators from hazards associated with fireworks displays. During the enforcement period, no person or vessel may enter the safety zone without permission of the Captain of the Port (COTP).

DATES: The regulation for the safety zone described in 33 CFR 165.160 will be enforced on the date and time listed in the table below.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Petty Officer First Class Ronald Sampert, U.S. Coast Guard; telephone 718–354–4154, email *ronald.j.sampert@uscg.mil.*

SUPPLEMENTARY INFORMATION:

The Coast Guard will enforce the safety zone listed in 33 CFR 165.160 on the specified date and time as indicated in Table 1 below. This regulation was published in the **Federal Register** on November 9, 2011 (76 FR 69614).

TABLE 1

1. Circle Line Sightseeing Yachts, NYE, Liberty Island Safety Zone, 33 CFR 165.160 (2.1).	• Launch site: A barge located in approximate position 40°41′16.5″ N, 074°02′23″ W (NAD 1983), approximately 360 yards east of Liberty Island. This Safety Zone is a 240-yard radius from the barge. • Date: December 31, 2016 • Time: 11:55 p.m.–12:10 a.m.

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

This notice is issued under authority of 33 CFR 165.160(a) and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide mariners with advanced notification of enforcement periods via the Local Notice to Mariners and marine information broadcasts.

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

Dated: December 7, 2016.

M. H. Day,

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

[FR Doc. 2016–31531 Filed 12–29–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 58

[EPA–HQ–OAR–2015–0486; FRL–9957–78–OAR]

RIN 2060–AS71

Revision to the Near-road NO_2 Minimum Monitoring Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action finalizes revisions to the minimum monitoring requirements for near-road nitrogen dioxide (NO_2) monitoring by removing the existing requirements for near-road NO_2 monitoring stations in Core Based Statistical Areas (CBSAs) having populations between 500,000 and 1,000,000 persons, that are due by January 1, 2017.

DATES: This final rule is effective December 30, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2015–0486. All documents in the docket are listed at *http://www.regulations.gov.* Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *www.regulations.gov.* In addition to being available in the docket, an electronic copy of the rule will also be available at *https://www.epa.gov/no2-pollution/ambient-nitrogen-dioxide-monitoring-requirements.*

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SUPPLEMENTARY INFORMATION:

Administrative Procedure Act: Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. The Environmental Protection Agency (EPA) is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: ''The provisions of section 553 through 557 . . . of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. The EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making this rule effective no later than January 1, 2017. Section 553(d) allows an effective date less than 30 days after publication for a rule that ''grants or recognizes an exemption or relieves a restriction'' or ''as otherwise provided by the agency for good cause found and published with the rule.'' The EPA finds that there is good cause for this rule to become effective immediately, because this rule removes a restriction. Specifically, this final rule removes the requirement for states to install air quality monitors in certain areas by January 1, 2017.

Judicial Review: This is a nationally applicable rulemaking because it revises generally applicable monitoring network requirements. Even if this rulemaking were not considered nationally applicable, EPA has determined that this action is of nationwide scope and effect because the monitors that will no longer be required under this rulemaking are located in 28 states, which fall within the jurisdiction of all 10 federal courts of appeals. Therefore, under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the D.C. Circuit by February 28, 2017.

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The following topics are discussed in this preamble:

I. Background

On February 9, 2010, the EPA promulgated minimum monitoring requirements for the ambient NO_2 monitoring network in support of the revised NO_2 NAAQS (75 FR 6474; February 9, 2010). The 2010 NO_2 NAAQS revision introduced a 1-hour standard with a 98th percentile form averaged over 3 years and a level of 100 parts per billion (ppb), reflecting the maximum allowable NO_2 concentration anywhere in an area, while retaining the annual standard of 53 ppb.

As part of the 2010 NO_2 NAAQS rulemaking, the EPA promulgated revisions to requirements for minimum numbers of ambient NO_2 monitors which included new monitoring near major roads in larger urban areas, requirements to characterize NO_2 concentrations representative of wider spatial scales in larger urban areas (area-wide monitors), and monitors intended to characterize NO_2 exposures of susceptible and vulnerable populations. Specifically, the requirements for these minimum monitoring requirements that were promulgated in 2010 were as follows:

(a) The first tier of the ambient NO_2 monitoring network required near-road monitoring.[1] The requirements included the placement of one near-road NO_2 monitoring station in each CBSA with a population of 500,000 or more persons to monitor a location of expected maximum hourly concentrations sited near a major road. An additional near-road NO_2 monitoring station was required at a second location of expected maximum hourly concentrations for any CBSA with a population of 2,500,000 or more persons, or in any CBSA with a population of 500,000 or more persons that has one or more roadway segments with 250,000 or greater Annual Average Daily Traffic (AADT) counts. Based upon 2010 census data and data maintained by the U.S. Department of Transportation's Federal Highway Administration on the most heavily trafficked roads in the U.S. (*http://www.fhwa.dot.gov/policyinformation/tables/02.cfm*), approximately 126 near-road NO_2 sites were required within 103 CBSAs nationwide at the time of rule promulgation.

(b) The second tier of the NO_2 network required area-wide NO_2 monitoring,[2] where area-wide means that the monitor is representative of a spatial scale of representativeness of neighborhood scale (0.5 to 4 km in dimension) or larger, as defined in 40 Code of Federal Regulations (CFR) part 58, appendix D, section 1.2. Requirements included the placement of one monitor in each CBSA with a population of 1,000,000 or more persons to monitor a location of expected highest NO_2 concentrations representing the neighborhood or larger spatial scales. Based on 2010 census data, approximately 52 area-wide NO_2 sites were required within 52 CBSAs at the time of rule promulgation.

(c) The third tier of the NO_2 minimum monitoring requirements was for the characterization of NO_2 exposure for susceptible and vulnerable populations.[3] The EPA Regional Administrators, in collaboration with states, required 40 NO_2 monitoring stations nationwide in any area, inside or outside of CBSAs, in addition to the minimum monitoring requirements for near-road and area-wide monitors, with a primary focus on monitoring in locations with susceptible and vulnerable populations. Monitoring sites intended to satisfy these NO_2 minimum monitoring requirements were required to be submitted to the EPA for approval. Per 40 CFR 58.10 and 58.13, states were required to submit a plan to the EPA for establishing required area-wide NO_2 monitoring sites and those NO_2 monitoring sites intended to represent areas with susceptible and vulnerable populations by July 1, 2012, and ensure that the monitoring stations were operational by January 1, 2013. State and local air monitoring agencies fulfilled the requirements for area-wide monitors and those sites representing areas with susceptible and vulnerable populations on schedule.

The near-road component of the ambient NO_2 monitoring network was also originally required to be completely operational by January 1, 2013. However, in 2012, the EPA proposed (77 FR 64244; October 19, 2012) and then finalized in 2013 (78 FR 16184; March 14, 2013), through a public notice and comment rulemaking, a requirement that the near-road NO_2 monitoring stations be installed in three phases. The revised installation schedule allowed more time for states to establish the near-road NO_2 network on a schedule consistent with available resources. The revised installation schedule for the near-road NO_2 monitoring network was modified to reflect the following:

Phase 1: In CBSAs with a population of 1,000,000 or more persons, one near-road NO_2 monitor shall be reflected in the state Annual Monitoring Network Plan submitted July 1, 2013, and that monitor shall be operational by January 1, 2014.

Phase 2: In CBSAs where two near-road NO_2 monitors are required (either because the CBSA has a population of 2,500,000 or more persons, or has a population of 500,000 or more persons plus one or more roadway segments having AADT counts of 250,000 or more), the second near-road NO_2 monitor shall be reflected in the state Annual Monitoring Network Plan submitted July 1, 2014, and that monitor shall be operational by January 1, 2015.

Phase 3: In CBSAs with a population of at least 500,000 persons, but less than 1,000,000 persons, one near-road NO_2 monitor shall be reflected in the state Annual Monitoring Network Plan submitted July 1, 2016, and the monitor shall be operational by January 1, 2017.

As of November of 2016, the EPA estimates that 69 near-road NO_2 monitors are in operation. At the time of this rulemaking, the EPA notes that a handful of near-road sites (4 from Phase 1 and 6 from Phase 2) are still in the process of being installed due to various delays at the state and local level. A review of near-road site meta-data indicate that state and local air monitoring agencies have successfully installed these new monitors in the appropriate locations, collectively placing monitors adjacent to highly trafficked roads in their respective CBSAs. The latest available near-road NO_2 monitoring site meta-data can be found at *http://www3.epa.gov/ttn/amtic/nearroad.html.*

II. Proposed Revisions to Near-Road NO_2 Minimum Monitoring Requirements

We proposed revisions to the near-road NO_2 minimum monitoring requirements (81 FR 30224) on May 16, 2016, to remove the requirement for near-road NO_2 monitoring stations in CBSAs having populations between 500,000 and 1,000,000 persons, also known as Phase 3 of the near-road NO_2 network. The proposal also included a revision to the requirement for a second

[1] See 40 CFR part 58, appendix D, section 4.3.2.

[2] See 40 CFR part 58, appendix D, section 4.3.3.

[3] See 40 CFR part 58, appendix D, section 4.3.4.

near-road NO_2 monitor in any CBSA having 500,000 or more persons that also had one or more road segments with 250,000 or greater AADT counts to only apply to CBSAs having 1,000,000 or more persons, which was intended to align all near-road NO_2 monitoring requirement language to only apply to those CBSAs having 1,000,000 persons or more.

The proposed removal of Phase 3 of the required near-road NO_2 network was based on empirical data and technical rationale, which were discussed in detail in the preamble to the proposed rule and supported by the Near-road NO_2 Network and Data Analysis memo to the docket (docket memo) located at *https://www.regulations.gov/docket?D=EPA-HQ-OAR-2015-0486.* The three key foundations of the proposal were that:

- The Phase 1 and Phase 2 near-road sites that have been installed to date are located at maximum concentration locations consistent with the guidance in the Near-road NO_2 Monitoring Technical Assistance Document (TAD) (*http://www3.epa.gov/ttn/amtic/files/nearroad/NearRoadTAD.pdf*) as demonstrated by a detailed examination of site meta-data.
- The higher populated CBSAs that contain these near-road NO_2 sites have higher mobile source emissions and associated indicators, such as Vehicle Miles Traveled (VMTs), than lesser populated CBSAs.
- Ambient concentrations collected at all existing near-road monitoring sites are well below both the annual and 1-hour daily maximum NAAQS levels of 53 ppb and 100 ppb, respectively.

III. Public Comments

The EPA received 22 individual submissions on the proposal during the public comment period from public health and environmental groups, industry groups, state and local air monitoring agencies and multi-agency groups, and one anonymous public commenter.[4]

Overall, 18 of the 22 commenters supported the proposal. This included all 14 state or multi-state groups: Association of Air Pollution Control Agencies (AAPCA); Akron Regional Air Quality Management District (ARAQMD); Central States Air Resource Agencies Association (CENSARA); Colorado; Georgia; Iowa; Kentucky; Michigan; National Association of Clean Air Agencies (NACAA); Northeast States for Coordinated Air Use Management (NESCAUM); North Carolina; Regional Air Pollution Control Agency, Dayton, OH (RAPCA); South Carolina; and Wisconsin. In addition, all 4 of the industry commenters voiced support of the proposal, including: American Petroleum Institute (API); American Road and Transportation Builders Association (ARTBA); NAAQS Implementation Coalition; and the Utility Air Regulatory Group (UARG).

Those commenters who supported the proposal primarily reiterated that the use of existing network data and meta-data, plus other supporting data, provide the rationale necessary to finalize the proposed changes to remove requirements for Phase 3 monitors from the near-road NO_2 network requirements. For example, AAPCA stated that the ''. . . [proposed] revision is based on clear evidence from Phases 1 and 2 of the near-road network . . .'' and ultimately that the data ''. . . demonstrate the need to remove the monitoring requirements for Phase 3.'' The API noted that ''the Agency's phased monitoring approach has provided EPA the time to collect and analyze early monitoring data, and therefore develop a more accurate view of NO_2 concentrations near roads.'' The API went on to state that ''near-road NO_2 levels in 1,000,000 resident cities represent current high end exposures which are expected to decrease due to improving fleet fuel efficiency and turnover, the same is true for smaller cities addressed by Phase 3.'' Other commenters also noted Tier 3 Motor Vehicle Emissions and Fuel standards,[5] which the EPA expects to reduce on-road emissions that directly contribute to near-road NO_2 concentrations going into the future. For example, the Iowa Department of Natural Resources stated that ''NOx emissions from mobile sources are expected to decrease with implementation of the Tier 3 engine and fuel standards. . . .'' Finally, NACAA commented that its ''. . . monitoring experts agree with EPA's conclusion that data collected from Phase 3 monitors, which would be located in relatively smaller CBSAs, would almost certainly measure lower or similar NO_2 concentrations [than those measured in the larger CBSAs].''

Those commenters who opposed the proposed rule included all 3 submissions from public health and environmental groups. The first of the three adverse comment submissions was collectively from the following entities: Asthma and Allergy Network, Alliance of Nurses for Healthy Environments, American Lung Association, American Public Health Association, American Thoracic Society, Asthma and Allergy Foundation of America, Children's Environmental Health Network, and Health Care Trust for America's Health. For convenience, through the remainder of this preamble, this group will be referred to as the ''Public Health Organizations.'' The second submission with adverse comments was collectively from the following entities: Earth Justice, Catholic Charities of the Diocese of Stockton, Clean Air Council, Clean Wisconsin, Midwest Environmental Defense Center, Natural Resources Defense Council, Valley Improvement Projects, and We Act for Environmental Justice. For convenience through the remainder of this preamble, this second group will be referred to as the ''Environmental Groups.'' The third submission with adverse comment to the proposed rule was from Clean Air Watch.

The key issues raised in those adverse comments include: (1) Arguments that the proposal is inconsistent with the original reasoning behind the establishment of the near-road network requirements in the 2010 NO_2 NAAQS rulemaking; (2) issues related to the near-road NO_2 network design and its installation; and (3) the empirical data relied on in the rationale for the proposed rule, which commenters criticized as being of relatively limited duration and representation.

In regard to the assertion that the proposal is inconsistent with the original reasoning behind the establishment of the near-road network, the Environmental Groups and Clean Air Watch both cited rationale provided in the 2010 NO_2 NAAQS rulemaking that was used to establish the original requirements for the near-road NO_2 network. They stated that the reasoning behind needing the network as it was originally required has presently not changed. The Environmental Groups stated that ''EPA's proposal to eliminate the requirement to install near-road monitors in areas below 1 million people is fundamentally inconsistent with EPA's prior conclusion, and with the facts EPA found to support it.'' The Clean Air Watch noted that after the 2010 NO_2 NAAQS revision the Administrator had highlighted that there would be many new roadside monitors going into place.

The EPA disagrees that the rationale for this action is inconsistent with the

[4] The single anonymous public commenter provided comments that were not within the scope of this rule action, as they requested a revision of the NO_2 NAAQS. That comment is not within the scope of today's action because the EPA did not propose any revisions relating to the level of the NAAQS.

[5] More information on the Tier 3 standards can be found at *https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-smog-soot-and-other-air-pollution-passenger.*

2010 rule. Rather, the revision to the 2010 rule's near-road monitoring provisions is based on the EPA's evaluation of monitoring data generated after issuance of the 2010 rule. The EPA notes that the key objective of the 2010 revision to the NO_2 NAAQS was to limit exposure to peak NO_2 concentrations that occur anywhere in an area. In recognition of the fact that the majority of exposure risks were found to be tied to mobile sources and the lack of specific information concerning the concentrations of NO_2 in the near-road environment that was available at the time, the near-road NO_2 monitoring network was required to address this lack of characterization. In the 2009 NO_2 NAAQS proposal, the agency noted that the NO_2 monitoring network at that time was ''. . .not oriented to address peak concentrations, such as the on-road and near-road environment. . .'' (74 FR 34440). At the time of that proposal and the promulgation of the 2010 final rule, there was a limited amount of near-road monitored data, which consisted mostly of integrated and continuous concentration data from research studies as opposed to compliance-quality data suitable for comparison to the NAAQS. The agency used those limited data in conjunction with information collected and presented in the Integrated Science Assessment (*https://www.regulations.gov/document?D=EPA-HQ-OAR-2006-0922-0048*) and the Risk and Exposure Assessment (*https://www.regulations.gov/document?D=EPA-HQ-OAR-2006-0922-0047*) to finalize the network design that originally required at least one monitor in all CBSAs having populations of 500,000 persons or more. As was noted by several commenters on the May 2016 proposal for this rule, the final 2010 network design was described as a near-road network that would provide ''. . . data from a geographically and spatially diverse set of CBSAs that supports the intent of the revised NAAQS . . .'' (75 FR 6508).

Subsequent to the 2010 NO_2 NAAQS rulemaking, the EPA has received and evaluated data from near-road NO_2 monitors installed in response to the requirements of the rule. As of November 2016, there are 69 operating near-road NO_2 sites, with an ever increasing data record. Due to the establishment and operation of these near-road NO_2 monitors, the EPA and the public now have a significantly better understanding of what ambient, near-road concentrations look like across a geographically diverse set of urban areas of differing population sizes, including several CBSAs with populations under 1,000,000 persons, than we did in 2010. It is the evaluation of these new data, not a change in the EPA's view that the near-road network reflects areas of peak NO_2 concentration, which led to the EPA's conclusion that the requirement to operate additional near-road NO_2 sites required by Phase 3 of the network is no longer necessary to provide adequate characterization on a national basis. These new data, which were not available during the 2010 NO_2 NAAQS rulemaking provide the EPA with a different and improved understanding of near-road NO_2 concentrations compared to the time when the network was originally required. In particular, these new data show that NO_2 concentrations from sites adjacent to some of the nation's highest trafficked roads in the most populated CBSAs (*i.e.,* expected maximum concentrations sites in the near-road environment) are not exceeding or even threatening to approach the level of the NAAQS. It is, therefore, evident that the degree of geographic and spatial diversity required of the near-road network is less than originally thought. Accordingly, the agency believes it is appropriate to reconsider the necessity of Phase 3 of the near-road NO_2 network by leveraging empirical evidence and targeted assessments and analyses of available near-road NO_2 network information, as explained in more detail in the docket memo associated with this action.

The second issue raised by the Environmental Groups and Public Health Organizations was in regard to the network design and physical characteristics of the existing near-road NO_2 network. The Public Health Organizations stated that ''limiting the required monitoring to only one or two locations in cities with millions of people severely limits the information available on near-road exposure in metropolitan areas.'' The Environmental Groups stated that ''the information relied upon by EPA does not show that the near-road monitors installed to date have been located to detect maximum [NO_2] levels.'' Finally, the Public Health Organizations also stated that ''new research examining the early results of some of these near-road monitors warn that the assumptions made in the initial siting decisions may not adequately reflect the wors[t] sources of highway emissions, even in major urban areas like Los Angeles.''

With regard to the Public Health Organizations' comment that the amount of near-road monitoring in a given urban area is limited, the EPA disagrees that additional monitors are needed. The network design targets expected maximum concentrations in the near-road environment. In the 2010 NO_2 NAAQS rulemaking, the near-road NO_2 network was required to be installed with consideration of six key factors: AADT, fleet mix, congestion patterns, roadway design, terrain, and meteorology. These factors varied by CBSA, where quantitative data was variable in availability and quality. The consideration of these six factors was required so that near-road monitors would be placed at locations in near-road environments where peak NO_2 concentrations, derived from on-road mobile sources, would be most likely to be observed within that CBSA. Because of this specific objective of the network, the need for multiple other near-road monitoring sites, above what is already required within a given CBSA to ascertain compliance with the NAAQS, is minimized.

The EPA strongly disagrees with the assertion that the near-road monitors installed to date have not been located to detect maximum NO_2 levels. The agency handled this issue through siting requirements in the CFR and through additional support via the production of the TAD. The TAD was created through collaboration amongst multiple offices across the agency, state and local air quality management agencies, the U.S. Department of Transportation, and several state departments of transportation. Further, the TAD was reviewed by the Clean Air Scientific Advisory Committee's Air Monitoring and Methods Subcommittee. The state and local air agencies' adherence to the siting requirements in the CFR and their use of the TAD is evidenced by meta-data presented and discussed in the proposal and the associated docket memo. As a result of the diligence of state and local air agencies, and the support and oversight of the agency, the near-road network meets all siting requirements and the selection of sites for the current near-road network was carried out with a high degree of success. For example, as was noted in the proposal, 55 percent of the near-road sites are adjacent to one of the top five highest trafficked road segments in their respective CBSA, 71 percent are adjacent to one of the top 10 most highly trafficked roads, and 91 percent are adjacent to one of the top 25 most highly trafficked roads. As there are thousands of road segments within each CBSA, this means that virtually all near-road monitors are adjacent to one of the most heavily trafficked roads within their respective CBSAs. And, as noted in the EPA's analysis of the existing near-road monitoring data, if the measure of traffic is adjusted for the fleet mix to account for higher oxides of nitrogen (NO_X) emissions from heavy-duty diesel vehicles, an even greater percentage of near-road monitors are adjacent to the road segments where NO_2 exposure is expected to be highest. Moreover, traffic volume was just one criterion out of a number of factors, plus logistical limitations, that all had bearing on site selection. These data, along with all the other data presented in the proposal and the docket memo, are indicative of a successful network deployment.

The EPA notes that in general, ambient monitor placement is a balancing act of knowing where an ideal monitoring location might be versus the reality of actually being able to place and operate a monitor in a particular location. This concept applies to all ambient monitoring endeavors, as the physical process of siting a monitor is subject to a myriad of logistical influences including, but not limited to: Permissions for access; physical limitations on site placement including the immediate terrain, topography, or the roadway design of a target road in the specific case of near-road monitoring; safety considerations, which are particularly important and evident in near-road siting situations; and utilities availability. Considering the factors and influences involved in the near-road siting process and the known characteristics of the network, the EPA strongly asserts that the network is appropriately deployed and situated to provide measurements that are a good representation of maximum near-road NO_2 concentrations that exist in a given CBSA, evidenced by meta-data presented and discussed in both the proposal and the docket memo.[6]

In response to the Public Health Organizations' statement that ''new research examining the early results of some of these near-road monitors warn that the assumptions made in the initial siting decisions may not adequately reflect the wors[t] sources of highway emissions, even in major urban areas like Los Angeles,'' the EPA would first like to point out that the research conducted for the referenced journal article did not utilize any data from the near-road NO_2 network, nor did it directly measure NO_2 during their on-road experiments. The data behind the referenced multi-pollutant research study were collected as part of an on-road mobile source emissions study primarily focused on improving understanding of the variability and influences on fleet-wide emissions via alternative methods of calculating emission factors. As such, the study does not indicate that information utilized in network siting decisions may not adequately reflect the worst sources of highway emissions. In fact, it does not even address near-road monitoring data from monitors installed to measure NO_2 levels. Instead, the EPA believes the study reinforces the fact that the required consideration of a number of previously mentioned factors including traffic volume and fleet mix, which were important to the cited literature, were appropriate and critical to the near-road site selection process.

The third issue raised was the claim that empirical data relied on in the proposal were too limited. To initiate their argument, the Environmental Groups stated that the ''. . . EPA has virtually no emissions data for CBSAs with populations under 1 million, so EPA's claim that 'higher populated CBSAs,' *i.e.,* CBSAs over 1 million people, will have 'higher mobile source emissions' is unfounded.''

In response, the EPA notes that data presented and reviewed in the docket memo clearly show otherwise. The emissions data used in the docket memo analysis came from the 2011 National Emissions Inventory (NEI). The NEI mobile source data come from the EPA's Motor Vehicle Emissions Simulator (MOVES), which aggregates mobile source emissions data from the county level across the entire country. Therefore, the commenter's statement that the EPA has ''virtually no emissions data'' from CBSAs with populations less than 1 million persons, and their subsequent argument, is incorrect. Still regarding emissions data and analysis, later in their arguments the Environmental Groups state that ''. . . NO_X emissions coming from on-road mobile sources in areas with 1 and 2.5 million persons is nearly the same in areas with 500,000 to 1 million people,'' suggesting that NO_X emissions are nearly the same in the smaller populated CBSAs as they are in the larger ones, with a difference of only 3.2 percentage points. In the docket memo, the EPA presents NO_X emissions inventory data, broken down by the categories of on-road mobile, non-road mobile, and all non-mobile source categories. These data are subsequently sorted into bins based on CBSA populations corresponding to the three phases by which the near-road network has been installed, plus a bin for all CBSAs with populations having less than 500,000 persons. The Environmental Group's comments are focused on the modest difference in percent contribution of on-road mobile sources to the total NO_X emissions between the 500,000 to 1 million person CBSA bin (48.1 percent) and the larger CBSA bins (51.3 percent for CBSAs having between 1 million and 2.5 million persons and 55.3 percent for CBSAs having 2.5 million or more persons). However, the differences between these CBSA groups are significant when considering the actual amount of NO_X in tons per year (tpy). The collective of CBSAs having 500,000 to 1 million persons have a NO_X emissions profile where 48.1 percent of a total of 950,000 tpy are attributable to on-road mobile sources (*i.e.,* 456,950 tpy). Meanwhile, the collective of CBSAs having 1 million to 2.5 million persons have a NO_X emissions profile where 51.3 percent of 2,000,000 tpy are attributable to on-road mobile sources (*i.e.,* 1,026,000 tpy) and the collective of CBSAs having 2.5 million persons or more have a NO_X emissions profile where 55.3 percent of 7,500,000 tpy are attributable to on-road mobile sources (*i.e.,* 4,147,500 tpy). It is clear by these data, and the analysis provided in the docket memo, that the larger CBSAs do in fact have much more on-road mobile source emissions than CBSAs with less than 1 million persons. Specifically, CBSAs with over 2.5 million persons have approximately 9 times more on-road mobile source NO_X emissions in tpy than CBSAs with populations between 500,000 and 1 million, while the CBSAs with populations between 1 million and 2.5 million have 2.2 times more. These data support the conclusion that the larger populated CBSAs have greater potential for exposure due to marked increases in coincidence between emissions and population. See Docket Memo at pp. 9–11.

Concluding the Public Health Organizations' and Environmental Groups' arguments, they commented that the EPA relied on monitored near-road NO_2 data from too few sites, particularly from CBSAs with less than 1 million persons, to substantiate the proposed rulemaking. The Public Health Organizations stated that ''. . . even if the preliminary data indicated compliance with the standards, the sparse number [of monitoring sites]

[6] In addition to the requirements for near-road monitors in state monitoring plans, the regulations also require the EPA Regional Administrators to identify locations for at least 40 additional NO_2 monitoring stations nationwide beyond the minimum monitoring requirements for each state, with the primary focus on siting these additional monitors in locations to protect susceptible and vulnerable populations. Moreover, even beyond that requirement, each Regional Administrator has the discretion to require additional monitors in any area. 40 CFR part 58, appendix D, section 4.3.4(a) and (b).

leaves open many questions. . . .'' The Environmental Groups argued that only having near-road NO_2 data from two CBSAs with populations under 1 million persons (Boise, Idaho and Des Moines, Iowa), ''. . . are not sufficient data from which to conclude that any kind of trend exists or to make any prediction about what one-hour NO_2 concentrations are likely to be reported in CBSAs with populations between 500,000 and 1 million; Boise and Des Moines alone are unlikely to be representative of all other CBSAs in this category.'' The Environmental Groups go on to discuss an analysis of the available near-road data and state that variability in the collected data, particularly for the 98th percentile 1-hour daily maximum values (1-hour values), makes ''. . . it exceedingly hard to predict whether an individual CBSA in either group [of different CBSA population sizes] would be likely to report high or low near-road NO_2 concentrations based on its population alone,'' and ultimately that ''. . . EPA's own data show that less-populated areas are not significantly less likely to have high near-road NO_2 concentrations (98th percentile one-hour daily max).''

Because Phases 1 and 2 of the network have nearly been fully deployed, there are sufficient data to analyze and to support a conclusion that the first two phases of the near-road monitoring network are sufficient to protect against risks associated with exposures to peak concentrations of NO_2. Regarding the length of the data record, we must consider the fact that the agency has multiple years of complete data that have already been used to judge compliance against the annual standard. Between 2013 and 2015, there were 69 annual design value data points across 39 different CBSAs (some with two near-road sites) available for analysis and comparison to the NAAQS. Further, regarding hourly data during the same (2013–2015) time period, there were a similar number of 98th percentile 1-hour daily maximum concentration values available for review. There were four sites in four separate CBSAs (Boise, ID; Des Moines, IA; Detroit, MI; and St. Louis, MO) with 3 years' worth of complete data that allowed the calculation of design values for the hourly standard. Although the remaining sites did not have enough data for the hourly design value calculation, the available data still provided evidence of what hourly near-road NO_2 concentrations look like across 1 or 2 years. All those data represent significant spatial representation nationally and across CBSAs of various population sizes, and were presented and discussed in the docket memo. (See Docket Memo, Figures 9, 10, and 11.) The data were ample enough to detect patterns and trends that provide an indication of whether or not near-road concentrations are threatening the NAAQS. Those indications, coupled with the understanding of NOx emissions and anticipated future emissions profiles, provided a strong basis for the proposal. We disagree that there are insufficient data on which to base our conclusions regarding the sufficiency of the near-road network. Commenters assert that the EPA has ''virtually no emissions data'' for CBSAs with populations under 1 million, which may have been intended to mean that the EPA has virtually no near-road NO_2 air quality data for CBSAs with populations under 1 million. This is incorrect. As explained in the docket memo, EPA has complete data for a full year from two sites, one in Boise and one in Des Moines. The commenters did not provide any explanation to support their comment that there are not enough data.

Regarding specific comments on variability of some of the data, particularly in the hourly data across different near-road sites in different CBSAs across a range of population sizes, the EPA notes that such variability is to be expected in more highly time-resolved data. Further, as explained above, each near-road site is influenced by a number of factors, which all can contribute to inter-site variability. The Environmental Groups believe that the Boise and Des Moines CBSAs would not likely be representative of all other CBSAs of the same CBSA size class, without explanation. The EPA notes that no single CBSA is expected to be totally representative of any other individual CBSA. However, as presented in the proposal and the docket memo, despite the expected variability, there are relationships within the data that are evident when analyzing emissions, traffic data, measured concentration data, and CBSA populations. Particularly, higher populated CBSAs correspondingly have more vehicles, which in turn increases the availability of mobile source derived emissions that lead to increased opportunity for higher NO_2 concentrations, particularly in the near-road environment. It is these relationships that lend to the concept that higher near-road NO_2 concentrations are expected in more heavily populated CBSAs as compared to those with lesser populations.[7]

It is also critical to conduct an analysis of the available near-road data. The analysis of all these data, which include data from the most heavily populated CBSAs and two CBSAs having populations between 500,000 and 1 million persons, reveals that there are no design values for either the annual or hourly NAAQS, or even a single 98th percentile 1-hour daily maximum value, that are approaching or exceeding the NAAQS. The highest recorded values throughout the 2013–2015 time period, analyzed and presented in the docket memo, were an annual average of 27 ppb in Los Angeles and an 98th percentile 1-hour value of 72 ppb from an incomplete year of data in New York City. In comparison, the NO_2 annual standard level is 53 ppb and the 98th percentile 1-hour daily maximum standard level averaged over 3 years is 100 ppb. The fact that no data collected to date have exceeded or are threatening to the NAAQS is paramount to the reasoning behind the approach to revise network requirements. There are no compelling concentration data or meta-data that indicate that the smaller CBSAs would be expected to have near-road NO_2 concentrations at or above those measured in more heavily populated CBSAs that have sites proximate to more heavily trafficked roads.

Further, the EPA expects a continuation in the reduction of on-road mobile source emissions on a per vehicle basis as a result of the implementation of mobile source standards such as the Tier 3 engine and fuel standards, which was echoed in the public comments. These continuing emission reductions should reduce the amount of measured NO_2 in the near-road environment, although other factors such as changes in traffic volume can impact those reductions.

Finally, the EPA notes that EPA Regional Administrators have the authority to work with state and local air monitoring agencies to require monitoring above the minimum requirements as needed to address a

[7] The commenters claim that the variability makes it difficult to predict NO_2 levels in a particular CBSA based on population alone, pointing to 2015 data showing one-hour concentrations in certain CBSAs with population between 1 million and 2.5 million that were higher than concentrations in some CBSAs with more than 2.5 million people. While NO_2 levels can vary from hour-to-hour, the EPA notes that the levels commenters refer to are all well below the level of the NO_2 NAAQS. (*e.g.,* the 98th percentile level in Providence, RI, is 67.4 ppb, which is well below the one-hour NAAQS of 100 ppb). See Docket Memo, Figure 11.

situation where near-road NO_2 concentrations are suspected to be approaching or exceeding the NAAQS. Accordingly, near-road monitoring could subsequently be required in smaller CBSAs should circumstances indicate the need to provide additional characterization beyond the monitoring provided by Phases 1 and 2 of the network. This Regional Administrator authority serves as an effective backstop against any unusual situation that could occur where monitoring might be warranted in an area that is not subject to minimum monitoring requirements.

Other comments received were outside the scope of this rule and not discussed in this preamble.

IV. Conclusion and Final Action

An analysis of available near-road NO_2 monitoring data indicates that air quality levels in the near-road environment are well below the NO_2 NAAQS. Based on the analysis of available concentration data, as well as related emissions, traffic, and network metadata, the EPA anticipates that measured near-road NO_2 concentrations in relatively smaller CBSAs (*i.e.,* CBSAs with populations less than 1,000,000 persons) would exhibit similar, and more likely, lower concentrations, than what is being measured at existing near-road NO_2 sites in larger urban areas. In consideration of the data presented and reviewed in the proposal and the public comments received on the proposal, the EPA is finalizing, as proposed, the removal of monitoring requirements for near-road NO_2 monitors in CBSAs having populations between 500,000 and 1,000,000 persons, also known as Phase 3 of the near-road NO_2 network. The agency is also finalizing, as proposed, the removal of the requirement for a second near-road NO_2 monitor in any CBSA having 500,000 or more persons that also had one or more road segments with 250,000 or greater AADT counts. The revised requirement for a second near-road NO_2 monitor will only apply to CBSAs having 1,000,000 or more persons with a road segment of 250,000 or greater AADT counts.

V. Statutory and Executive Order Reviews

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

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. The final revisions do not add any information collection requirements beyond those imposed by the existing NO_2 monitoring requirements.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action will remove a sub-set of the current air monitoring requirements and, therefore, relieve state and local air monitoring agencies from having to provide evidence of compliance with the NO_2 NAAQS in the near-road environment in CBSAs with less than 1,000,000 persons. We have, therefore, concluded that this action will relieve regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action will reduce the number of required near-road NO_2 monitors to be operated by state and local air monitoring agencies.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications, as specified in Executive Order 13175. This final rule imposes no requirements on tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets EO 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The results of the network and data evaluation are contained in the Near-road NO_2 Network and Data Analysis docket memo, which provides a review and analysis of the characteristics of the existing near-road NO_2 monitoring network and the relationships between NO_2 emissions, population, traffic, and NO_2 concentration data. Further, this rule does not modify the existing requirements for near-road monitors required in CBSAs having 1,000,000 or more persons, area-wide NO_2 monitors, or monitoring of NO_2 in areas with susceptible and vulnerable populations.

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), and the EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 58

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations.

Dated: December 22, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency is amending title 40, chapter I of the Code of Federal Regulations as follows:

PART 58—AMBIENT AIR QUALITY SURVEILLANCE

■ 1. The authority citation for part 58 continues to read as follows:

Authority: 42 U.S.C. 7403, 7405, 7410, 7414, 7601, 7611, 7614, and 7619.

■ 2. Amend § 58.10 by revising paragraph (a)(5)(iv) and removing paragraph (a)(5)(v) to read as follows:

§ 58.10 Annual monitoring network plan and periodic network assessment.

(a) * * *

(5) * * *

(iv) A plan for establishing a second near-road NO_2 monitor in any CBSA with a population of 2,500,000 persons or more, or a second monitor in any CBSA with a population of 1,000,000 or more persons that has one or more roadway segments with 250,000 or greater AADT counts, in accordance with the requirements of appendix D, section 4.3.2 to this part, shall be submitted as part of the Annual Monitoring Network Plan to the EPA Regional Administrator by July 1, 2014. The plan shall provide for these required monitors to be operational by January 1, 2015.

* * * * *

■ 3. Amend § 58.13 by revising paragraph (c)(4) and removing paragraph (c)(5) to read as follows:

§ 58.13 Monitoring network completion.

* * * * *

(c) * * *

(4) January 1, 2015, for a second near-road NO_2 monitor in CBSAs that have a population of 2,500,000 or more persons or a second monitor in any CBSA with a population of 1,000,000 or more persons that has one or more roadway segments with 250,000 or greater AADT counts that is required in appendix D, section 4.3.2.

* * * * *

■ 4. Appendix D to part 58 is amended by revising section 4.3.2 to read as follows:

Appendix D to Part 58—Network Design Criteria for Ambient Air Quality Monitoring

* * * * *

4.3.2 Requirement for Near-road NO_2 Monitors

(a) Within the NO_2 network, there must be one microscale near-road NO_2 monitoring station in each CBSA with a population of 1,000,000 or more persons to monitor a location of expected maximum hourly concentrations sited near a major road with high AADT counts as specified in paragraph 4.3.2(a)(1) of this appendix. An additional near-road NO_2 monitoring station is required for any CBSA with a population of 2,500,000 persons or more, or in any CBSA with a population of 1,000,000 or more persons that has one or more roadway segments with 250,000 or greater AADT counts to monitor a second location of expected maximum hourly concentrations. CBSA populations shall be based on the latest available census figures.

(1) The near-road NO_2 monitoring sites shall be selected by ranking all road segments within a CBSA by AADT and then identifying a location or locations adjacent to those highest ranked road segments, considering fleet mix, roadway design, congestion patterns, terrain, and meteorology, where maximum hourly NO_2 concentrations are expected to occur and siting criteria can be met in accordance with appendix E of this part. Where a state or local air monitoring agency identifies multiple acceptable candidate sites where maximum hourly NO_2 concentrations are expected to occur, the monitoring agency shall consider the potential for population exposure in the criteria utilized to select the final site location. Where one CBSA is required to have two near-road NO_2 monitoring stations, the sites shall be differentiated from each other by one or more of the following factors: fleet mix; congestion patterns; terrain; geographic area within the CBSA; or different route, interstate, or freeway designation.

(b) Measurements at required near-road NO_2 monitor sites utilizing chemiluminescence FRMs must include at a minimum: NO, NO_2, and NO_X.

* * * * *

[FR Doc. 2016–31645 Filed 12–29–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 160302174–6999–02]

RIN 0648–BF81

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Dolphin and Wahoo Fishery Off the Atlantic States; Regulatory Amendment 1

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Regulatory Amendment 1 for the Fishery Management Plan for the Dolphin and Wahoo Fishery off the Atlantic States (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This final rule establishes a commercial trip limit for Atlantic dolphin for vessels with a Federal commercial permit for Atlantic dolphin and wahoo. The purpose of this final rule is to reduce the chance of an in-season closure of the dolphin commercial sector as a result of the annual catch limit (ACL) being reached during the fishing year, and to reduce the severity of economic or social impacts caused by these closures.

DATES: This rule is effective January 30, 2017.

ADDRESSES: Electronic copies of Regulatory Amendment 1, which includes an environmental assessment, an assessment under the Regulatory Flexibility Act (RFA), a regulatory impact review, and fishery impact statement, may be obtained from *www.regulations.gov* or the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/dw/2016/reg_am1/documents/pdfs/dw_reg_am1.pdf.*

FOR FURTHER INFORMATION CONTACT: Karla Gore, NMFS SERO, telephone: 727–551–5753, or email: *karla.gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The dolphin and wahoo fishery of the Atlantic is managed under the FMP. The FMP was prepared by the Council and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Steven Act).

On June 30, 2016, NMFS published a proposed rule for Regulatory Amendment 1 and requested public comment (81 FR 42625). The proposed rule and Regulatory Amendment 1 outline the rationale for the action contained in this final rule. A summary of the action implemented by Regulatory Amendment 1 and this final rule is provided below.

Management Measure Contained in This Final Rule

This final rule establishes a commercial trip limit for dolphin for vessels that have a Federal commercial permit for Atlantic dolphin and wahoo.

Dolphin Commercial Trip Limit

Currently, no commercial trip limit exists for vessels that possess a Federal commercial permit for Atlantic dolphin and wahoo. However, there is a commercial trip limit of 200 lb (91 kg) of dolphin and wahoo, combined, for vessels that do not have a Federal commercial permit for Atlantic dolphin and wahoo but do have a Federal commercial permit in any other fishery, provided that all fishing and landings from that trip occur north of 39° N. lat. (50 CFR 622.278(a)(2)). This final rule establishes a commercial trip limit of 4,000 lb (1,814 kg), round weight, for the dolphin commercial sector in the Atlantic, once 75 percent of the commercial ACL is reached. This trip limit remains in effect until the end of the fishing year or until the commercial ACL is met, whichever comes first. This trip limit applies to vessels that have a Federal commercial permit for Atlantic dolphin and wahoo, provided that the vessel is not operating as a charter vessel or headboat. There will be no applicable trip limit for the dolphin commercial sector in the Atlantic prior to 75 percent of the commercial ACL being reached. The Council determined that establishing this commercial trip limit would reduce the chance of early closures during the fishing year as a result of the accountability measures being triggered, and thereby reduce the severity of any economic or social impacts as a result of a commercial sector closure.

Comments and Responses

NMFS received four comments on the proposed rule and Regulatory Amendment 1. One comment was outside the scope of the amendment and two were in support of the amendment as proposed. Those comments are not addressed below. The remaining single commenter opposed the management actions in the proposed rule and Regulatory Amendment 1; summaries of and responses to the comments in opposition to the proposed rule and Regulatory Amendment 1 are below.

Comment 1: The commercial trip limit selected in Regulatory Amendment 1 is not supported by the best available science, as mandated by the Magnuson-Stevens Act. No peer-reviewed stock assessment has ever been conducted for dolphin. Dolphin is the highest priority in the Council's list of species in need of a peer-reviewed stock assessment yet no Southeast Data, Assessment, and Review (SEDAR) assessment has been scheduled or requested. NMFS should conduct a stock assessment of dolphin in the Atlantic before implementing Regulatory Amendment 1.

Response: NMFS disagrees that dolphin needs to be assessed before implementing this amendment and has certified that Regulatory Amendment 1 is based on the best scientific information available. Although dolphin is not currently scheduled for a stock assessment, it is a short-lived, highly productive species that is not considered to be vulnerable to overfishing. The decision to manage the fishery represented a precautionary and risk-averse approach to management. The Report to Congress on the Status of U.S. Fisheries indicates that dolphin is not overfished and is not undergoing overfishing. The Southeast Fisheries Science Center listed dolphin as a stock assessment priority; however, the Council did not include dolphin in its list of long-term priorities due to the need to revise assessments that had already been completed with updated data from the Marine Recreational Information Program. Thus, dolphin is not the highest priority of species in need of a peer-reviewed stock assessment and the Council and NMFS need not await a stock assessment to proceed with the Regulatory Amendment 1.

Comment 2: The dolphin fishery is in need of management measures that will, when implemented, eliminate the need for commercial trip limits. NMFS should only implement Regulatory Amendment 1 as a temporary measure to give the Council and NMFS time to develop new management measures based on a new stock assessment. Therefore, a sunset date to the trip limit action should be included in Regulatory Amendment 1, to allow the commercial trip limits for the longline component of the commercial sector to be valid for a set number of years.

Response: Regulatory Amendment 1 establishes a dolphin commercial trip limit of 4,000 lb (1,814 kg), round weight, once 75 percent of the commercial ACL is reached. The Council did not consider a sunset date for the action in this amendment. In the future, if deemed necessary, the Council could modify or remove the trip limit.

Comment 3: The dolphin commercial trip limit will negatively impact commercial fishermen in the North Atlantic more significantly than fishermen in the Mid-Atlantic or South Atlantic as a result of dolphin's migratory patterns, in violation of National Standard 4. The fishing year should be changed from beginning on January 1 to begin on June 1 to allow the fishermen in the North Atlantic better access to the resource.

Response: NMFS disagrees. The amendment does not violate National Standard 4 because it is intended to lengthen the fishing year for all commercial fishermen fishing in the Atlantic. The Council did not consider revising the fishing year in Regulatory Amendment 1. In the future, if deemed necessary, the Council could revise the fishing year.

Comment 4: This amendment violates National Standard 9 and ''no less than 4 U.N. resolutions and the UN FAO Code of Conduct for Responsible Fisheries'' because the implementation of commercial trip limits will cause an increase in regulatory discards.

Response: NMFS disagrees. Marine fisheries in the United States are scientifically monitored and regionally managed under a number of requirements, including the ten national standards in the Magnuson-Stevens Act. The National Standards are requirements that must be followed in any FMP to ensure sustainable and responsible fishery management. When reviewing FMPs, FMP amendments, and regulations, the Secretary of Commerce must ensure that they are consistent with the National Standards. National Standard 9 states: Conservation and management measures shall, to the extent practicable, (a) minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. The dolphin and wahoo fishery is managed under the FMP which is consistent with the National Standards. As discussed in the bycatch practicability assessment included in the Regulatory Amendment, the magnitude of discards in the dolphin and wahoo fishery is small, and bycatch is believed to be minimal in both the commercial and recreational sectors. Action was taken in the original FMP to reduce bycatch by prohibiting the use of surface and pelagic longline gear for dolphin and wahoo within any ''time or area closure'' closed to the use of pelagic gear for highly migratory pelagic species in the Council's area of jurisdiction. Although this action may increase the regulatory discards when the commercial trip limit is triggered, any increase is likely to be minimal.

The commenter did not provide any information on, or citation to, the United Nations resolutions that it believes the rule violates, and thus NMFS cannot evaluate the comment that the rule is inconsistent with those resolutions. However, to the extent that those resolutions seek to minimize bycatch, this final rule is consistent with them. As explained above, although the final rule may increase regulatory discards when the rule is implemented, NMFS does not believe those increases in regulatory discards violate National Standard 9 or other efforts to minimize bycatch.

In addition, with respect to the comment that the rule violates the United Nation's 1995 Code of Conduct for Responsible Fisheries (CCRF), NMFS disagrees. Similar to National Standard 9, the CCRF seeks to minimize bycatch. As explained above, the final rule is consistent with National Standard 9 and thus is consistent with other initiatives to minimize bycatch, including the CCRF.

Comment 5: If trip limits are implemented, all forms of mortality, including regulatory discards, must be accounted for accurately in order to determine the effect of overall mortality on stock status. It is essential that NMFS collect data on discards of dolphin with the implementation of a commercial trip limit.

Response: As described in the response to comment 4, the bycatch in the dolphin fishery is minimal. Information on dolphin landings and discards are collected through a variety of ways in the Atlantic. Commercial dolphin fishermen who are selected by the NMFS Science and Research Director are required to maintain and submit fishing records. Commercial dolphin fishermen are also required to submit logbooks with trip and effort information. Currently, discard data are collected using a supplemental form that is sent to a stratified random sample of 20 percent of the active Federal dolphin and wahoo commercial permit holders in the dolphin and wahoo fishery. For the recreational sector, estimates of the number of recreational discards are available from the Marine Recreational Information Program and the NMFS Southeast Headboat Survey.

Additionally, the Council is currently developing the Bycatch Reporting Amendment to improve bycatch reporting in all of their managed fisheries. This amendment is intended to improve data collection on discards, including regulatory discards.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this final rule is necessary for the conservation and management of Atlantic dolphin and is consistent with Regulatory Amendment 1, the FMP, the Magnuson-Stevens Act, and other applicable law.

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

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. NMFS did not receive any comments from SBA's Office of Advocacy or the public on the certification in the proposed rule.

On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only (80 FR 81194, December 29, 2015). The $11 million standard became effective on July 1, 2016, and is to be used in place of the SBA's current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA that are published after July 1, 2016. *Id.* at 81194.

Pursuant to the RFA, and prior to July 1, 2016, a certification was developed for this regulatory action using SBA's size standards. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standard. All of the entities directly regulated by this regulatory action are finfish commercial fishing businesses and were considered small under the previously applicable SBA size standards. These commercial fishing businesses will not exceed the new threshold standard for small businesses, and thus they all will continue to be considered small under the new standard. Thus, NMFS has determined that the new size standard does not affect analyses prepared for this regulatory action.

The Chief Counsel for Regulation of the Department of Commerce hereby reaffirms that the rule will not have a significant economic impact on a substantial number of small entities. Because this final rule, if implemented, will not have a significant economic impact on a substantial number of small entities, a final regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 622

Commercial, Dolphin, Fisheries, Fishing, Trip limits.

Dated: December 22, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, NMFS amends 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.278, revise paragraph (a) to read as follows:

§ 622.278 Commercial trip limits.

* * * * *

(a) *Trip-limited permits*—(1) *Atlantic wahoo.* (i) The trip limit for wahoo in or from the Atlantic EEZ is 500 lb (227 kg). This trip limit applies to a vessel that has a Federal commercial permit for Atlantic dolphin and wahoo, provided that the vessel is not operating as a charter vessel or headboat.

(ii) See § 622.280(b)(1) for the limitations regarding wahoo after the ACL is reached.

(2) The trip limit for a vessel that does not have a Federal commercial vessel permit for Atlantic dolphin and wahoo but has a Federal commercial vessel permit in any other fishery is 200 lb (91 kg) of dolphin and wahoo, combined, provided that all fishing on and landings from that trip are north of 39° N. lat. (A charter vessel/headboat permit is not a commercial vessel permit.)

(3) *Atlantic dolphin.* (i) Once 75 percent of the ACL specified in § 622.280(a)(1)(i) is reached, the trip limit is 4,000 lb (1,814 kg), round weight. When the conditions in this paragraph (a)(3)(i) have been met, the Assistant Administrator will implement this trip limit by filing a notification with the Office of the Federal Register. This trip limit applies to a vessel that has a Federal commercial permit for Atlantic dolphin and wahoo, provided that the vessel is not operating as a charter vessel or headboat.

(ii) See § 622.280(a)(1) for the limitations regarding dolphin after the ACL is reached.

* * * * *

[FR Doc. 2016–31463 Filed 12–29–16; 8:45 am]

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Proposed Rules

Federal Register

Vol. 81, No. 251

Friday, December 30, 2016

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM17–3–000]

Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing to revise its regulations to require that each regional transmission organization and independent system operator incorporate market rules that meet certain requirements when pricing fast-start resources. These reforms should lead to prices that more transparently reflect the marginal cost of serving load, which will reduce uplift costs and thereby improve price signals to support efficient investments.

DATES: Comments are due February 28, 2017.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov*. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail/Hand Delivery: Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Daniel Kheloussi (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6391, *daniel.kheloussi@ferc.gov*.

Eric Vandenberg (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6283, *eric.vandenberg@ferc.gov*.

Kaleb Lockwood (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8255, *kaleb.lockwood@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

Paragraph Numbers

1. In this Notice of Proposed Rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) is proposing to address the pricing of energy from resources that are able to start quickly (*i.e.,* any resource that is able to start up within ten minutes or less, that has a minimum run time of one hour or less, and that submitted an economic energy offer to the market) (fast-start resources). In this context, fast-start pricing addresses the software algorithms by which a regional transmission organization (RTO) or independent system operator (ISO) incorporates the offers of fast-start resources into the market prices for energy and ancillary services.[1]

2. Varied approaches exist among RTOs and ISOs to incorporate fast-start resources into energy and ancillary services prices (fast-start pricing). Fast-start resources are unique because they are often dispatched to their inflexible minimum or maximum operating limits, and are thus not eligible to set the locational marginal price (LMP).[2] In addition, fast-start resources are typically committed in real-time, very close to the interval when they are needed. As a result, the cost to commit these resources is incurred at roughly the same time the incremental energy costs are incurred, which raises the question of whether the commitment costs should be included in the LMP. Finally, fast-start resources can arguably respond quickly enough to be considered part of an RTO's/ISO's operating reserves even when they have

[1] In the November 20, 2015 Order Directing Reports issued in Docket No. AD14–14–000, the Commission noted that inflexible resources ''are generally referred to as block-loaded fast-start resources.'' *Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators,* 153 FERC ¶ 61,221, at P 9 (2015) (Order Directing Reports). The Commission also stated that

[a]n inflexible resource generally refers to a resource that may not be able to physically operate much below its maximum output and therefore cannot be dispatched up or down. For this reason, the energy supply offer parameters for these resources may stipulate that they be dispatched either to zero or to a minimum level that is at (or close to) their maximum output, but not in between.

Id. P 9 n.8. The Commission further noted that ''[a] block-loaded resource is a resource whose economic minimum operating limit is equal to its economic maximum output.'' *Id.* P 9 n.9. While this NOPR seeks to address issues discussed in the Order Directing Reports and the subsequent reports and comments submitted in that docket, we do not limit terms used in this NOPR to the definitions provided in the Order Directing Reports.

[2] At a high level, the LMP is set by the offer of the resource that is dispatched up to serve the next additional MW of demand or dispatched down to accommodate the next MW of reduced demand. Fast-start resources often have little or no dispatch range (*i.e.,* their economic minimum operating limit equals their economic maximum operating limit). A resource that is operating inflexibly at its economic minimum operating limit or maximum operating limit is not dispatchable to serve an additional increment or decrement of load, and is thus not eligible to set the LMP.

not yet been committed. As a result of these unique characteristics, RTOs/ISOs have developed pricing specific to this class of resources. This pricing is designed generally to recognize that fast-start resources are, for all intents and purposes, the marginal resource used to meet the next increment of energy or operating reserves demand. Based on experience with the different fast-start pricing used by each RTO/ISO, we believe some practices have emerged over time that better represent the marginal cost of serving load.

3. We preliminarily find that some of these approaches may not result in rates that are just and reasonable for several reasons. We are concerned that some existing practices may not ensure that prices accurately reflect the marginal cost of serving load, potentially resulting in prices that do not reflect the value of fast-start resources, potentially creating unnecessary uplift payments, and potentially failing to provide incentives for market participants to make efficient investments. As a result, we propose to require that each RTO/ISO incorporate the following five requirements for its fast-start pricing. First, an RTO/ISO must apply fast-start pricing to any resource committed by the RTO/ISO that is able to start up within ten minutes or less, has a minimum run time of one hour or less, and that submits economic energy offers to the market. Second, when an RTO/ISO makes a decision to commit a fast-start resource, it should incorporate commitment costs, *i.e.,* start-up and no-load costs, of fast-start resources in energy and operating reserve prices, but must do so only during the fast-start resource's minimum run time. Third, an RTO/ISO must modify its fast-start pricing to relax the economic minimum operating limit of fast-start resources and treat them as dispatchable from zero to the economic maximum operating limit for the purpose of calculating prices. Fourth, if an RTO/ISO allows offline fast-start resources to set prices for addressing certain system needs, the resource must be feasible and economic. Finally, an RTO/ISO must incorporate fast-start pricing in both the day-ahead and real-time markets.

4. We seek comment on these proposed reforms 60 days after publication of this NOPR in the **Federal Register**.

I. Background

5. In June 2014, the Commission initiated a proceeding, in Docket No. AD14–14–000, Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators, to evaluate issues regarding price formation in the energy and ancillary services markets operated by RTOs/ISOs (Price Formation Proceeding). The notice initiating that proceeding stated that there may be opportunities for the RTOs/ISOs to improve the price formation process in the energy and ancillary services markets. As set forth in the notice, prices used in energy and ancillary services markets ideally ''would reflect the true marginal cost of production, taking into account all physical system constraints, and these prices would fully compensate all resources for the variable cost of providing service.'' [3] Pursuant to the notice, staff conducted outreach and convened technical workshops on the following four general issues: (1) use of uplift payments; (2) offer price mitigation and offer price caps; (3) scarcity and shortage pricing; and (4) operator actions that affect prices.[4]

6. In January 2015, the Commission requested comments on questions that arose from the price formation technical workshops.[5] As a result of these comments, the Commission identified, among other things, five technical topics with potential for reform to improve price formation, but for which further information was needed. In November 2015, the Commission issued an order that directed each RTO/ISO to report on these five price formation topics: fast-start pricing; managing multiple contingencies; look-ahead modeling; uplift allocation; and transparency.[6] The order directed each RTO/ISO to file a report providing an update on its current practices in the topic areas, outlining the status of its efforts (if any) to address issues in each of the five topics, and responding to specific questions contained in the order. This NOPR addresses the pricing of fast-start resources.

7. In the reports filed and the subsequent comments, RTOs/ISOs and other commenters addressed the issue of fast-start pricing, as discussed below.[7]

II. Discussion

8. In RTOs/ISOs, LMPs reflect the system marginal cost of serving the next increment of load, taking into account transmission constraints and line losses. With certain exceptions, only resources that are dispatchable, *i.e.,* those that can be dispatched up or down in response to changes in system conditions, are eligible to set prices.[8] In many situations, this eligibility requirement ensures that LMPs reflect the marginal cost of serving the next increment of demand. However, this eligibility requirement can distort LMPs when a fast-start resource is committed and dispatched to serve expected load during a particular interval. This restriction often prevents a fast-start resource from setting prices when the resource is dispatched at its economic minimum operating limit. Fast-start resources are often required to be dispatched at their economic minimum operating limit or are block-loaded.[9] Because the system may need fewer megawatts (MW) than the fast-start resource's economic minimum operating limit to meet load, other resources must be dispatched down. The resources that were dispatched down become the most economic option to serve the next increment of load. Therefore, despite the fact that a fast-start resource is essentially marginal, this restriction prevents a fast-start resource dispatched at its economic minimum operating limit from setting the LMP. To allow fast-start resources to set prices so that LMPs better reflect the marginal cost of serving load, some RTOs/ISOs modify the market rules and software. Typically, they treat fast-start resources as dispatchable in a pricing algorithm (*i.e.,* pricing run) separate from the dispatch algorithm (*i.e.,* dispatch run). While the dispatch run meets all of the physical constraints of the resources, the pricing run relaxes the economic minimum operating limit of a fast-start resource so that the resource is treated as dispatchable by the market-clearing software and eligible to set prices.

9. Fast-start pricing can result in improved price signals, especially during tight or unexpected system conditions when the need for fast-start resources is the greatest. However, fast-start pricing can create a disconnect between prices and dispatch instructions, which can lead to over-generation. Specifically, fast-start

[3] Price Formation in Energy and Ancillary Services Markets Operated by Transmission Organizations and Independent System Operators, Notice, Docket No. AD14–14–000, at 2 (June 19, 2014).

[4] *Id.* at 1, 3–4.

[5] Notice Inviting Post-Technical Workshop Comments, Docket No. AD14–14–000 (Jan. 16, 2015).

[6] Order Directing Reports, 153 FERC ¶ 61,221).

[7] A list of commenters and the abbreviated names used in this NOPR appears in the Appendix.

[8] Order Directing Reports, 153 FERC ¶ 61,221 at P 9.

[9] Block-loaded means the resource's economic minimum operating limit equals its economic maximum operating limit. The economic minimum and maximum operating limits are the minimum amount of electric power that a resource must be allowed to produce, and the highest level a resource can produce, while under economic dispatch, respectively.

pricing requires the pricing run to assume that fast-start resources can operate below the resources' economic minimum operating limit such that the pricing run also dispatches other units at levels greater than the level instructed by the dispatch run. Many RTOs/ISOs ensure that the disconnect in resource output levels between the pricing and dispatch runs are reconciled to avoid over-generation; however, some RTOs/ISOs do not reconcile the differences, leading to dispatch targets that produce energy in excess of what is needed to serve load, *i.e.,* over-generation. Further, generation resources that are dispatched downward to accommodate the commitment of fast-start resources may have incentives to produce energy above their dispatch targets to capture the higher prices set by fast-start resources, leading to over-generation. Thus, fast-start pricing rules are typically paired with market rules to reduce the incentives for producing energy above dispatch targets.

10. Further, reflecting commitment costs in LMPs requires some judgment regarding how and when to include those commitment costs. Similarly, reflecting the costs of offline resources in LMPs requires some judgment regarding when these resources are actually economically and technically able to address a reserve shortage or transmission constraint.

A. Current RTO/ISO Approaches to Fast-Start Pricing

11. Each RTO/ISO has developed its own unique pricing to accommodate the specific characteristics of fast-start resources in its respective market.

12. CAISO defines fast-start resources as those that can come online in under two hours and can be committed in CAISO's fifteen-minute market or the short-term unit commitment process. CAISO states that there is no special treatment for the commitment or pricing of generating units related to whether they are fast, medium, or long start.[10] However, CAISO applies special modeling logic to certain block-loaded or nearly block-loaded resources known as Constrained Output Generators.[11] CAISO currently allows minimum load costs to affect LMPs but does not include start-up costs.[12] In the day-ahead market, Constrained Output Generators are treated as dispatchable resources in both the scheduling and pricing run; thus, in the day-ahead market, Constrained Output Generators can set prices. In the real-time market, the scheduling run does not allow Constrained Output Generators to be dispatched below their economic minimum operating limit, but in the pricing run the economic minimum operating limit is relaxed to zero. CAISO does not allow offline resources to set LMP.[13] CAISO states that because so few resources have registered as Constrained Output Generators, it has no anecdotal data that its Constrained Output Generator-related pricing logic results in over-generation issues. However, CAISO notes that over-generation could be a concern if a large number of resources were to register as Constrained Output Generators.[14] CAISO states that it is not currently working on any stakeholder initiatives to modify commitment or pricing logic related to fast-start units, but notes that some of its stakeholders have argued for an extended pricing mechanism similar to MISO's Extended LMP mechanism.[15]

13. ISO–NE recently proposed revisions to its process for dispatching and pricing fast-start units, which will become effective March 31, 2017.[16] ISO–NE defines fast-start resources as those with start-up times of thirty minutes or less and which have a minimum run time of one hour or less and a minimum down time of one hour or less.[17] ISO–NE states that its pricing mechanism will allow start-up and no-load costs to be included in LMPs. ISO–NE will have separate dispatch and pricing runs, with the pricing run following the dispatch run, where economic minimum operating limits are relaxed.[18]

However, ISO–NE does not allow offline resources to set the LMP.[19] ISO–NE states that its revised fast-start pricing is being implemented in the real-time market only.[20] ISO–NE argues that its revised fast-start pricing logic will eliminate over-generation issues and states that it will compensate certain re-dispatched resources for their opportunity costs.[21]

14. MISO's fast-start pricing logic, referred to as Extended LMP (ELMP), became effective in 2015.[22] MISO defines a fast-start generating resource as a generating unit with a start-up time of ten minutes or less and a minimum run time of one hour or less.[23] MISO allows a fast-start resource's start-up and no-load costs to affect the LMP. MISO also allows an offline fast-start resource to set LMPs but only under reserve or transmission scarcity conditions.[24] MISO's ELMP is applied to both day-ahead and real-time markets in order to facilitate price convergence between the two markets.[25] MISO states that, though it recognizes that fast-start pricing can result in over-generation, it has not observed any significant over-generation issues. However, MISO emphasizes that its settlement rules incentivize following dispatch instructions because it penalizes resources that deviate.[26] MISO states that it is currently planning to implement ELMP Phase II, which it states will expand upon Phase I principles by applying fast-start pricing to more peaking resources.[27]

15. NYISO does not apply fast-start pricing to all fast-start resources. Instead, NYISO applies special pricing logic, referred to as ''hybrid gas turbine pricing logic,'' to all committed block-loaded resources qualified to provide 10-minute non-synchronous reserves. This pricing logic allows block-loaded gas turbines to set prices.[28] Under this logic, start-up and no-load costs are not reflected in LMP. In the day-ahead

[10] Report of CAISO, Docket No. AD14–14–000, at 4 (Mar. 4, 2016) (CAISO Report).

[11] CAISO defines a Constrained Output Generator as any generating unit with an operating range that is no greater than the highest of three MW or five percent of its maximum operating range. *Id.* at 1–2. Block-loaded resources in CAISO are required to register as Constrained Output Generators, while certain nearly-block loaded resources are permitted to register as Constrained Output Generators, if desired. CAISO notes that there are currently no resources registered as Constrained Output Generators. *Id.* at 11.

[12] *Id.* at 2. In CAISO, a Constrained Output Generator's calculated energy bid (which is the unit's minimum load costs divided by the MW quantity of the unit's maximum output) can set the LMP.

[13] *Id.* at 10.

[14] *Id.* at 8. Fast-start pricing could result in over-generation (*i.e.,* producing energy in excess of what is needed to serve load) due to several factors. First, price signals generated by fast-start pricing could incent some resources to produce energy above their dispatch targets. Specifically, if LMP is higher than a resource's incremental energy offer, that resource would have an incentive to increase its profits by generating above energy dispatch targets, leading to over-generation. Second, an RTO/ISO may use a scheduling run that incorporates relaxed economic minimum operating limits and does not require that generation be equal to load, resulting in over-generation. *See* PJM Report on Price Formation Issues, Docket No. AD14–14–000, at 12–13 (Feb. 17, 2016) (PJM Report).

[15] CAISO Report at 8–9.

[16] *ISO New England Inc. and New England Power Pool Participants Committee,* Docket No. ER15–2716–000 (Oct. 19, 2015) (delegated letter order).

[17] Report of ISO–NE., Docket No. AD14–14–000, at 6 (Mar. 4, 2016) (ISO–NE Report).

[18] *Id.* at 16.

[19] *Id.* at 10.

[20] *Id.* at 3.

[21] *Id.* at 14–15.

[22] *Midcontinent Indep. Sys. Operator, Inc.,* 150 FERC ¶ 61,143 (2015).

[23] Report of MISO, Docket No. AD14–14–000, at 9 (Mar. 4, 2016) (MISO Report).

[24] *Id.* at 11.

[25] *Id.* at 8.

[26] *Id.* at 15.

[27] *Id.* at 7.

[28] Corrected Report of NYISO, Docket No. AD14–14–000, at 9 (Mar. 23, 2016) (NYISO Report).

market, all resources are modeled as dispatchable in the pricing pass of the Security Constrained Unit Commitment process, but NYISO states that this process does not employ the same fast-start pricing as is used in real-time.[29] NYISO explains that, in the real-time market, its hybrid gas turbine pricing logic allows block-loaded resources to be modeled as fully dispatchable to determine prices.[30] NYISO applies fast-start pricing during a fast-start resource's minimum run time if it is economic.[31] NYISO also allows offline fast-start resources to set prices and allows start-up costs for those resources to be reflected in the price.[32] NYISO states that it will be working with stakeholders during 2016 to allow all block-loaded units economically committed by the real-time commitment software to set prices.[33]

16. PJM's tariff and other governing documents do not include formal definitions for fast-start or block-loaded resources. For the purposes of its report, PJM describes a fast-start resource as a combustion turbine that can start within two hours and a block-loaded resource as one with an economic minimum operating limit equal to its economic maximum operating limit. In practice, PJM allows block-loaded resources to set prices.[34] PJM's pricing logic does not allow block-loaded resources' start-up or no-load costs to be included in prices. PJM states that in the day-ahead market, the pricing and dispatch runs are combined, while in the real-time market, the pricing run executes first, followed by the dispatch run.[35] PJM states that in both the day-ahead and real-time markets, it relaxes the economic minimum operating level of block-loaded resources up to ten percent.[36] However, PJM does not allow offline resources to set prices.[37] PJM explains that it allows resources with a limited operating range, other than block-loaded resources, to set prices when operating to control a specific transmission constraint.[38] PJM states that it is not currently working on any stakeholder initiatives regarding fast-start unit pricing.[39]

17. SPP has special pricing logic that it applies to what it refers to as quick-start resources. SPP defines a quick-start resource as a resource that (1) is registered as a quick-start resource; (2) has a cold start-up time of ten minutes or less; (3) has a minimum run time of one hour or less; and (4) has a total minimum down time of one hour or less.[40] SPP does not allow start-up or no-load costs to affect LMP directly, but does allow quick-start resources to include start-up and no-load costs in their mitigated energy offer curves for the purpose of unit commitment.[41] SPP's production run determines both dispatch and pricing for all resources but resources constrained by their economic minimum or maximum operating limits are not eligible to set LMP.[42] Specifically, SPP states that it relaxes the economic minimum operating limit of quick-start resources to zero in a screening run that is executed prior to the final production run, which includes both dispatch and pricing. SPP explains that if the quick-start resource is dispatched below its economic minimum operating limit in the screening run, it will be considered offline in the final production run. Conversely, SPP states that if the quick-start resource is committed at or above its economic minimum operating limit, it will be considered online in the final production run.[43] Additionally, SPP does not allow offline quick-start resources to set LMP.[44] SPP reports that it intends to implement new fast-start pricing to commit quick-start resources more efficiently in real-time in the second quarter of 2017.[45]

B. Comments on Fast-Start Pricing

18. Multiple commenters support the use of fast-start pricing methods that allow resources dispatched at their operating limits to set LMP and allow start-up and no-load costs to affect prices.[46] EPSA/WPTF [47] argues that such fast-start pricing methods could improve pricing signals and help correct CAISO's ''duck curve problem'' by redistributing excess costs incurred during the middle of the day to the ramping periods.[48] Similarly, Exelon believes that RTOs/ISOs should ensure that start-up and no-load costs of resources dispatched at operational limits can affect prices by using a particular mathematical technique called ''convex hull pricing,'' which would better reflect the cost of electricity, reduce uplift, and enhance incentives for all resources to perform.[49]

19. Commenters identified a number of best practices across the RTOs/ISOs. Entergy, EPSA, and Westar generally support certain aspects of MISO's ELMP. EPSA believes that MISO's ELMP approach yields favorable results by ensuring that generators follow dispatch signals and that generators' minimum operating limits are satisfied in dispatch.[50] EPSA states that several components of MISO's ELMP can be widely adopted across all RTO/ISO pricing mechanisms.[51] Further, EPSA and PSEG Companies believe the approaches used by MISO and ISO–NE to relax the economic minimum limits represent a best practice.[52] Further, PSEG Companies states that ISO–NE's revised fast-start pricing method addresses over-generation concerns by paying lost opportunity payments to those resources that follow dispatch instructions but are subsequently re-dispatched down to their economic set point.[53] In addition, EPSA and EPSA/IPPNY are generally supportive of NYISO's fast-start pricing methods.[54]

20. On the other hand, EPSA and Golden Spread express concern that the fast-start pricing methods employed by SPP are insufficient.[55] Specifically, Golden Spread states that certain aspects of SPP's market design features and operator practices result in inefficient market prices and fail to reflect the costs to start and operate fast-start resources or the value they provide to the system.[56]

21. In contrast, the PJM Market Monitor argues that relaxing economic minimum limits for price setting artificially overrides fundamental pricing logic in order to reduce uplift. The PJM Market Monitor argues that

[29] *Id.* at 15.

[30] *Id.* at 3.

[31] *Id.* at 4.

[32] *Id.* at 6, 10.

[33] *Id.* at 3, 8.

[34] PJM Report at 2.

[35] *Id.* at 5.

[36] *Id.* at 5.

[37] *Id.* at 10–11.

[38] *Id.* at 14–15.

[39] *Id.* at 9.

[40] Report of SPP on Price Formation Issues, Docket No. AD14–14–000, at 1–2 (Mar. 7, 2016) (SPP Report).

[41] *Id.* at 5, 8, 10.

[42] *Id.* at 2–3.

[43] *Id.* at 2–3.

[44] *Id.* at 8–9.

[45] *Id.* at 4–5.

[46] DC Energy, Inertia Power, and Vitol Comments at 8; EPSA Comments at 11; EPSA/IPPNY Comments at 6; EPSA/P3 Comments at 5; EPSA/WPTF Comments at 4–5; Exelon Comments at 7–8; PSEG Companies Comments at 8.

[47] EPSA filed multiple sets of comments paired with different groups as well as its own stand-alone comments.

[48] EPSA/WPTF Comments at 4–5.

[49] Exelon Comments at 6–7. Commenters frequently refer to a certain pricing methodology known as ''convex hull pricing.'' This methodology allows the start-up and no-load costs of resources to affect prices by using a particular mathematical technique.

[50] EPSA Comments (on MISO Report) at 12.

[51] *Id.* at 6; EPSA Comments (on price formation) at 12–13.

[52] EPSA Comments (on MISO Report) at 6; PSEG Companies Comments at 4.

[53] PSEG Companies Comments at 7.

[54] EPSA Comments (on SPP Report) at 7; EPSA/IPPNY Comments at 5–6.

[55] EPSA Comments (on SPP Report) at 5; Golden Spread Comments at 1–2.

[56] Golden Spread Comments at 1–2.

this can result in an increase in total production costs.[57] Specifically, the PJM Market Monitor opposes PJM's practice of reducing the economic minimum limit of certain resources to change LMPs. The PJM Market Monitor argues that this pricing logic is a form of subjective pricing because it varies from fundamental LMP logic based on an administrative decision to reduce uplift.[58]

1. Fast-Start Resource Definitions and Resource Eligibility

22. Commenters generally support applying enhanced technology-neutral fast-start pricing logic to an expanded set of resources. Exelon and IMG Midstream/Tangibl recommend that the definition of fast-start resources be technology agnostic.[59] EPSA and Entergy support expanding MISO's ELMP pricing to include units that can respond within thirty minutes and to include more emergency demand response resources.[60] EPSA/NEPGA also supports prioritizing fast-start demand response resource pricing.[61] IMG Midstream/Tangibl states that PJM's and CAISO's definitions of fast-start resources do not coincide with the definition used by other RTOs/ISOs, which define fast-start resources as being able to start up within ten minutes, rather than two hours as defined by PJM and CAISO. Further, IMG Midstream/Tangibl argues that PJM's definition inappropriately rewards less flexible resources.[62] IMG Midstream/Tangibl recommends that the Commission direct PJM and CAISO to define stricter start-up time requirements for fast-start resources, or create two different classes for these resources to better differentiate those that are truly fast-start from those that are not.[63] With respect to CAISO's Constrained Output Generator commitment process, EPSA/WPTF points out that not all fast-start resources are registered or would qualify for this process.[64]

2. Inclusion of Start-Up and No-Load Costs in Prices

23. Multiple commenters believe that the start-up and no-load costs of fast-start resources should be allowed to affect LMPs, particularly when a unit is within its minimum run time.[65] According to EEI, including start-up and no-load costs in appropriate markets could minimize uplift and result in more complete and accurate price signals for market participants.[66] DC Energy, Inertia Power, and Vitol note that both ISO–NE and MISO use reasonable methods of amortizing a fast-start resource's start-up costs over its minimum run time, and that resource's no-load costs over its actual run time, which appropriately includes these costs in prices.[67]

24. EPSA/IPPNY urges the Commission to direct NYISO to review whether the start-up and no-load costs of fast-start resources should be allowed to affect LMPs and supports NYISO's current efforts in this regard.[68] Similarly, Golden Spread, Westar, and EPSA believe that SPP should incorporate the start-up and no-load costs of fast-start resources into the LMP[69] in order to reduce uplift and prevent price suppression.[70]

25. Conversely, the PJM Market Monitor states that PJM appropriately explains in its report the likely negative impacts of including start-up and no-load costs in PJM's price-setting logic.[71] PJM argues that to account for start-up costs in LMP would involve assumptions regarding the run time of a fast-start resource in order to amortize these costs over that period. PJM contends that assumptions regarding actual run time would introduce uncertainty and error in LMP calculations and cause potential divergence between the dispatch instructions given to a resource and the LMP at the resource's location.[72] In addition, PJM explains that incorporating no-load costs into the calculation of LMP would represent a significant change to the status quo and produce negligible benefits. PJM asserts that such a change would introduce a divergence between LMPs and dispatch signals for all resources.[73]

26. CAISO asserts that LMPs are intended to reflect the incremental cost of serving load, which does not include commitment costs, but states that the logic by which the no-load costs of block-loaded Constrained Output Generators are included in LMPs could be extended to other resources with a limited operating range.[74]

3. Relaxation of Economic Minimum Operating Limit

27. Several commenters argue that the economic minimum operating limit of block-loaded or fast-start resources should be relaxed to zero when determining prices. EPSA, EPSA/P3, Exelon, and PSEG Companies argue that PJM's practice of relaxing the economic minimum operating limit by at most ten percent limits the ability for block-loaded resources to set LMPs whenever they are required to meet load and prevents a full consideration of a block-loaded resource's costs.[75] PSEG Companies requests that the Commission find that relaxing a block-loaded fast-start resource's minimum operating limit to zero (*i.e.,* relaxing the minimum operating limit by 100 percent) is the best practice because it ensures that block-loaded resources can set the price whenever they are needed.[76] PJM argues that because it limits the relaxation of the economic minimum operating limit by at most ten percent, over-generation is kept to a minimum and any imbalances are managed by existing grid services.[77]

28. EPSA encourages the Commission to direct all RTOs/ISOs to incorporate the principles exemplified by MISO's ELMP pricing logic, which it believes relaxes economic minimum operating limits in a pricing run that occurs after the dispatch run, and appears to have resulted in robust dispatch operations and not resulted in significant over-generation. EPSA states that such logic will help adequately compensate resources for their distinct capabilities

[57] PJM Market Monitor Comments at 2–3.

[58] *Id.* at 2.

[59] Exelon Comments at 13; IMG Midstream/Tangibl Comments 4–5.

[60] EPSA Comments (on MISO Report) at 10; EPSA Comments (on price formation) at 13; Entergy Comments at 7.

[61] EPSA/NEPGA Comments at 6–7.

[62] IMG Midstream/Tangibl Comments at 2–4, 6–8.

[63] *Id.* at 4–5. However, CAISO states that regardless of whether a unit is classified as fast, medium, or long start, there is no special treatment for the commitment or pricing of that unit. CAISO Report at 4.

[64] EPSA/WPTF Comments at 5.

[65] DC Energy, Inertia Power, and Vitol Comments at 8–9; EEI Comments at 3; EPSA/P3 Comments at 5–6; Exelon Comments at 9–10; IMG Midstream/Tangibl Comments at 8–9; PSEG Companies Comments at 9. Exelon also states that PJM's concern that resources will chase prices if start-up and no-load costs are included in price should be resolved by imposing a penalty to resources that deviate from dispatch instructions. Exelon Comments at 12.

[66] EEI Comments at 3–4.

[67] DC Energy, Inertia Power, and Vitol Comments at 9.

[68] EPSA/IPPNY Comments at 6.

[69] As noted previously, SPP determines a unit's offer curve by combining start-up and no-load adders with the unit's energy offer curve. However, only the energy component is used to set LMP. SPP Report at 8.

[70] EPSA Comments (on SPP Report) at 8; Golden Spread Comments at 1–2; Westar Comments at 3–4.

[71] PJM Market Monitor Comments at 1.

[72] PJM Report at 10.

[73] *Id.* at 10.

[74] CAISO Report at 12.

[75] EPSA Comments (on MISO Report) at 6; EPSA/P3 Comments at 6; Exelon Comments at 12; PSEG Companies Comments at 4–5.

[76] PSEG Companies Comments at 7.

[77] PJM Report at 12.

through LMPs and lead to efficient and orderly dispatch.[78]

29. NYISO states that it allows block-loaded resources to be considered as fully dispatchable from zero to their upper limit when determining prices so that these resources can set the price whenever they are needed to meet load.[79] NYISO argues that not treating such resources as fully dispatchable could prevent these resources from setting prices, especially in load pockets within New York where only block-loaded resources are available to meet reliability needs.[80]

4. Offline Fast-Start Resources

30. Several commenters express concern that allowing offline resources to set prices when they are not actually capable of resolving a transmission or reserve shortage could lead to inaccurate price signals.[81] Specifically, Entergy, EPSA, and Westar express concern that MISO is over-including offline resources in price setting even when they are not available to serve an increase in demand.[82] Westar further states that the use of offline unit costs can inappropriately prevent scarcity price signals, prevent online resources with higher costs from setting the price, lead to increased uplift, and result in prices that do not represent the true marginal cost of production.[83] To remedy this issue, EPSA argues that MISO must make significant improvements to its dispatch modeling and pricing processes in order to allow offline resources to set prices only when these resources are both economic and available.[84] MISO states that it allows offline fast-start resources to set LMP, but has, per guidance from its market monitor, revised its commitment methodology to better reflect unit economics and availability.[85]

31. CAISO does not believe that allowing offline resources to contribute to LMP would lead to the most economical market solution.[86] CAISO explains that it clears its markets using classical unit commitment methodologies where the objective is to minimize the overall system costs, including the commitment costs. Under this approach, CAISO states that offline resources would not be committed in CAISO markets because they are considered to not lead to the most economical solution. PJM and ISO–NE argue that, since LMP is based on the cost of the next incremental unit of energy at that moment in time and an offline resource cannot provide that next incremental unit of energy, offline resources should not be eligible to set prices.[87]

32. With respect to NYISO's treatment of offline resources, LIPA states that NYISO's model reflects the availability of offline units in LMPs while not accurately representing the actual flexibility of the system. LIPA explains that this leads to inefficient pricing and system dispatch, as well as excessive start-ups of offline units.[88]

5. Day-Ahead and Real-Time Market Consistency

33. Commenters also generally support the use of fast-start pricing in both the day-ahead and real-time markets. Some commenters contend that RTOs/ISOs should use consistent fast-start pricing for both day-ahead and real-time models to encourage price convergence, regardless of how infrequently fast-start units are committed in the day-ahead market.[89] Entergy supports MISO's past efforts to implement ELMP as a day-ahead and real-time market platform such that LMP reflects the true marginal cost of production.[90] PJM states that its fast-start pricing logic is applied to both markets in order to reflect the costs of resources operated to address transmission constraints in both day-ahead and real-time LMPs.[91] On the other hand, ISO–NE states that its revised fast-start pricing is being implemented in the real-time market only.[92] ISO–NE explains that implementation in the day-ahead market would have a smaller beneficial impact given that most fast-start resources do not clear in the day-ahead market. ISO–NE states that this is especially true with respect to fossil fuel fast-start resources, which have inherently high operating costs and primarily operate in response to unanticipated real-time system conditions.[93]

C. Need for Reform of Fast-Start Pricing

34. We preliminarily find that RTOs'/ISOs' existing practices regarding the pricing of fast-start resources may result in rates that are unjust and unreasonable.

35. The Commission has stated that the goals of price formation are to: (1) Maximize market surplus for consumers and suppliers; (2) provide correct incentives for market participants to follow commitment and dispatch instructions, make efficient investments in facilities and equipment, and maintain reliability; (3) provide transparency so that market participants understand how prices reflect the actual marginal cost of serving load and the operational constraints of reliably operating the system; and (4) ensure that all suppliers have an opportunity to recover their costs.[94] The accurate pricing of fast-start resources can advance price formation goals by more transparently reflecting the marginal cost of serving load, which will reduce uplift costs and thereby improve price signals to support efficient investments in facilities and equipment.

36. While most RTOs/ISOs have incorporated some form of fast-start pricing into their market-clearing software, based on experience with the different fast-start pricing used by each RTO/ISO, we believe some practices have emerged that better represent the marginal cost of serving load. Specifically, we believe that some existing fast-start pricing practices, or a lack of fast-start pricing practices, may result in market prices that fail to accurately reflect the marginal cost of serving load. These prices may fail to reflect the value of fast-start resources and create unnecessary uplift payments.

37. For the reasons outlined below, we preliminarily find that such market outcomes may produce rates that are unjust and unreasonable. First, we preliminarily find that some current RTO/ISO practices may fail to accurately reflect the marginal cost of serving load because fast-start resources are inappropriately prevented from setting prices.[95] Fast-start resources are often dispatched to meet real-time system needs but are often ineligible to

[78] EPSA Comments (on MISO Report) at 12–13.

[79] NYISO Report at 5.

[80] *Id.* at 5.

[81] Entergy Comments at 7; EPSA Comments (on MISO Report) at 6–8; Exelon Comments at 13; Westar Comments at 4–5.

[82] Entergy Comments at 7; EPSA Comments (on MISO Report) at 6–8; Westar Comments at 4–5.

[83] Westar Comments at 4–5.

[84] EPSA Comments (on MISO Report) at 6.

[85] MISO Report at 11–14.

[86] CAISO Report at 10.

[87] PJM Report at 11; ISO–NE Report at 10.

[88] LIPA Comments at 4.

[89] DC Energy, Inertia Power, and Vitol Comments at 9–10.

[90] Entergy Comments at 7.

[91] PJM Report at 13.

[92] ISO–NE Report at 16–17.

[93] ISO–NE Report at 16.

[94] *See* Notice Inviting Post-Technical Workshop Comments, Docket No. AD14–14–000 at 2 Price Formation in Energy and Ancillary Services Market Operated by Transmission Organizations and Independent System Operators, Notice, Docket No. AD14–14–000.

[95] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,067, at P 38 (2012) (finding that MISO's LMP pricing algorithm, which prohibited fast-start resources from setting the market clearing price, "may produce an inaccurate price signal").

set the clearing price because these resources are either dispatched at an economic minimum operating limit or are block-loaded. This is the case because LMP is set by the offer of the resource that is dispatched up to serve the next additional MW of demand or dispatched down to accommodate the next MW of reduced demand. Fast-start resources often have little or no dispatch range (*i.e.,* their economic minimum operating limit equals their economic maximum operating limit). A resource that is operating inflexibly at its economic minimum operating limit or economic maximum operating limit is not dispatchable to serve an additional increment or decrement of demand, so is not eligible to set prices.[96] Rules or modeling practices that prevent fast-start resources from setting prices result in prices that fail to reflect the cost of the marginal resource on the system when that resource is needed to serve load.

38. While PJM and NYISO allow certain block-loaded resources to set prices, they do not generally allow fast-start resources that are not block-loaded to set prices. CAISO allows only certain block-loaded and nearly block-loaded resources to set prices. In addition, PJM's practice of relaxing the economic minimum operating limits of block-loaded resources by at most ten percent could restrict the set of circumstances in which such a resource could set prices.

39. Second, even if fast-start resources were allowed to set prices, certain other aspects of some current RTO/ISO fast-start pricing practices, such as not choosing to include commitment costs, can prevent prices from accurately reflecting the marginal cost of serving load. Because of their operating characteristics, fast-start resources are uniquely situated to respond to unforeseen real-time system needs. When fast-start resources are committed in real-time, it is often at short notice to meet some system condition or market need over a short time period, and, as such, we preliminarily find that these commitment costs should be considered marginal costs. However, this is not the current practice in all RTOs/ISOs, and we preliminarily find that market rules in some RTOs/ISOs that prevent prices from reflecting commitment costs of fast-start resources may contribute to inaccurate price signals.

40. Third, some current practices regarding the use of offline resources to set prices in certain RTOs/ISOs may distort price signals. For example, MISO allows offline fast-start resources to set prices under transmission constraint violations or reserve shortage conditions, although sometimes such resources are not feasible (*i.e.,* the resources are not able to start up quickly enough to address the shortage or transmission constraint violation) or economic for addressing the shortage or transmission constraint violation.[97] If an offline fast-start resource is not actually feasible or economic for addressing a shortage or transmission constraint violation, then the resulting prices could be inefficiently low and mute the price signals associated with shortages or transmission constraint violations.[98]

41. Fourth, we are concerned that implementation of fast-start pricing in the real-time market only, or implementation of fast-start pricing practices in the day-ahead market that are significantly different from the real-time market, can negatively impact day-ahead and real-time price convergence and may result in day-ahead market prices that fail to reflect the marginal cost of fast-start resources. Furthermore, even though some RTOs/ISOs have implemented some form of fast-start pricing in the day-ahead market, current rules limit which resources qualify as fast-start resources in a manner that is inconsistent with the requirements herein.

42. Accordingly, we preliminarily find that, based on experience with existing RTO/ISO fast-start pricing practices, some forms of fast-start pricing may result in prices that fail to reflect the marginal cost of production in intervals when fast-start resources are needed to serve load. As a result, prices in RTO/ISO energy markets in some periods may not reflect the value that fast-start resources provide. As a result, over the long run, prices in RTO/ISO energy markets may fail to reflect the need for fast-start resources and thus fail to provide appropriate incentives for investment.

43. We also preliminarily find that existing RTO/ISO fast-start pricing could create unnecessary uplift payments. For example, when prices do not sufficiently reflect a marginal fast-start resource's commitment cost, the resource must be compensated through out-of-market uplift payments. Compensating resources through uplift payments is less transparent than compensating resources through market clearing prices that reflect the marginal cost of production, which could be based on the costs of a fast-start resource. Additionally, uplift payments are often allocated more broadly, which can mute the investment signals provided by prices over longer time periods, therefore inhibiting efficient market entry and exit. In addition, resources with costs below the market-clearing price may also have a lower financial incentive to perform at times when fast-start resources typically operate, such as during stressed system conditions, when the performance of all resources is particularly important.[99]

D. Commission Proposal

44. To remedy the potentially unjust and unreasonable rates caused by existing RTO/ISO fast-start pricing practices, we propose, pursuant to section 206 of the Federal Power Act,[100] to establish a set of fast-start pricing requirements in RTOs/ISOs. These requirements would ensure RTO/ISO day-ahead and real-time markets more accurately reflect the marginal costs of operating fast-start resources. Specifically, we propose to require each RTO/ISO to establish the following set of requirements for its fast-start pricing: (1) Apply fast-start pricing to any resource committed by the RTO/ISO that is able to start up within ten minutes, has a minimum run time of one hour or less, and that submits economic energy offers to the market; (2) incorporate commitment costs, *i.e.,* start-up and no-load costs, of fast-start resources in energy and operating reserve prices; (3) modify fast-start pricing to relax the economic minimum operating limit of fast-start resources and treat them as dispatchable from zero to the economic maximum operating limit for the purpose of calculating prices; (4) if the RTO/ISO allows offline fast-start resources to set prices for addressing certain system needs, the resource must be feasible and economic; and (5) incorporate fast-start pricing in both the day-ahead and real-time markets. We seek comment on each of these proposals.

[96] *See* Federal Energy Regulatory Commission, *Price Formation in Organized Wholesale Electricity Markets: Staff Analysis of Operator-Initiated Commitments in RTO and ISO Markets,* Docket No. AD14–14–000, at 26–27 (Dec. 2014), *http://www.ferc.gov/legal/staff-reports/2014/AD14-14-operator-actions.pdf.*

[97] MISO, Informational Report on Extended Locational Marginal Pricing, Docket No. ER12–668–000, at 9 (Aug. 29, 2016). MISO states that for reserve shortages, 53 percent of participating offline fast-start units were feasible and economic. For transmission violations, it states that 77 percent of participating offline units were feasible and economic.

[98] *See, e.g.,* Potomac Economics, 2015 State of the Market Report for the MISO Electricity Markets at 33 (June 2016).

[99] *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 825, FERC Stats. & Regs. ¶ 31,384, at P 58 & n.99 (2016).

[100] 16 U.S.C. 824e (2012).

45. We expect that the proposed reforms will remedy current RTO/ISO fast-start pricing practices that potentially lead to unjust and unreasonable rates and will provide benefits that are consistent with the goals of the Commission's price formation initiative. For instance, the proposed reforms are intended to more accurately reflect the marginal cost of production in periods when a fast-start resource is the marginal resource and provide price signals that better inform investment decisions, including where and when fast-start resources should be built or maintained. The proposed reforms will also benefit markets by providing more accurate and transparent price signals that better reflect the actual marginal cost of serving load and reduce uplift.

1. Fast-Start Resource Definitions and Resource Eligibility

46. In order to establish consistent treatment for fast-start resources across RTOs/ISOs and ensure that prices appropriately reflect the cost of serving load, we propose to require that each RTO/ISO must define fast-start resources as resources that meet the following performance requirements: [101] (1) Are able to start up within ten minutes or less; (2) have a minimum run time of one hour or less; and (3) submit economic energy offers to the market, *i.e.,* not self-scheduling energy. We preliminarily find that this definition of fast-start resources will address the deficiencies in current RTO/ISO fast-start pricing practices that limit the eligibility of certain fast-start resources to set prices.[102] In addition, any resource, regardless of technology type, that meets the above definition would qualify as a fast-start resource and would then be covered by the fast-start pricing requirements, as defined further herein.

47. We preliminarily find that it is appropriate to include both dispatchable fast-start resources and block-loaded fast-start resources in the definition of a fast-start resource, as is done in ISO–NE and MISO. That is, some fast-start resources are committed and dispatched to an output level equal to the resource's economic minimum operating limit that is lower than the resource's economic maximum operating limit. Such a resource would not be eligible to set prices in all circumstances and would therefore create the same concerns we have regarding block-loaded fast-start resources. Further, if only block-loaded fast-start resources are included in the definition, as is done in CAISO and NYISO, certain resources could have the incentive to restrict the operating range in their energy supply offers.[103] Moreover, it appears that a variety of technologies beyond conventional generation can and should be eligible for dispatch under fast-start pricing. For example, both MISO and ISO–NE allow certain demand response resources to set prices under their fast-start pricing.[104] Given that a variety of resources could be the last resource dispatched to serve load (*i.e.,* the marginal resource), we propose to use the performance requirements noted earlier to define fast-start resources, rather than specific technological characteristics.

48. We seek comment on this proposed definition of fast-start resources. For example, we seek comment on whether the definition of fast-start resources should include resources that have start-up times of greater than ten minutes. Similarly, we seek comment on whether the definition of fast-start resources should include resources with minimum run times of longer than one hour. We also seek comment on whether there are other characteristics that should be included in the definition of fast-start resources. Additionally, we seek comment on any additional tariff changes that may be necessary to implement the reforms proposed herein. Finally, we seek comment on whether this proposed definition should instead define minimum standards for each operating characteristic necessary to be considered a fast-start resource, to, among other things, allow regional variation.

2. Inclusion of Start-Up and No-Load Costs in Prices

49. We propose to require RTOs/ISOs to allow fast-start resources' commitment costs, *i.e.,* start-up and no-load costs,[105] to be reflected in prices. Specifically, we propose to require that, in the pricing run, each RTO/ISO determine prices by calculating an enhanced energy offer for each fast-start resource that includes not just the incremental energy offer but also incorporates start-up and no-load costs. Specifically, the enhanced energy offer should include the following components: (1) The incremental energy offer; (2) the amortized start-up cost; and (3) an amortized portion of the no-load cost, as described below. The enhanced energy offer can only be used to set prices during the resource's minimum run time, as discussed further below.

50. To incorporate a fast-start resource's start-up and no-load costs into prices, we propose to define specific formulations. Recognizing that commitment costs may be determined in different ways in RTOs/ISOs, these proposals are not intended to alter how a resource's start-up and no-load costs are calculated. To incorporate a fast-start resource's start-up cost into prices, we propose to define a resource's amortized start-up cost as equal to its start-up cost divided by the product of its economic maximum operating limit and minimum run time. To determine the portion of a fast-start resource's no-load costs that is reflected in prices, we propose to define the amortized no-load cost as the no-load cost divided by the resource's economic maximum operating limit. For both amortized start-up and no-load costs, we propose to accept any mathematically equivalent formula.[106]

51. We preliminarily find that given the unique operating characteristics of fast-start resources, their commitment costs, *i.e.,* start-up and no-load costs, should be viewed as marginal costs and, as such, should be included in prices. The Commission previously accepted MISO's ELMP methodology, which allows commitment costs to affect prices. There, the Commission found that incorporating the commitment costs of fast-start resources in prices leads to prices that better reflect the costs of committing and dispatching resources.[107] Moreover, incorporating a fast-start resource's start-up and no-load costs would ensure that prices reflect

[101] RTOs/ISOs would need to routinely assess a resource's currently effective parameters and status prior to conferring fast-start pricing eligibility.

[102] *See supra* section II.C. We understand that this proposed definition of fast-start resource could require changes to previously approved RTO/ISO pricing practices. However, as discussed further below, we seek comment on this proposed definition, and will consider these comments in the development of any Final Rule in this proceeding.

[103] For example, if only block-loaded fast-start resources are eligible for fast-start pricing, some resources may have an incentive to reduce their dispatchable range, which could lead to inefficient results, such as a reduction in system flexibility.

[104] MISO, FERC Electric Tariff, Schedule 29A, ELMP for Energy and Operating Reserve Market: Ex-Post Pricing Formulations (40.0.0); ISO–NE, Transmission, Markets and Services Tariff, Market Rule 1, III.2.4 (19.0.0).

[105] No-load costs are the theoretical costs in $/hour for operating a resource at zero MW output.

[106] For instance, the RTO/ISO could introduce a fractional commitment variable for fast-start resources within the market pricing algorithm. Adding such a variable provides an additional option of introducing a portion of the capability of a resource in the solution while adding only an equivalent fraction of the amortized commitment cost.

[107] *Midwest Indep. Transmission Sys. Operator, Inc.,* 140 FERC ¶ 61,067 at P 39.

the actual marginal cost of production and will thus reduce uplift.

52. As noted above, we propose that the enhanced energy offer can only be used to set prices during the resource's minimum run time. While it could be argued that commitment costs for fast-start resources are still marginal costs of operating the system even beyond a fast-start resource's minimum run time, attempting to amortize start-up costs beyond the minimum run time is problematic from a practical standpoint, specifically in the real-time market. This is because, after the minimum run time is completed, the unit commitment algorithm may decommit the fast-start resource if it is no longer economic, making the total run time unknown. When the actual run time of the fast-start resource is unknown, it is difficult to define an appropriate period over which to amortize that resource's start-up cost. Given that the resource must operate for no less than its minimum run time, we believe that amortizing a fast-start resource's commitment costs during this period represents a reasonable approach.[108]

53. We seek comment on the proposal to include a fast-start resource's start-up and no-load costs as marginal costs. We also seek comment on whether to amortize commitment costs for the purpose of calculating prices, and the proposed formulas to amortize these costs. In particular, we understand that the amortization period for commitment costs acts as a proxy for the timeframe over which the committed fast-start resource is likely to be marginal. Therefore, we seek comment on whether there are better or alternative timeframes over which commitment costs for fast-start resources should be amortized. We also specifically seek comment on whether the economic maximum operating limit is the appropriate value to use when amortizing start-up and no-load costs or whether another capacity value may be more appropriate.

3. Relaxation of Economic Minimum Operating Limit

54. We propose to require RTOs/ISOs, in the pricing run, to relax to zero each fast-start resource's economic minimum operating limit, thereby treating these resources as fully dispatchable for the purpose of calculating prices. Relaxing the economic minimum operating limit of a fast-start resource to zero will permit an inflexible or mostly inflexible fast-start resource to be treated as dispatchable by the RTO/ISO market software during the pricing run. The purpose of this proposal is to enable a fast-start resource to set the market clearing price if it is, indeed, the marginal unit needed to serve load. Additionally, RTOs/ISOs must ensure that they sufficiently address over-generation concerns. Specifically, each RTO/ISO must ensure that physical dispatch instructions to resources do not result in over-generation and must have market rules that address the potential for over-generation due to deviations from dispatch instructions. As noted above, RTOs/ISOs with fast-start pricing already use penalties and/or opportunity cost payments to ensure that resources adhere to scheduled dispatch instructions.[109] We propose that, as part of its compliance filing to any Final Rule, each RTO/ISO should either demonstrate that its current practices meet the requirements established here to address over-generation, or propose additional tariff changes to do so.

55. We seek comment on whether there are challenges associated with relaxing the economic minimum operating limit for the pricing run. We also seek comment on any over-generation concerns, such as whether over-generation can be managed through penalties for deviations, opportunity cost payments, or other existing mechanisms. Additionally, we seek comment on alternative methods to treat fast-start resources as fully dispatchable for the purpose of calculating prices.

4. Offline Fast-Start Resources

56. Allowing offline fast-start resources to set prices can better reflect the cost of providing energy at a given location or of meeting reserve requirements. For instance, if the real-time dispatch algorithm optimizes spinning reserve[110] supply among online resources and these online resources are not sufficient to meet the RTO's/ISO's spinning reserve requirements, the dispatch algorithm will determine there is a shortage of spinning reserve and implement the appropriate shortage pricing. However, in such circumstances, while online resources may not be sufficient to meet spinning reserve requirements, there may be offline fast-start resources that can quickly provide energy in the same time frame as spinning reserve. If RTOs/ISOs do not adequately consider all resources that are available to meet system needs, including fast-start resources that are offline, this may result in the use of administrative pricing or other measures (*e.g.,* committing additional resources) that are less economically efficient because they do not reflect the availability of less expensive fast-start resources that could resolve the issue and thus result in higher overall system costs. Allowing RTOs/ISOs to include offline fast-start resources may have benefits; however, we do not propose to require that all RTOs/ISOs allow offline resources to set prices. Instead, we propose to establish certain requirements for those RTOs/ISOs that choose to allow offline fast-start resources to set prices.

57. While allowing offline fast-start resources to set prices can be beneficial, it is imperative that the offline resources actually be feasible (*i.e.,* able to start quickly) and economic for addressing certain system needs.[111] For example, an offline fast-start resource that has not reached its minimum down time would not actually be able to start to remedy a transmission constraint violation, energy shortage, or reserve shortage. Such an offline fast-start resource is not a feasible option to resolve the system issue and should not be allowed to set prices. Further, if online resources were not able to meet an RTO's/ISO's spinning reserve requirement, the dispatch algorithm would calculate the price based on an applicable shortage price. However, if offline fast-start resources are considered, there may be an offline fast-start resource that can be used to meet the spinning reserve requirement at a price lower than the shortage price. If, for example, the shortage price for spinning reserve was $80/MWh, it would only be economic to allow a fast-start resource to set prices if the full cost to operate the resource was less than $80/MWh. To accurately reflect the full cost of operating the fast-start resource, its offer would need to include start-up costs and no-load costs (amortized over a certain timeframe and capacity value). If the offline fast-start resource set prices at a level that did not reflect its full cost of operation, the resulting prices could be inefficiently low. For instance, if the offline fast-start resource set the spinning reserve price

[108] This proposal does not address RTOs/ISOs including no-load costs in prices beyond a fast-start resource's minimum run time.

[109] *See supra* section II.A; MISO, FERC Electric Tariff, § 40.3.4 (33.0.0) (charges for excessive or deficient energy deployment); ISO–NE., Transmission, Markets and Services Tariff, Market Rule 1, III.F.2.3.10 (24.0.0) (lost opportunity cost credit for resources displaced by fast-start resources).

[110] Spinning reserve refers to reserve capacity that is online and synchronized to the system and is ready to meet electric demand within ten minutes of a dispatch instruction by an RTO/ISO.

[111] *See* Order No. 825, FERC Stats. & Regs. ¶ 31,384 at P 168 (''. . . we agree with Potomac Economics that if an RTO's/ISO's pricing model allows infeasible or uneconomic units to set prices, the offline units represent an artificial increase in real-time supply that will depress real-time prices.'').

based on an offer that included only its incremental energy cost of $75/MWh, the resource would be setting the spinning reserve price, even though, if its full cost of operation was considered, it may not be more economic than establishing the shortage price of $80/MWh.

58. We propose to allow offline fast-start resources to be eligible to set prices if the resource is feasible and economic. As a threshold requirement, an offline fast-start resource may only be used to set prices (1) during a transmission constraint violation; or (2) if energy or ancillary service shortage conditions exist. Transmission constraint violations are defined as any instance where a transmission constraint is exceeded because the cost of redispatching resources to resolve the constraint is greater than the penalty factor associated with that constraint.[112] Energy or ancillary service shortage conditions are defined as any instance where prices for energy or ancillary services are calculated using administrative prices as defined in the RTO's/ISO's tariff. To be considered feasible, we propose that an offline fast-start resource must meet the following criteria: (1) Have a start-up time of ten minutes or less; (2) have a generation shift factor of no less than 5 percent on the applicable transmission constraint that is being exceeded; and (3) must not have any operational constraints that would prevent the resource from starting and providing energy.[113] We preliminarily find that a start-up time of ten minutes or less will ensure that offline fast-start resources are feasible to address transmission constraint violations or reserve shortages in a timeframe that is consistent with applicable facility ratings and contingency reserve deployment periods. Similarly, we preliminarily find that requiring a generation shift factor of no less than 5 percent will ensure that an offline fast-start resource used to set price during a transmission constraint violation can actually relieve the constraint if started. This minimum generation shift factor is similar to the threshold used in MISO, which is 6 percent.[114] To be considered economic, the RTO/ISO's fast-start pricing must consider the full cost of an offline fast-start resource, including its amortized start-up and no-load costs. The offline fast-start resource's full cost must be less than the administrative shortage price for the shortage or transmission constraint violation the resource is resolving.

59. We seek comment on the proposal to reflect the costs of offline fast-start resources in prices in certain circumstances. Specifically, we seek comment on whether we should establish a standard amortization period for the commitment costs of offline fast-start resources for all RTOs/ISOs, similar to online fast-start resources, or whether RTOs/ISOs should be allowed to propose an amortization period on compliance. To determine a resource's full cost for the purpose of pricing, RTOs/ISOs could amortize a resource's costs over a particular time period. We also seek input on any additional rules for offline fast-start resources to ensure they will respond in time to meet the system needs beyond requiring that they be feasible and economic for addressing system needs. We also seek comment on the market conditions under which offline fast-start resources should be able to set prices (*e.g.,* transmission constraint violations, energy or operating reserve shortages).

5. Day-Ahead and Real-Time Market Consistency

60. We propose to require RTOs/ISOs to incorporate fast-start pricing in both the day-ahead and real-time markets. We preliminarily find that doing so provides a more accurate price signal in the day-ahead market and supports price convergence between the day-ahead and real-time markets.

61. As discussed above, fast-start resources are frequently used to quickly respond to real-time system conditions. However, under certain market conditions, such as high day-ahead demand or persistent congestion patterns, fast-start resources may economically clear the day-ahead market. For reasons similar to the ones discussed above, we believe that when these resources economically clear the market, market prices should reflect the marginal cost of these resources. By allowing fast-start resources to set prices, RTO/ISO markets will send a transparent price signal that more accurately reflects marginal costs.

62. We further preliminarily find that requiring consistent pricing practices in both the day-ahead and real-time markets will lead to better price convergence, and therefore we believe these benefits merit implementation of fast-start pricing in both the day-ahead and real-time markets. Absent consistent pricing in both the day-ahead and real-time markets, day-ahead and real-time market prices may be different even under similar market conditions. For example, the day-ahead and real-time markets in ISO–NE could produce different energy prices even under identical market conditions because the day-ahead market does not incorporate the commitment costs of fast-start resources in energy prices.

63. We seek comment on the proposal to incorporate consistent fast-start pricing in both day-ahead and real-time markets. Specifically, we acknowledge that implementation in the day-ahead market may have a smaller benefit given that most fast-start resources clear in the real-time market, and we thus seek comment on the extent to which there are benefits or drawbacks to applying the proposed reforms to both the day-ahead and real-time markets, as opposed to only the real-time markets. Further, we seek comment on whether there are any reasons for establishing different fast-start pricing practices in the day-ahead and real-time markets. In particular, we seek comment on including commitment costs in the day-ahead market given different forecast, optimization, and commitment time horizons than the real-time market, where fast-start units can have brief dispatch periods to meet system needs.

6. Additional Comments Sought on This Proposal

64. We seek comment on the need for reform and on the five proposals outlined above.[115] We also seek comment on whether allowing fast-start resources to set prices could result in the exercise of market power. For example, the concentrated ownership of fast-start resources could raise market power concerns that are not addressed in existing RTO/ISO market power mitigation procedures.[116]

[112] *See* Comments of Potomac Economics, Docket No. AD14–14–000, at 20 (Feb. 24, 2015).

[113] For example, the resource cannot be within its minimum down time and must not be prevented from starting due to environmental restrictions, fuel use restrictions, or other operational restrictions.

[114] MISO, FERC Electric Tariff, Schedule 29A, ELMP for Energy and Operating Reserve Market: Ex-Post Pricing Formulations (40.0.0), II.B, III.B.

[115] These five proposals are: (1) An RTO/ISO must apply fast-start pricing to any resource committed by the RTO/ISO that is able to start up within ten minutes, has a minimum run time of one hour or less, and that submits economic energy offers to the market; (2) an RTO/ISO should incorporate commitment costs of fast-start resources in energy and operating reserve prices; (3) an RTO/ISO must modify its fast-start pricing to relax the economic minimum operating limit of fast-start resources and treat them as dispatchable from zero to the economic maximum operating limit for the purpose of calculating prices; (4) if an RTO/ISO allows offline fast-start resources to set prices for addressing certain system needs, the resource must be feasible and economic; and (5) an RTO/ISO must incorporate fast-start pricing in both the day-ahead and real-time markets.

[116] Such procedures could include any procedures or conduct and impact tests that provide offer and physical operating parameter mitigation for economic withholding, physical withholding, or out-of-market commitment.

65. We recognize the potential that the proposed reforms may require significant changes to RTO/ISO software systems, which can be a complex and costly endeavor. We seek comment on the required software changes, updates to optimization modeling and parameter inputs, estimated costs and time necessary to implement aspects of the reforms proposed in this NOPR, and any additional considerations for implementing the requirements proposed herein.

III. Compliance

66. We propose to require that each RTO/ISO submit a compliance filing within 90 days of the effective date of any eventual Final Rule in this proceeding to demonstrate that it meets the proposed requirements set forth in any Final Rule. We note that this compliance deadline is for RTOs/ISOs to submit proposed tariff changes or otherwise demonstrate compliance with any Final Rule. We understand that implementing the reforms required by any Final Rule in this proceeding may be a complex endeavor. However, we preliminarily find that implementation of these reforms is important to ensure rates remain just and reasonable. Therefore, we propose that tariff changes filed in response to a Final Rule in this proceeding must become effective no more than six months after compliance filings are due. We seek comment on this proposed compliance timeline.

67. We seek comment on the proposed deadline for RTOs/ISOs to submit the compliance filing 90 days following the effective date of any Final Rule in this proceeding. Specifically, we seek comment on whether 90 days is sufficient time for RTOs/ISOs to develop new tariff language in response to any Final Rule.

68. To the extent that any RTO/ISO believes that it already complies with the reforms proposed in this NOPR, the RTO/ISO would be required to demonstrate how it complies in the compliance filing required 90 days after the effective date of any Final Rule in this proceeding. To the extent that any RTO/ISO seeks to argue on compliance that its existing market rules are consistent with or superior to the reforms adopted in any Final Rule, the Commission will entertain those at that time.[117]

IV. Information Collection Statement

69. The Paperwork Reduction Act (PRA)[118] 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 regulations[119] require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

70. The reforms proposed in this NOPR would amend the Commission's regulations to improve the operation of organized wholesale electric power markets operated by RTOs/ISOs. The Commission proposes to require each RTO and ISO implement market rules that meet certain requirements when pricing fast-start resources. The reforms proposed in this NOPR would require one-time filings of tariffs with the Commission and potential software upgrades to implement the reforms proposed in this NOPR. The Commission anticipates the reforms proposed in this NOPR, once implemented, would not significantly change currently existing burdens on an ongoing basis. With regard to those RTOs/ISOs that believe that they already comply with the reforms proposed in this NOPR, they could demonstrate their compliance in the compliance filing required 90 days after the effective date of any Final Rule in this proceeding. The Commission will submit the proposed reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act.[120]

71. While the Commission expects the adoption of the reforms proposed in this NOPR to provide significant benefits, the Commission understands implementation can be a complex endeavor. The Commission solicits comments on the accuracy of provided burden and cost estimates and any suggested methods for minimizing the respondents' burdens, including the use of automated information techniques. Specifically, the Commission seeks detailed comments on the potential cost and time necessary to implement aspects of the reforms proposed in this NOPR, including (1) hardware, software, and business processes changes; and (2) processes for RTOs/ISOs to vet proposed changes amongst their stakeholders.

72. *Burden Estimate:*[121] The Commission believes that the burden estimates below are representative of the average burden on respondents, including necessary communications with stakeholders. The estimated burden and cost for the requirements contained in this NOPR follow.[122]

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours and cost per response[123] (4)	Total annual burden hours and total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Tariff filing costs	6	1	6	80 hours, $5,920	480 hours, $35,520	....

[117] *See, e.g.,* Order No. 825, FERC Stats. & Regs. ¶ 31,384 at P 72; *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745, FERC Stats. & Regs. ¶ 31,322, at P 4 & n.7, *order on reh'g and clarification,* Order No. 745–A, 137 FERC ¶ 61,215 (2011), *reh'g denied,* Order No. 745–B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n* v. *FERC,* 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760 (2016).

[118] 44 U.S.C. 3507(d).

[119] 5 CFR 1320.

[120] 44 U.S.C. 3507(d) (2012).

[121] Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a federal agency, including: ''. . . (ii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information; (iii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information; (iv) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information. . . .'' 5 CFR 1320.3(b)(1) (2016). The time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records) will be excluded from the ''burden'' if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary.

[122] For this information collection, the Commission staff estimates that industry is similarly situated in terms of hourly cost (wages plus benefits). Based on the Commission's average cost (wages plus benefits) for 2016, the Commission is using $74.50/hour.

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours and cost per response [123] (4)	Total annual burden hours and total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Implementation costs ..	6	1	6	3,853 hours, $285,122	23,118 hours, $1,710,732.	....
Total (one-time in Year 1).				3,933 hours, $291,042	23,598 hours, $1,746,252.	$291,042

Cost to Comply: The Commission has projected the total cost of compliance, all within six months of a Final Rule plus initial implementation, to be $1,746,252. After Year 1, the reforms proposed in this NOPR, once implemented, would not significantly change existing burdens on an ongoing basis.

Title: FERC–516E, NOPR in RM17–3.

Action: Proposed revisions to an information collection.

OMB Control No.: TBD.

Respondents for this Rulemaking: RTOs and ISOs.

Frequency of Information: One-time during year one.

Necessity of Information: The Commission proposes this rule to improve competitive wholesale electric markets in the RTO and ISO regions.

Internal Review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

65. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], email: *DataClearance@ferc.gov*, Phone: (202) 502–8663, fax: (202) 273–0873. Comments on the collection of information and the associated burden estimate in the proposed rule should be sent to the Commission in this docket and may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], at the following email address: *oira_submission@omb.eop.gov*. Please refer to Docket No.: RM17–3, FERC–516E, OMB Control No. 1902–0286 in your submission.

V. Environmental Analysis

73. 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.[124] We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission's jurisdiction, plus the classification, practices, contracts and regulations that affect rates, charges, classifications, and services.[125]

VI. Regulatory Flexibility Act

74. The Regulatory Flexibility Act of 1980 (RFA) [126] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[127] These standards are provided on the SBA Web site.[128]

75. The SBA classifies an entity as an electric utility if it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale. Under this definition, the six RTOs/ISOs are considered electric utilities, specifically focused on electric bulk power and control. The size criterion for a small electric utility is 500 or fewer employees.[129] Since every RTO/ISO has more than 500 employees, none are considered small entities.

76. Furthermore, because of their pivotal roles in wholesale electric power markets in their regions, none of the RTOs/ISOs meet the last criterion of the two-part RFA definition of a small entity: ''not dominant in its field of operation.'' [130] As a result, we certify that the reforms required by this NOPR would not have a significant economic impact on a substantial number of small entities.

VII. Comment Procedures

77. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due February 28, 2017. Comments must refer to Docket No. RM17–3–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

78. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard

[123] The Commission staff anticipates that the average respondent for this collection is similarly situated to the Commission, in terms of salary plus benefits. Based upon FERC's 2016 annual average of $154,647 (for salary plus benefits), the average hourly cost is $74.50/hour.

[124] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[125] 18 CFR 380.4(a)(15).

[126] 5 U.S.C. 601–12.

[127] 13 CFR 121.101.

[128] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (effective Feb. 26, 2016), *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*.

[129] 13 CFR 121.201 (Sector 22, Utilities).

[130] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. The Small Business Administration's regulations at 13 CFR 121.201 define the threshold for a small Electric Bulk Power Transmission and Control entity (NAICS code 221121) to be 500 employees. *See* 5 U.S.C. 601(3) (citing to section 3 of the Small Business Act, 15 U.S.C. 632).

word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

79. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

80. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

81. 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.

82. 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.

83. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's 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*.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities.

By direction of the Commission.

Dated: December 15, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Regulatory Text

In consideration of the foregoing, the Commission proposes to amend Part 35, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.28 by adding paragraph (g)(10) to read as follows:

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(g) * * *

(10) *Pricing fast-start resources*—(i) *Definition of fast-start resources.* A fast-start resource is any resource that is able to start up within ten minutes or less, that has a minimum run time of one hour or less, and that submitted an economic energy offer to the market.

(ii) *Application to both day-ahead and real-time markets.* A Commission-approved independent system operator or regional transmission organization with a tariff that contains a day-ahead and a real-time market must implement the following requirements in both the day-ahead and real-time markets. Implementation of the following requirements must be consistent between the day-ahead and real-time markets.

(iii) *Start-up and no-load costs.* When a Commission-approved independent system operator or regional transmission organization makes a decision to commit a fast-start resource, it must calculate prices by determining a fast-start resource's enhanced energy offer, which includes the following components: The resource's incremental energy offer, amortized start-up cost, and amortized no-load cost. In using that offer to calculate prices for the real-time and day-ahead markets, each Commission-approved independent system operator and regional transmission organization must amortize a fast-start resource's start-up cost over the resource's minimum run time and its economic maximum operating limit and must divide a fast-start resource's no-load cost by the resource's economic maximum operating limit, but are only required to do so during the resource's minimum run time.

(iv) *Relaxation of economic minimum operating limit.* Each Commission-approved independent system operator and regional transmission organization must relax to zero each fast-start resource's economic minimum operating limit such that the resource is able to be treated as fully dispatchable for purposes of calculating prices. Each Commission-approved independent system operator and regional transmission organization must ensure that physical dispatch instructions to resources do not result in over-generation and must have market rules that address the potential for over-generation due to deviations from dispatch instructions.

(v) *Offline fast-start resources.* If a Commission-approved independent system operator or regional transmission organization uses offline fast-start resources to calculate prices, the resource must have a start-up time of ten minutes or less, must not have any operational constraints that would prevent the resource from starting and providing energy, and must set prices based on the resource's amortized full cost, including start-up and no-load costs, which must be less than the administrative shortage price for the shortage or transmission constraint violation the resource is resolving. In addition, an offline fast-start resource used to resolve a transmission constraint violation must have a generation shift factor of no less than 5 percent on the applicable transmission constraint that is being exceeded. Each Commission-approved independent system operator and regional transmission organization may use an offline fast-start resource to calculate prices only during a transmission constraint violation or during energy or ancillary service shortage conditions.

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

Appendix—List of Short Names/Acronyms of Commenters

Short name/acronym	Commenter
CAISO	California Independent System Operator Corporation.
DC Energy, Inertia Power, and Vitol	DC Energy, LLC, Inertia Power, LP, and Vitol Inc.
EEI	Edison Electric Institute.
EPSA	Electric Power Supply Association.
EPSA/IPPNY	Electric Power Supply Association and Independent Power Producers of New York.
EPSA/NEPGA	Electric Power Supply Association and New England Power Generators Association, Inc.

Short name/acronym	Commenter
EPSA/P3	Electric Power Supply Association and PJM Power Providers.
EPSA/WPTF	Electric Power Supply Association and Western Power Trading Forum.
Entergy	Entergy Services, Inc. commented on behalf of the Entergy Operating Companies (Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.).
Exelon	Exelon Corporation.
Golden Spread Electric	Golden Spread Electric Cooperative, Inc.
IMG Midstream/Tangibl	IMG Midstream LLC and Tangibl LLC.
ISO–NE	ISO New England Inc.
LIPA	Long Island Power Authority and Long Island Lighting Company d/b/a Power Supply Long Island.
MISO	Midcontinent Independent System Operator, Inc.
PJM Market Monitor	Monitoring Analytics, LLC.
NYISO	New York Independent System Operator, Inc.
PJM	PJM Interconnection, L.L.C.
PSEG Companies	PSEG Companies (Public Service Electric and Gas Company; PSEG Power LLC; and PSEG Energy Resources & Trade LLC).
SPP	Southwest Power Pool, Inc.
Westar	Westar Energy, Inc.

[FR Doc. 2016–30971 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2016–D–2335]

Use of the Term ''Healthy'' in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or we) is extending the comment period for a docket to receive information and comments on the use of the term ''healthy'' in the labeling of human food products. We established the docket through a notice that appeared in the **Federal Register** of September 28, 2016. In the notice, we requested comments on the term ''healthy'', generally, and as a nutrient content claim in the context of food labeling; we also requested comments on specific questions contained in the notice. We are taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the notice that published in the **Federal Register** of September 28, 2016 (81 FR 66562). Submit either electronic or written comments by April 26, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–2335 for ''Use of the Term 'Healthy' in the Labeling of Human Food Products; Request for Information and Comments.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Vincent de Jesus, Center for Food Safety and Applied Nutrition (HFS–830), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1450.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 28, 2016, we published a notice announcing the establishment of a docket to receive information and comments on the use of the term ''healthy'' in the labeling of human food products. The notice discussed FDA's position regarding the use of the term ''healthy'', the events that prompted us to establish a docket to request information and comments on this issue, and specific issues for consideration. We provided a 120-day comment period that was scheduled to end on January 26, 2017.

We have received requests to extend the comment period. The requests conveyed concern that the current 120-day comment period does not allow sufficient time to develop meaningful or thoughtful comments to the questions and issues we presented in the notice.

We have considered the requests and are extending the comment period for 90 days, until April 26, 2017. We believe that a 90-day extension allows adequate time for interested persons to submit comments.

Dated: December 27, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31734 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2016–F–3880]

Novus International, Inc.; Filing of Food Additive Petition (Animal Use); Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the notice of petition, published in the **Federal Register** of November 8, 2016 (81 FR 78528), proposing that the food additive regulations be amended to provide for the safe use of poly (2-vinylpyridine-co-styrene) as a nutrient protectant for methionine hydroxy analog in animal food for beef cattle, dairy cattle, and replacement dairy heifers. Additionally, the petition proposes that the food additive regulations be amended to provide for the safe use of ethyl cellulose as a binder for methionine hydroxy analog to be incorporated into animal food. FDA is reopening the comment period to allow additional time for comments on environmental impacts.

DATES: Submit either electronic or written comments by January 30, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–F–3880 for ''Food Additives Permitted in Feed and Drinking Water of Animals; 2-Vinylpyridine-Co-Styrene.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:
Carissa Doody, Center for Veterinary Medicine (HFV–228), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–6283, *carissa.doody@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 8, 2016 (81 FR 78528), Novus Inc. proposed regulations be amended to provide for the safe use of poly (2-vinylpyridine-co-styrene) as a nutrient protectant for methionine hydroxy analog in animal food for beef cattle, dairy cattle, and replacement dairy heifers. Additionally, the petition proposes that the food additive regulations be amended to provide for the safe use of ethyl cellulose as a binder for methionine hydroxy analog to be incorporated into animal food.

Interested persons were originally given until December 8, 2016, to comment on the petitioner's environmental assessment. The November 8, 2016, notice of petition was published with the incorrect docket number. A correction published in the **Federal Register** of November 29, 2016 (81 FR 85972). On our own initiative, we are reopening the comment period to allow potential respondents to thoroughly evaluate and address pertinent environmental issues.

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31606 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 31

[REG–123841–16]

RIN 1545–BN58

Withholding on Payments of Certain Gambling Winnings

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 3402(q) with respect to withholding on certain payments of gambling winnings from horse races, dog races, and jai alai and on certain other payments of gambling winnings. The proposed regulations affect both payers and payees of the gambling winnings subject to withholding under section 3402(q).

DATES: Written or electronic comments and requests for a public hearing must be received by March 30, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–123841–16), 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–123841–16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–123841–16).

FOR FURTHER INFORMATION CONTACT:
Concerning the proposed regulations, David Bergman, (202) 317–6845; concerning submissions of comments or to request a public hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been approved by the Office of Management and Budget through Form W–2G (OMB No. 1545–0238) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Notice and an opportunity to comment on the proposed changes to burden hours for the forms related to this proposed rule will be published in a separate notice in the **Federal Register**.

Background

This document contains proposed regulations to amend the Employment Tax Regulations (26 CFR 31) under section 3402 of the Internal Revenue Code relating to withholding from gambling winnings for horse races, dog races, and jai alai. The proposed regulations update and clarify other provisions of § 31.3402(q)–1 and make conforming changes to § 31.3406(g)–2.

Section 3402(q)(1) requires every person, including the United States government, a state, a political subdivision thereof, or any instrumentality of the foregoing, that makes any payment of gambling winnings to deduct and withhold tax on certain payments at the third-lowest tax rate applicable under section 1(c), which for the 2016 tax year is 25 percent. Section 3402(q)(2) provides an exemption from withholding under this section for payments of winnings to nonresident aliens and foreign corporations subject to withholding under sections 1441(a) or 1442(a). Section 3402(q)(3) describes the winnings subject to withholding as proceeds from a wager determined in accordance with the rules in that subsection.

Whether winnings are subject to withholding depends on the type of wagering transaction, the proceeds from a wager, and in some cases the odds associated with a wager. Under sections 3402(q)(3)(B) and (C)(i), payers generally must withhold if the proceeds from a wager exceed $5,000 in a State-conducted lottery, other lottery, sweepstakes, or wagering pool. Under section 3402(q)(3)(A) and (C)(ii), in the case of a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai, the payer must withhold if the proceeds exceed $5,000 and are at least 300 times as large as the amount wagered. Winnings from bingo, keno, and slot machines are exempted from withholding under section 3402(q)(1) by section 3402(q)(5).

Proceeds From a Wager and Identical Wagers

Section 3402(q)(4) provides that proceeds from a wager are determined by reducing the amount received by the amount of the wager, and proceeds which are not money are taken into account at fair market value. The current regulations provide rules for determining the amount of proceeds from a wager, including a special rule for ''identical wagers.'' The rule treats ''identical wagers'' as paid with respect to a single wager for purposes of calculating the proceeds from the wager. See § 31.3402(q)–1(c)(ii).

Neither the statute nor the existing regulations explicitly define the terms ''wager'' or ''identical wagers,'' but the regulation text of § 31.3402(q)–1(c)(ii), regarding rules for determining the amount of proceeds from a wager, and § 31.3402(q)–1(d) provide examples of wagers that are and are not identical wagers. For example, amounts paid on two bets placed in a parimutuel pool on a particular horse to win a particular race are treated as paid with respect to the same wager. These two bets would not be identical, however, if one bet was for the horse to win and the other bet was for the horse to place (which are bets in two separate parimutuel pools, as explained below). Those two bets would also not be identical if one bet was placed in a pool conducted by the racetrack and the other bet was placed in a separate pool conducted by an off-track betting establishment and such wagers are not pooled with those placed at the racetrack. In addition, two bets on the same race are not identical where the bettor makes an exacta bet on horse M to win and horse N to place and a trifecta bet on horse M to win, horse N to place, and horse O to show. See § 31.3402(q)–1(d), Example 11. The preamble to the current regulations provides the following definition for identical bets: ''Identical bets are those in which winning depends on the occurrence (or non-occurrence) of the same event or events.'' T.D. 7919 (48 FR 46296) (Oct. 12, 1983).

The statute does not explicitly address how to determine the amount of the wager in the case of exotic wagers. Exotic wagers are those other than straight wagers. Straight wagers include bets to win (selecting the first-place finisher), place (selecting a finisher to place first or second), and show (selecting a finisher to place first, second, or third). Examples of exotic bets include multi-contestant bets, such as an exacta (selecting the first and second-place finishers in a single contest, in the correct order) and a trifecta (selecting the first, second, and third-place finishers in a single contest, in the correct order). Other examples include multi-contest bets such as a Pick 6 (selecting the first-place finisher in six consecutive contests).

The instructions to Form W–2G provide the rule for multiple wagers reflected on a single ticket as follows: ''For multiple wagers sold on one ticket, such as the $12 box bet on a Big Triple or Trifecta, the wager is considered as six $2 bets and not one $12 bet for purposes of computing the amount to be reported or withheld.'' *See, e.g.,* 2016 Instructions to Forms W–2G and 5754, at 2, available at *https://www.irs.gov/pub/irs-pdf/iw2g.pdf.* Thus, according to the instructions, the bettor may only consider the cost of a single winning combination when determining the amount wagered for purposes of determining whether proceeds from a wager meets the threshold for withholding in section 3402(q)(3)(C)(ii).

2015 Request for Comments

The Treasury Department and the IRS requested comments from the public on the treatment of wagers in parimutuel gambling on March 4, 2015, in a notice of proposed rulemaking (REG–132253–11) under section 6041 regarding information returns to report winnings from bingo, keno, and slot machine play. The notice of proposed rulemaking stated that taxpayers required to report winnings from parimutuel gambling may have concerns relating to when wagers with respect to horse races, dog races, and jai alai may be treated as identical and that the Treasury Department and the IRS intend to amend the regulations under § 31.3402(q)–1.

Multiple commentators requested a rule that would take into account all money wagered in a particular parimutuel pool when determining proceeds from a wager for purposes of determining whether withholding under section 3402(q) was required. In particular, some commentators requested that the Treasury Department and the IRS revise the regulations to provide a definition of the ''amount of the wager'' when multiple bets are placed in the same pool to include the total amount wagered by a bettor into a specific parimutuel pool for purposes of determining whether wagering proceeds are subject to withholding and reporting. The commentators stated that this change would reflect innovations and changes to today's modern parimutuel wagering strategies.

Reporting Rules

Section 3402(q)(6) provides that recipients of gambling winnings subject to withholding must furnish a statement to the payer, under penalties of perjury, containing the name, address, and taxpayer identification number of the recipient and each person entitled to any portion of the payment. The current regulations provide that the statement, furnished on a Form W–2G, Certain Gambling Winnings, or Form 5754, Statement by Person(s) Receiving Gambling Winnings, also must indicate if the payee and any other persons entitled to payment are entitled to winnings from identical wagers. §§ 1.6011–3, 31.3402(q)–1(c)(ii). The payer may rely on this statement in determining the amount of proceeds from the wager. § 31.3402(q)–1(c)(ii).

On or before February 28 (March 31 if filed electronically) of the calendar year following the calendar year in which the payment is made, the payer must file a return on Form W–2G with the Internal Revenue Service reporting the gambling winnings subject to withholding. § 31.3402(q)–1(f). Section 6041(d) and the instructions to Form W–2G require that the payer filing a Form W–2G also furnish a statement to the payee on or before January 31 of the calendar year following the calendar year in which the payment is made.

Explanation of Provisions

The current regulations for withholding from gambling winnings under section 3402(q) were last substantively amended in 1983. According to commentators, since that time, exotic bets on horse races, dog races, and jai alai have accounted for an increasing percentage of total bets placed on horse races, dog races, and jai alai. The increase in exotic betting, and in particular the use of certain methods of exotic betting, has resulted in scenarios where the current rules may result in withholding that significantly exceeds the individual gambler's ultimate income tax liability. In light of this, the proposed regulations amend the rules regarding how payers determine the amount of the wager in parimutuel wagering transactions with respect to horse races, dog races, and jai alai. Specifically, these proposed regulations address exotic bets on horse races, dog races, and jai alai by providing a new rule to determine the amount of the wager when wagers are placed in a single parimutuel pool and are reflected on a single ticket. In addition, the current regulations under section 3402(q) are updated to reflect current law regarding the withholding thresholds and certain information reporting requirements.

I. Wagers in the Case of Horse Races, Dog Races, and Jai Alai

A. Parimutuel Betting

In parimutuel betting, which translates to betting ''amongst ourselves,'' the bettors themselves establish the odds and payouts, as opposed to having fixed odds. Each type of bet on a contest or series of contests goes into its own parimutuel pool. For example, each win bet goes into the win pool for that contest, regardless of the finisher selected to win. As amounts are wagered in the pool, the odds and payouts adjust accordingly. Following the contest or contests determinative of a particular pool, all bettors who placed a winning bet share the money placed in that particular pool, less the applicable takeout. Parimutuel betting in the United States is used in betting on horse races, dog races, and jai alai.

Parimutuel betting involves both straight and exotic bets. Each type of straight or exotic bet is placed in its own parimutuel pool. For example, a trifecta bet on a particular contest goes into that contest's trifecta pool, regardless of the finishers or order of finish selected, and the trifecta pool is separate from the win pool, the exacta pool, and all other pools associated with that particular contest. Exotic bets provide greater odds and bigger pay-offs than straight bets.

Multiple combinations of exotic bets may be placed on a single ticket, making it easier for bettors to place wagers on the various possible outcomes. For example in horse racing, bettors often use box, key, and wheel bets to place the same type of exotic bet (*e.g.,* exacta or trifecta) on multiple combinations of outcomes. Box bets involve betting on all possible outcomes of a specific group of horses in the same race; for example, a three-horse exacta box is a bet in which three specific horses are selected to place first or second in any combination or order of finish. A bettor wins a three-horse exacta box bet if any combination of the bettor's three horses finishes first and second. Key bets involve betting a single horse in one position with all possible combinations of the other selected horses; for example, a trifecta key is a bet where a single horse is selected to win and the other horses included in the bet are selected to place second or third in any combination or order of finish. Finally, a wheel bet involves multiple horses in multiple combinations in multiple races; for example, a Daily Double wheel is a bet where a single horse is selected to win the first race and every horse is selected in the second race.

B. Comments Regarding Current Treatment of Parimutuel Betting

Commentators stated that since the regulations were last substantively amended, the rise in the number of exotic bets available at certain racetracks and the popularity of exotic betting has altered parimutuel betting practices. Commentators stated that, for example, in the 1978 Kentucky Derby, there were three types of bets available to be placed at Churchill Downs racetrack, where the Kentucky Derby is run. Those bets were bets to win, place, or show. By contrast, in the 2015 Kentucky Derby, there were twenty-three types of bets available to be placed at Churchill Downs racetrack, including the superfecta, super high five, and pick 7 jackpot. Furthermore, commentators stated that today approximately 67% of all parimutuel wagering occurs on exotic wagers (versus straight wagers), as compared to the 1970s when approximately 10% of parimutuel wagering occurred on exotic wagers.

Further, commentators stated that the increase in availability of exotic betting has caused bettors to substantially increase their amounts wagered, often by placing box, key, and wheel bets, in a particular parimutuel pool to increase their chances of winning and increase the potential payout. In addition, commentators attributed the rise in popularity of exotic bets to the fact that exotic bets offer significantly higher odds. As a result, commentators stated that modern bettors are putting more money towards bets with greater potential payouts in anticipation of significant winnings.

Commentators also stated that payouts from straight bets were rarely subject to withholding because they virtually never came close to exceeding the 300 to 1 ratio of proceeds to the amount of the wager. On the other hand, exotic bets do result in proceeds exceeding the amount of the wager by a 300 to 1 ratio; for example, seven different exotic bets at the 2015 Kentucky Derby produced payouts exceeding the 300 to 1 ratio. However, given the vast number of potential outcomes possible with exotic bets, the commentators stated that bettors are using techniques such as box, key, or wheel bets to increase their odds. As a result, it is undoubtedly the case that the winners wagered far more into the pool than the cost of the winning bet.

Commentators stated that the tax treatment under the current rules ignores the actual investment in a single parimutuel pool and may result in withholding that significantly exceeds the amount necessary to cover the individual gambler's ultimate income tax liability and suggested changing the rule to take into account all wagers in the same parimutuel pool. The commentators provided the following example to illustrate this. A bettor makes a seven-horse trifecta box wager, which involves selecting a group of seven horses to place first, second, and third, in any order. This bet has 210 unique possible results. Assuming the bettor bets $20 on each combination, the total amount wagered is $4,200. At race time the winning combination carries 304 to 1 odds. After the race, the bettor holds a winning ticket that pays $6,100 ($304 × $20 wagered + $20 return of bet). Under the current rules, the racetrack would withhold $1,520 (($6,100 − 20) × 25%) and report $6,080 in winnings ($6,100 − $20) because the rules treat only the $20 paid for the single winning combination as the amount wagered. However, the commentators stated that the individual has netted only $1,900 ($6,100 winnings less $4,200 wagered), and is left with $380 ($1,900 − $1,520) once withholding taxes are taken out, which makes the withholding rate 80% of net winnings.

Under the commentators' proposed change, the amount of the wager would be considered to be $4,200. Thus the racetrack would not withhold because the proceeds from the wager ($1,900) are less than the $5,000 withholding threshold and are also less than $1,260,000 (300 times the amount wagered). Similarly, the racetrack would not report the proceeds because they are not at least 300 times the amount wagered.

The commentators noted that although the bettor may be able to deduct the losing wagers on the bettor's tax return at the end of the year as a miscellaneous itemized deduction, there would be other consequences. For example, the $1,520 withholding lowers the amount of money in circulation at the racetrack that day and reduces the bettor's cash on hand, whereas the commentators' proposed change would result in additional cash on hand to be bet in subsequent races.

In addition, the commentators stated that the deduction for losing wagers results in reporting of higher adjusted gross income than would result under the commentator's proposed change. Commentators further stated that a higher adjusted gross income can cause the bettor to lose unrelated tax benefits. In addition, the deduction is only available if the bettor itemizes deductions and is not subject to the alternative minimum tax. Finally the commentators noted that many states limit itemized deductions for state tax purposes.

C. Proposed Rule for the Amount of the Wager in the Case of Horse Races, Dog Races, and Jai Alai

Proposed § 31.3402(q)–1(c)(ii) provides a new rule for purposes of determining the amount of the wager for wagering transactions in horse races, dog races, and jai alai. The proposed rule allows all wagers placed in a single parimutuel pool and represented on a single ticket to be aggregated and treated as a single wager for purposes of determining the amount of the wager. The proposed rule allows a payer to take into account the total amount wagered in a particular pool as reflected on a single ticket to determine whether the winnings are subject to withholding and reporting. This treatment better reflects the full cost of exotic bets. In addition, straight wagers are unlikely to have odds and produce payouts of at least 300 to 1, so they generally are not subject to withholding, regardless of the application of the proposed rule. The proposed regulations contain examples to illustrate the proposed rule for wagering transactions in the case of horse races, dog races, and jai alai.

The proposed rule for determining the amount of the wager addresses the fact that the current rules may result in withholding that significantly exceeds the amount necessary to cover the individual gambler's ultimate income tax liability, and that creates an unnecessary burden on the bettor and the horse racing, dog racing, and jai alai industries. As described in the commentators' example, current rules for exotic bets placed as box, key, or wheel bets can result in an 80% withholding rate on net winnings from wagers placed in the same pool. This result has become more common in the decades since the regulations were last amended because the number of exotic bet types and the popularity of exotic bets have increased substantially, and various combinations of these exotic bets are often placed together on a single ticket as part of the same transaction.

By limiting the amount of the wager in a wagering transaction with respect to horse races, dog races, and jai alai to the wagers represented on a single ticket, the proposed rule limits the potential for fraud and creates an administrable system for payers. The rule is administrable because it does not require payers to collect information regarding winning wagers where additional wagers placed in the same pool are reflected on multiple tickets. If bettors want to place additional wagers in the same parimutuel pool after already having purchased a ticket, commentators stated that bettors may be able to cancel the first ticket and place the original and additional wagers for that pool on a new ticket.

The proposed regulations maintain the current rule regarding identical wagers. To clarify the meaning of the term, however, the proposed regulations provide a definition of identical wagers taken from the preamble of the current regulations. T.D. 7919 (48 FR 46296). The proposed regulations also move examples of identical wagers from the regulatory text to the examples section.

The Treasury Department and the IRS request comments regarding whether the proposed rule addressing the amount of the wager in a wagering transaction in the case of horse races, dog races, and jai alai should apply to other types of gambling subject to withholding under section 3402(q), such as lotteries.

II. Ministerial Updates to Current Regulations

In addition to the proposed rule for wagers in horse races, dog races, and jai alai, the proposed regulations make ministerial updates to the current regulations to reflect current law.

Proposed regulations § 31.3402(q)–1(a) and (b) are amended to reflect the current statutory tax rate for withholding (the third-lowest tax rate under section 1(c)) and the current statutory thresholds for withholding for all types of gambling covered by this regulation ($5,000). In 1992 and again in 2001, Congress amended section 3402(q)(1) to change the withholding rate first from 20 percent to 28 percent and then to its current level of ''the third lowest rate of tax applicable under section 1(c),'' but the current regulations do not reflect either of these statutory amendments. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16, § 101(c)(8); Energy Policy Act of 1992, Public Law 102–486, § 1934(a). In 1992, Congress also amended sections 3402(q)(3)(A) and (C) to change the withholding threshold for certain types of gambling from $1,000 to $5,000, which the current regulations do not reflect. Energy Policy Act, § 1942(a). In addition, the proposed regulations remove certain dates reflecting transition periods, which are no longer necessary.

In addition, proposed regulation § 31.3402(q)–1(c)(4) updates the rule regarding payments to nonresident aliens or foreign corporations.

III. Information Reporting for Gambling Winnings Subject to Withholding Under Section 3402(q)

Proposed regulations § 31.3402(q)–1(d) and (e) update and clarify the reporting rules for gambling winnings subject to withholding under section 3402(q). The amendments to § 31.3402(q)–1(d), regarding the statement by the payee of gambling winnings subject to withholding under section 3402(q), reorganize the current regulations into new sub-sections. Proposed § 31.3402(q)–1(d)(1) provides the general rule that each payer of gambling winnings subject to withholding under section 3402(q) must obtain a payee statement. Proposed § 31.3402(q)–1(d)(2) describes the content of the payee statement. Proposed § 31.3402(q)–1(d)(3) states the reliance rule currently described in § 31.3402(q)–1(c)(1)(ii) that where a payee furnishes the required payee statement and, as required by § 1.6011–3, indicates that he or she is entitled to winnings from identical wagers, the payer may rely on the statement in determining the total amount of proceeds from the wager.

The amendments to proposed § 31.3402(q)–1(e), regarding the information return filed by the payer on Form W–2G, modernize the current reporting rules. First, the proposed regulations replace outdated references to the place of filing with a requirement that the return be filed with the appropriate Internal Revenue Service location designated in the instructions to the form.

Second, the proposed regulations require the payer to report the taxpayer identification number of the winner in lieu of the social security number to allow for a broader range of taxpayer identification numbers, including individual taxpayer identification numbers (ITINs) and adoption taxpayer identification numbers (ATINs). This amendment allows truncation of the taxpayer identification number on the statement furnished by the payer to the payee because the regulation no longer requires a social security number. For provisions relating to the use of truncated taxpayer identification numbers, see § 31.6109–4 of this chapter.

Third, the proposed regulations update the payee identification provisions. Section 31.3402(q)–1(f)(1)(v) of the current regulations provides that the identification verifying the payee's identity must include the payee's social security number. According to the current regulations, examples of acceptable identification include a driver's license, a social security card, or a voter registration card. However, today most forms of identification do not include a person's social security number. Therefore, many payees do not have identification that contains the payee's social security number and, even if they do, they may not have this identification with them at the time that they receive a payment of gambling winnings subject to withholding under section 3402(q).

To address this issue, proposed §§ 31.3402(q)–1(e)(1)(v) and (e)(2) provide that, in addition to government-issued identification, a properly completed Form W–9 signed by the payee is an acceptable form of identification to verify the payee's identifying information. Payers who verify payee information using identification set forth in proposed

§§ 31.3402(q)–1(e)(1)(v) and (e)(2) before the date that final regulations implementing these provisions are published in the **Federal Register** will be treated as meeting the requirements of § 31.3402(q)–1(f)(1)(v) of the current regulations.

Fourth, the proposed regulations contain a special rule in § 31.3402(q)–1(e)(3) that tribal member identification cards need not contain the payee's photograph to meet the identification requirements in § 31.3402(q)–1(e)(1)(v) of the proposed regulations, provided specific criteria are met. This special rule responds to comments raised by Indian tribes in response to the notice of proposed rulemaking (REG–132253–11) under section 6041 regarding information returns to report winnings from bingo, keno, and slot machine play that many tribal identification cards do not contain photographs.

Fifth, the proposed regulations update the obsolete reference to Form W–3G to reflect that payers should use Form 1096 to transmit Forms W–2G to the Internal Revenue Service.

Finally, the proposed regulations in § 31.3402(q)–1(e)(5) provides that a payer filing an information return with the Internal Revenue Service must furnish a statement to the payee containing the same information on or before January 31st of the year following the calendar year in which payment of the winnings subject to withholding is made. See section 6041(d).

Proposed amendments to the regulations under section 3406 update the reporting requirements to address horse races, dog races, and jai alai. Proposed § 31.3406(g)–2(d) is amended to clarify the definition of a reportable gambling winning and to add a cross-reference to § 31.3402(q)–1(c) for determining the amount of the wager in a wagering transaction with respect to horse races, dog races, and jai alai, or amounts paid with respect to identical wagers.

Proposed Effective/Applicability Date

These regulations are proposed to apply to payments made after the date of publication of the Treasury Decision adopting these rules as final regulations in the **Federal Register**.

Statement of Availability of IRS Documents

IRS published guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS Web site at *http://www.irs.gov.*

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this rule merely provides guidance regarding withholding and reporting requirements for payers of certain gambling winnings. The requirement for payers to withhold and make information returns is imposed by statute and not these regulations. In addition, this rule reduces the existing burden on payers to comply with the statutory requirement by decreasing the number of payments subject to withholding and reporting. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. In addition to the requests for comments noted in the Background Section, Treasury and the IRS request comments on any other aspects of the proposed rules, and any other issues relating to the payment of gambling winnings that are not addressed in the proposed regulations. All comments will be available at *www.regulations.gov* for public inspection or upon request.

A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is David Bergman of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 31

Employment taxes and collection of income tax at source.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAXES AT THE SOURCE

■ **Paragraph 1.** The authority citation for part 31 continues to read in part as follows:

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

■ **Par. 2.** Section 31.3402(q)–1 is amended:

■ 1. By revising paragraphs (a)(1), (b), and (c)(1) and (4).

■ 2. By redesignating paragraph (d) as paragraph (f), paragraph (e) as paragraph (d), and paragraph (f) as paragraph (e).

■ 3. By revising newly designated paragraphs (d) and (e).

■ 4. In paragraph (f), removing Example 3 and Example 11, by redesignating Examples 4 through 10 as Examples 3 through 9, and adding examples 10 through 16.

■ 5. In paragraph (f), in newly redesignated Example 4 by removing the language ''Example 4'' and adding in its place the language ''Example 3'' and in newly redesignated Example 6 by removing the language ''Example 6'' and adding in its place the language ''Example 5'' wherever it appears.

■ 6. By adding paragraph (g).

The revisions and additions read as follows:

§ 31.3402(q)–1 Extension of withholding to certain gambling winnings.

(a) *Withholding obligation*—(1) *General rule.* Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentality of any of the foregoing making any payment of ''winnings subject to withholding'' (defined in paragraph (b) of the section) shall deduct and withhold a tax in an amount equal to the product of the third lowest rate of tax applicable under section 1(c) and such payment. The tax shall be deducted and withheld upon payment of the winnings by the person making such payment (''payer''). See paragraph (c)(5)(ii) of this section for a special rule relating to the time for making deposits of withheld amounts and filing the return with respect to those amounts. Any person receiving a payment of winnings subject to withholding must furnish the payer a statement as required in paragraph (d) of this section. Payers of winnings subject to withholding must file a return with the Internal Revenue Service and furnish a statement to the payee as required in paragraph (e) of this section. With respect to reporting requirements for certain payments of gambling winnings not subject to withholding, see section 6041 and the regulations thereunder.

* * * * *

(b) *Winnings subject to withholding.* (1) *In general.* Winnings subject to withholding means any payment from—

(i) A wager placed in a State-conducted lottery (defined in paragraph (c)(2) of this section) but only if the proceeds from the wager exceed $5,000;

(ii) A wager placed in a sweepstakes, wagering pool, or lottery other than a State-conducted lottery but only if the proceeds from the wager exceed $5,000; or

(iii) Any other wagering transaction (as defined in paragraph (c)(3) of this section) but only if the proceeds from the wager (A) exceed $5,000 and (B) are at least 300 times as large as the amount of the wager.

(2) *Total proceeds subject to withholding.* If proceeds from the wager qualify as winnings subject to withholding, then the total proceeds from the wager, and not merely amounts in excess of $5,000, are subject to withholding.

(c) *Definitions; special rules*—(1) *Rules for determining amount of proceeds from a wager*—(i) *In general.* The amount of ''proceeds from a wager'' is the amount paid with respect to the wager, less the amount of the wager.

(ii) *Amount of the wager in the case of horse races, dog races, and jai alai.* In the case of a wagering transaction with respect to horse races, dog races, or jai alai, all wagers placed in a single parimutuel pool and represented on a single ticket are aggregated and treated as a single wager for purposes of determining the amount of the wager. A ticket in the case of horse races, dog races, or jai alai is a written or electronic record that the payee must present to collect proceeds from a wager or wagers.

(iii) *Amount paid with respect to a wager*—(A) *Identical wagers.* Amounts paid with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. Two or more wagers are identical wagers if winning depends on the occurrence (or non-occurrence) of the same event or events; the wagers are placed with the same payer; and, in the case of horse races, dog races, or jai alai, the wagers are placed in the same parimutuel pool. Wagers may be identical wagers even if the amounts wagered differ as long as the wagers are otherwise treated as identical wagers under this paragraph (c)(1)(iii)(A). Tickets purchased in a lottery generally are not identical wagers, because the designation of each ticket as a winner generally would not be based on the occurrence of the same event, *e.g.,* the drawing of a particular number.

(B) *Non-monetary proceeds.* In determining the amount paid with respect to a wager, proceeds which are not money are taken into account at the fair market value.

(C) *Periodic payments.* Periodic payments, including installment payments or payments which are to be made periodically for the life of a person, are aggregated for purposes of determining the amount paid with respect to the wager. The aggregate amount of periodic payments to be made for a person's life is based on that person's life expectancy. See §§ 1.72–5 and 1.72–9 of this chapter for rules used in computing the expected return on annuities. For purposes of determining the amount subject to withholding, the first periodic payment shall be reduced by the amount of the wager.

* * * * *

(4) *Certain payments to nonresident aliens or foreign corporations.* A payment of winnings that is subject to withholding tax under section 1441(a) (relating to withholding on nonresident aliens) or 1442(a) (relating to withholding on foreign corporations) is not subject to the tax imposed by section 3402(q) and this section if the payer complies with the requirements of withholding, documentation, and information reporting rules of section 1441(a) or 1442(a) and the regulations thereunder. A payment is treated as being subject to withholding tax under section 1441(a) or 1442(a) notwithstanding that the rate of such tax is reduced (even to zero) as may be provided by an applicable treaty with another country. However, a reduced or zero rate of withholding of tax shall not be applied by the payer in lieu of the rate imposed by sections 1441 and 1442 unless the person receiving the winnings has provided to the payer the documentation required by § 1.1441–6 of this chapter to establish entitlement to treaty benefits.

* * * * *

(d) *Statement furnished by payee*—(1) *In general.* Each person who is making a payment subject to withholding under this section must obtain from the payee a statement described in paragraph (d)(2) of this section.

(2) *Contents of statement.* (i) Each person who is to receive a payment of winnings subject to withholding under this section must furnish the payer a statement on Form W–2G or 5754 (whichever is applicable) made under the penalties of perjury containing—

(A) The name, address, and taxpayer identification number of the winner accompanied by a declaration that no other person is entitled to any portion of such payment, or

(B) The name, address, and taxpayer identification number of the payee and of every person entitled to any portion of such payment.

(3) If more than one payment of winnings subject to withholding is to be made with respect to a single wager, for example in the case of an annuity, the payee is required to furnish the payer a statement with respect to the first such payment only, provided that such other payments are taken into account in a return required by paragraph (e) of this section.

(4) *Reliance on statement for identical wagers.* If the payee furnishes the statement which may be required pursuant to § 1.6011–3 of this chapter (regarding the requirement of a statement from payees of certain gambling winnings), indicating that the payee (and any other persons entitled to a portion of the winnings) is entitled to winnings from identical wagers, as defined in paragraph (c)(1)(iii)(A) of this section, and indicating the amount of such winnings, if any, then the payer may rely upon such statement in determining the total amount of proceeds from the wager under paragraph (c)(1) of this section.

(e) *Return of payer*—(1) *In general.* Every person making payment of winnings for which a statement is required under paragraph (d) of this section shall file a return on Form W–2G with the Internal Revenue Service location designated in the instructions to the form on or before February 28 (March 31 if filed electronically) of the calendar year following the calendar year in which the payment of winnings is made. The return required by this paragraph (e) need not include the statement by the payee required by paragraph (d) of this section and, therefore, need not be signed by the payee, provided such statement is retained by the payer as long as the contents thereof may become material in the administration of any internal revenue law. In addition, the return required by this paragraph (e) need not contain the information required by paragraph (e)(1)(v) of this section provided such information is obtained with respect to the payee and retained by the payer as long as the contents thereof may become material in the administration of any internal revenue law. For payments to more than one winner, a separate Form W–2G, which in no event need be signed by the winner, shall be filed with respect to each such winner. Each Form W–2G shall contain the following:

(i) The name, address, and employer identification number of the payer;

(ii) The name, address, and taxpayer identification number of the winner;

(iii) The date, amount of the payment, and amount withheld;

(iv) The type of wagering transaction;

(v) Except with respect to winnings from a wager placed in a State-conducted lottery, a general description of the two types of identification (as described in paragraph (e)(2) of this section), one of which must have the payee's photograph on it (except in the case of tribal member identification cards in certain circumstances as described in paragraph (e)(3) of this section), that the payer relied on to verify the payee's name, address, and taxpayer identification number;

(vi) The amount of winnings from identical wagers; and

(vii) Any other information required by the form, instructions, or other applicable guidance published in the Internal Revenue Bulletin.

(2) *Identification.* The following items are treated as identification for purposes of paragraph (e)(1)(v) of this section—

(i) Government-issued identification (for example, a driver's license, passport, social security card, military identification card, tribal member identification card issued by a federally-recognized Indian tribe, or voter registration card) in the name of the payee; and

(ii) A Form W–9, ''Request for Taxpayer Identification Number and Certification,'' signed by the payee that includes the payee's name, address, taxpayer identification number, and other information required by the form. A Form W–9 is not acceptable for this purpose if the payee has modified the form (other than pursuant to instructions to the form) or if the payee has deleted the jurat or other similar provisions by which the payee certifies or affirms the correctness of the statements contained on the form.

(3) *Special rule for tribal member identification cards.* A tribal member identification card need not contain the payee's photograph to meet the identification requirement described in paragraph (e)(1)(v) of this section if—

(i) The payee is a member of a federally-recognized Indian tribe;

(ii) The payee presents the payer with a tribal member identification card issued by a federally-recognized Indian tribe stating that the payee is a member of such tribe; and

(iii) The payer is a gaming establishment (as described in § 1.6041–10(b)(2)(iv) of this chapter) owned or licensed (in accordance with 25 U.S.C. 2710) by the tribal government that issued the tribal member identification card referred to in paragraph (e)(3)(ii) of this section.

(4) *Transmittal form.* Persons making payments of winnings subject to withholding shall use Form 1096 to transmit Forms W–2G to the Internal Revenue Service.

(5) *Furnishing a statement to the payee.* Every payer required to make a return under paragraph (e)(1) of this section must also make and furnish to each payee, with respect to each payment of winnings subject to withholding, a written statement that contains the information that is required to be included on the return under paragraph (e)(1) of this section. The payer must furnish the statement to the payee on or before January 31st of the year following the calendar year in which payment of the winnings subject to withholding is made. The statement will be considered furnished to the payee if it is provided to the payee at the time of payment or if it is mailed to the payee on or before January 31st of the year following the calendar year in which payment was made.

(f) *Examples.* * * *

Example 10. B places a $15 bet at the cashier window at the racetrack for horse A to win the fifth race at the racetrack that day. After placing the first bet, B gains confidence in horse A's prospects to win and places an additional $40 bet at the cashier window at the racetrack for horse A to win the fifth race, receiving a second ticket for this second bet. Horse A wins the fifth race, and B wins a total of $5,500 (100 to 1 odds) on those bets. The $15 bet and the $40 bet are identical wagers under paragraph (c)(1)(iii)(A) of this section because winning on both bets depended on the occurrence of the same event and the bets are placed in the same parimutuel pool with the same payer. This is true regardless of the fact that the amount of the wager differs in each case.

B cashes the tickets at different cashier windows. Pursuant to paragraph (d) of this section and § 1.6011–3, B completes a Form W–2G indicating that the amount of winnings is from identical wagers and provides the form to each cashier. The payments by each cashier of $1,500 and $4,000 are less than the $5,000 threshold for withholding, but under paragraph (c)(1)(iii)(A) of this section, identical wagers are treated as paid with respect to a single wager for purposes of determining the proceeds from a wager. The payment is not subject to withholding or reporting because although the proceeds from the wager are $5,445 ($1,500 + $4,000 − $55), the proceeds from the wager are not at least 300 times as great as the amount wagered ($55 × 300 = $16,500).

Example 11. B makes two $1,000 bets in a single ''show'' pool for the same jai alai game, one bet on Player X to show and one bet on Player Y to show. A show bet is a winning bet if the player comes in first, second, or third in a single game. The bets are placed at the same time at the same cashier window, and B receives a single ticket showing both bets. Player X places second in the game, and Player Y does not place first, second, or third in the game. B wins $8,000 from his bet on Player X. Because winning on both bets does not depend on the occurrence of the same event, the bets are not identical bets under paragraph (c)(1)(iii)(A) of this section. However, pursuant to the rule in paragraph (c)(1)(ii) of this section, the amount of the wager is the aggregate amount of both wagers ($2,000) because the bets were placed in a single parimutuel pool and reflected on a single ticket. The payment is not subject to withholding or reporting because although the proceeds from the wager are $6,000 ($8,000 − $2,000), the proceeds from the wager are not at least 300 times as great as the amount wagered ($2,000 × 300 = $600,000).

Example 12. B bets a total of $120 on a three-dog exacta box bet ($20 for each one of the six combinations played) at the dog racetrack and receives a single ticket reflecting the bet from the cashier. B wins $5,040 from one of the selected combinations. Pursuant to the rule in paragraph (c)(1)(ii) of this section, the amount of the wager is $120, not $20 for the single winning combination of the six combinations played. The payment is not subject to withholding under section 3402(q) because the proceeds from the wager are $4,920 ($5,040 − $120), which is below the section 3402(q) withholding threshold.

Example 13. B makes two $12 Pick 6 bets at the horse racetrack at two different cashier windows and receives two different tickets each representing a single $12 Pick 6 bet. In his two Pick 6 bets, B selects the same horses to win races 1–5 but selects different horses to win race 6. All Pick 6 bets on those races at that racetrack are part of a single parimutuel pool from which Pick 6 winning bets are paid. B wins $5,020 from one of his Pick 6 bets. Pursuant to the rule in paragraph (c)(1)(ii) of this section, the bets are not aggregated for purposes of determining the amount of the wager because the bets are reflected on separate tickets. Assuming that the applicable rate is 25%, the racetrack must deduct and withhold $1,252 (($5,020 − $12) × 25%) because the amounts of the proceeds of $5,008 ($5,020 − $12) is greater than $5,000 and is at least 300 times as great as the amount wagered ($12 × 300 = $3,600). The racetrack also must report B's winnings on Form W–2G pursuant to paragraph (e) of this section and furnish a copy of the Form W–2G to B.

Example 14. C makes two $50 bets in two different parimutuel pools for the same jai alai game. One bet is an ''exacta'' in which C bets on player M to win and player N to ''place''. The other bet is a ''trifecta'' in which C bets on player M to win, player N to ''place,'' and player O to ''show.'' C wins both bets and is paid $2,000 with respect to the bet in the ''exacta'' pool and $3,100 with respect to the bet in the ''trifecta'' pool. Under paragraph (c)(1)(iii)(A) of this section, the bets are not identical bets. Under paragraph (c)(1)(ii) of this section, the bets are not aggregated for purposes of determining the amount of the wager for either payment because they are not wagers in the same parimutuel pool. No section 3402(q) withholding is required on either payment because neither payment separately exceeds the $5,000 withholding threshold.

Example 15. C makes two $100 bets for the same dog to win a particular race. C places one bet at the racetrack and one bet at an off-track betting establishment, but the two pools constitute a single pool. C receives separate tickets for each bet. C wins both bets and is paid $4,000 from the racetrack and $4,000 from the off-track betting establishment. Under paragraph (c)(1)(ii) of this section, the bets are not aggregated for purposes of determining the amount of the wager because the wager placed at the racetrack and the wager placed at the off-track betting establishment are reflected on separate tickets, despite being placed in the same parimutuel pool. No section 3402(q) withholding is required because neither payment separately exceeds the $5,000 withholding threshold.

Example 16. C places a $200 Pick 6 bet for a series of races at the racetrack on a particular day and receives a single ticket for the bet. No wager correctly picks all six races that day, so that portion of the pool carries over to the following day. On the following day, C places an additional $200 Pick 6 bet for that day's series of races and receives a new ticket for that bet. C wins $100,000 on the second day. Pursuant to the rule in paragraph (c)(1)(ii) of this section, the bets are on two separate tickets, so C's two Pick 6 bets are not aggregated for purposes of determining the amount of the wager. Assuming that the applicable rate is 25%, the racetrack must deduct and withhold $24,950 (($100,000 − $200) × 25%) because the amount of the proceeds of $99,800 ($100,000 − $200) is greater than $5,000, and is at least 300 times as great as the amount wagered ($200 × 300 = $60,000). The racetrack also must report C's winnings on Form W–2G pursuant to paragraph (e) of this section and furnish a copy of the Form W–2G to C.

(g) *Applicability date.* These rules apply to payments made after [*the date of publication of the Treasury decision adopting these rules as final regulations in the* **Federal Register**]. For rules that apply to payments made before that date, see 26 CFR 31.3402(q)–1 (revised April 2015).

■ **Par. 3.** Section 31.3406–0 is amended by adding an entry for paragraph (h) to § 31.3406(g)–2 to read as follows:

§ 31.3406–0 Outline of the backup withholding regulations.

* * * * *

§ 31.3406(g)–2 Exception for reportable payments for which backup withholding is otherwise required.

* * * * *

(h) Effective/applicability date.

* * * * *

■ **Par. 4.** Section 31.3406(g)–2 is amended by revising paragraphs (d)(2) and (3) and adding paragraph (h) to read as follows:

§ 31.3406(g)–2 Exception for reportable payment for which withholding is otherwise required.

* * * * *

(d) * * *

(2) *Definition of a reportable gambling winning and determination of amount subject to backup withholding.* For purposes of withholding under section 3406, a reportable gambling winning is any gambling winning subject to information reporting under section 6041. A gambling winning (other than a winning from bingo, keno, or slot machines) is a reportable gambling winning only if the amount paid with respect to the wager is $600 or more and if the proceeds are at least 300 times as large as the amount wagered. See § 1.6041–10 of this chapter to determine whether a winning from bingo, keno, or slot machines is a reportable gambling winning and thus subject to withholding under section 3406. The amount of a reportable gambling winning is—

(i) The amount paid with respect to the amount of the wager reduced, at the option of the payer; by

(ii) The amount of the wager.

(3) *Special rules.* For special rules for determining the amount of the wager in a wagering transaction with respect to horse racing, dog racing, and jai alai, or amounts paid with respect to identical wagers, see § 31.3402(q)–1(c).

* * * * *

(h) *Applicability date.* The rules apply to reportable gambling winnings paid after [*the date of publication of the Treasury decision adopting these rules as final regulations in the* ***Federal Register***]. For reportable gambling winnings paid on or before [*the date of publication of the Treasury decision adopting these rules as final regulations in the* ***Federal Register***], § 31.3406(g)–2 (as contained in 26 CFR part 31, revised April 2015) applies.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–31579 Filed 12–29–16; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 87 and 1068

[EPA–HQ–OAR–2014–0828; FRL–9957–73–OAR]

Reconsideration of Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action denying petition for reconsideration.

SUMMARY: This action provides notice that the U.S. Environmental Protection Agency (EPA) Administrator, Gina McCarthy, denied a petition for reconsideration of the final Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare, published in the **Federal Register** on August 15, 2016.

DATES: The EPA took final action to deny the petition for reconsideration on December 21, 2016.

FOR FURTHER INFORMATION CONTACT: Lesley Jantarasami, Office of Atmospheric Programs, Climate Change Division, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Mail Code 6207–A, Washington DC 20460; Telephone number: (202) 343–9990; Email address: *ghgendangerment@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How can I get copies of this document and other related information?

This **Federal Register** document, the petition for reconsideration and the EPA's response addressing the petition for reconsideration are available in the docket under Docket ID No. EPA–HQ–OAR–2014–0828.

Docket. The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2014–0828. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center (EPA/DC), EPA WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is

(202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. This action, the petition for reconsideration and the EPA's response addressing the petition can also be found on the EPA's Web site at *https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-finding-greenhouse-gas-emissions-aircraft.*

Electronic access. You may access this **Federal Register** document electronically from the Government Printing Office under the ''**Federal Register**'' listings at FDSys (*http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR*).

II. Judicial Review

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

The EPA has determined that its action denying the petition for reconsideration is nationally applicable for purposes of CAA section 307(b)(1) because it affects the final Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare, and that finding triggers the EPA's statutory duty to promulgate aircraft engine emission standards under CAA section 231, which are nationally applicable regulations and for which judicial review will be available only in the U.S. Court of Appeals for the District of Columbia Circuit. Moreover, EPA already determined that the subject finding was nationally applicable, *see* 81 FR 54422 (Aug. 15, 2016), and that finding has in fact been challenged in the U.S. Court of Appeals for the District of Columbia Circuit. In the alternative, even if this action were considered to be only locally or regionally applicable, the Administrator has determined that it has nationwide scope and effect within the meaning of CAA section 307(b)(1) both because EPA has determined that the final finding has nationwide scope and effect within the meaning of CAA section 307(b)(1), *see* 81 FR 54422 (Aug. 15, 2016), and because it concerns risks from GHG pollution and contributions to such pollution that occur across the nation.

Thus, any petition for judicial review of the EPA's decision to deny the petition for reconsideration described in this document must be filed in the U.S. Court of Appeals for the District of Columbia Circuit by February 28, 2017.

III. Description of Action

On July 25, 2016, EPA Administrator McCarthy signed the action entitled ''Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare.'' That action included two findings under section 231(a)(2)(A) of the CAA. These findings were that: (1) Concentrations of six well-mixed greenhouse gases (GHGs) in the atmosphere endanger the public health and welfare of current and future generations (the endangerment finding), and (2) GHGs emitted from certain classes of engines used in certain aircraft [1] are contributing to the air pollution—the mix of those six GHGs in the atmosphere—that endangers public health and welfare (the cause or contribute finding, or contribution finding). The Administrator made these findings using the same definitions of ''air pollution'' and ''air pollutant'' as were used in earlier findings under CAA section 202(a)(1) regarding motor vehicle GHG emissions (the 2009 Findings), namely the combined mix of six key well-mixed GHGs: carbon dioxide (CO_2), methane, nitrous oxide, hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). While the 2009 Findings under CAA section 202(a)(1) relate to GHG emissions from new motor vehicles and new motor vehicle engines, these findings under CAA section 231(a)(2)(A) relate to GHG emissions from certain classes of engines used in certain aircraft. These findings were published in the **Federal Register** on August 15, 2016 (81 FR 54422), and became effective on September 14, 2016 (2016 Findings).

The Biogenic CO_2 Coalition (Petitioner) submitted a petition dated October 14, 2016 asking the EPA to reconsider the 2016 Findings with respect to the Agency's treatment of biogenic carbon dioxide (CO_2) emissions from short-cycle annual herbaceous crops. CAA section 307(d)(7)(B) states that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.''

The EPA carefully reviewed the petition for reconsideration and evaluated all the information presented on the issues raised, along with information contained in the docket for the 2016 Findings, in reaching a decision on the petition. The EPA has concluded that the petition does not meet the criteria for reconsideration in CAA section 307(d)(7)(B). In a letter to the petitioner, the EPA Administrator, Gina McCarthy, denied the petition for reconsideration. The letter included an enclosure, a Reconsideration Response document entitled ''Response to the Biogenic CO_2 Coalition's Petition for Reconsideration of the Final Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare,'' that articulates in detail the rationale for the EPA's final responses to the petition for reconsideration and the EPA Administrator's denial of that petition. These documents are all available in the docket for this action.

IV. Conclusion

For the reasons discussed in the letter to the petitioner and the Reconsideration Response document, the petition to reconsider the final Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare is denied.

[1] The contribution finding concludes that GHG emissions from certain classes of engines used in ''U.S. covered aircraft'' contribute to the air pollution that endangers public health and welfare. The finding defines ''U.S. covered aircraft'' to be subsonic jet aircraft with a maximum takeoff mass (MTOM) greater than 5,700 kilograms and subsonic propeller driven aircraft (*e.g.,* turboprops) with a MTOM greater than 8,618 kilograms. This contribution finding for engines used in U.S. covered aircraft results in the vast majority (89 percent) of total U.S. aircraft GHG emissions being included in this determination.

Dated: December 21, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–31644 Filed 12–29–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 15, 25, 30, and 101

[GN Docket No. 14–177, IB Docket Nos. 15–256 and 97–95, WT Docket No. 10–112; Report No. 3065]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Petitions for Reconsideration (Petitions) have been filed in the Commission's rulemaking proceeding by Chris Pearson, on behalf of 5G Americas; Donald L. Herman, Jr., on behalf of Adams Telcom, Inc., jointly with Central Texas Communications, Inc., E.N.M.R. Telephone Cooperative, Louisiana Competitive Telecommunications, Inc., and Pine Belt Communications, Inc.; Audrey L. Allison, on behalf of The Boeing Company; Steven K. Berry, on behalf of Competitive Carriers Association; Brian M. Josef, on behalf of CTIA; Giselle Creeser, on behalf of Inmarsat, Inc., jointly with Jennifer A. Manner, on behalf of EchoStar Satellite Operating Corporation and Hughes Network Systems LLC; Rick Chessen, on behalf of NTCA—The Internet & Television Association; Michele C. Farquhar, on behalf of Nextlink Wireless, LLC; Petra Vorwig, on behalf of SES Americom, Inc., jointly with Suzanne Malloy, on behalf of O3b Limited; Tom Stroup, on behalf of Satellite Industry Association; James Reid, on behalf of Telecommunications Industry Association; Steve B. Sharkey, on behalf of T-Mobile USA, Inc.; and Christopher Murphy, on behalf of ViaSat, Inc.

DATES: Oppositions to the Petition must be filed on or before January 17, 2017. Replies to an opposition must be filed on or before January 24, 2017.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: John Schauble, Wireless Telecommunications Bureau, (202) 418–0797; email: *John.Schauble@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3065, released December 22, 2016. The full text of the Petitions is available for viewing and copying at the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554 or may be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/.* The Commission will not send a copy of this document pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because this document does not have an impact on any rules of particular applicability.

Subject: Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, FCC 16–89, published at 81 FR 79894, November 14, 2016, in GN Docket No. 14–177, IB Docket Nos. 15–256 and 97–95, RM–11664, and WT Docket No. 10–112. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 13.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–31709 Filed 12–29–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 14–50, 09–182, 07–294, and 04–256; Report No. 3064]

Petitions for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Petitions for Reconsideration (Petitions) have been filed in the Commission's rulemaking proceeding by David Oxenford and Kelly Donohue, on behalf of Connoisseur Media, LLC.; Richard J. Bodorff *et al.,* on behalf of Nexstar Broadcasting, Inc.; and Rick Kaplan *et al.,* on behalf of National Association of Broadcasters.

DATES: Oppositions to the Petitions must be filed on or before January 17, 2017. Replies to an opposition must be filed on or before January 24, 2017.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Benjamin Arden, Media Bureau, (202) 418–2605; email: *Benjamin.Arden@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3064, released December 21, 2016. The full text of the Petitions is available for viewing and copying at the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554 or may be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/.* The Commission will not send a copy of this document pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because this document does not have an impact on any rules of particular applicability.

Subject: 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, FCC 16–107, published at 81 FR 76220, November 1, 2016, in MB Docket Nos. 14–50, 09–182, 07–294, and 04–256. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 3.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–31708 Filed 12–29–16; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 160929897–6897–01]

RIN 0648–BG37

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Russian River Estuary Management Activities

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

ACTION: Proposed rule.

SUMMARY: NMFS has received a request from the Sonoma County Water Agency (SCWA) for authorization to take marine mammals incidental to Russian River estuary management activities in Sonoma County, California, over the course of five years (2017–2022). As required by the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that

take and requests comments on the proposed regulations.

DATES: Comments and information must be received no later than January 30, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2016–0163, by any of the following methods:

- *Electronic submission:* Submit all electronic public comments via the federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0163,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910.

Comments regarding any aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via one of the means provided here and to the Office of Information and Regulatory Affairs, NEOB–10202, Office of Management and Budget, Attn: Desk Office, Washington, DC 20503, *OIRA@omb.eop.gov.*

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

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of SCWA's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online 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**).

National Environmental Policy Act (NEPA)

NMFS prepared an Environmental Assessment (EA; 2010) and associated Finding of No Significant Impact (FONSI) in accordance with NEPA and the regulations published by the Council on Environmental Quality. These documents are posted at the aforementioned Internet address. Information in SCWA's application, NMFS's EA (2010), and this notice collectively provide the environmental information related to proposed issuance of these regulations for public review and comment. We will review all comments submitted in response to this notice as we complete the NEPA process, including a decision of whether the existing EA and FONSI provide adequate analysis related to the potential environmental effects of issuing an incidental take authorization to SCWA, prior to a final decision on the request.

Purpose and Need for Regulatory Action

This proposed rule, to be issued under the authority of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*), would establish a framework for authorizing the take of marine mammals incidental to SCWA's estuary management activities at the mouth of the Russian River in Sonoma County, CA. SCWA proposes to manage the naturally-formed barrier beach at the mouth of the Russian River in order to minimize potential for flooding adjacent to the estuary and to enhance habitat for juvenile salmonids, as well as to conduct biological and physical monitoring of the barrier beach and estuary. Breaching of the naturally-formed barrier beach at the mouth of the Russian River requires the use of heavy equipment and increased human presence, and monitoring in the estuary requires the use of small boats.

We received an application from SCWA requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to estuary management activities due to disturbance of hauled pinnipeds. The regulations would be valid from 2017 to 2022. Please see ''Background'' below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs 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 for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity, as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing five-year regulations, and for any subsequent Letters of Authorization. As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

The following provides a summary of some of the major provisions within the proposed rulemaking for SCWA estuary management activities. We have preliminarily determined that SCWA's adherence to the proposed mitigation, monitoring, and reporting measures listed below would achieve the least practicable adverse impact on the affected marine mammals. They include:

- Measures to minimize the number and intensity of incidental takes during sensitive times of year and to minimize the duration of disturbances.
- Measures designed to eliminate startling reactions.
- Eliminating or altering management activities on the beach when pups are present, and by setting limits on the frequency and duration of events during pupping season.

Background

Paragraphs 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1371 (a)(5)(A) and (D)) 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 September 2, 2016, we received an adequate and complete request from SCWA for authorization to take marine mammals incidental to estuary management activities. On September 20, 2016 (81 FR 64440), we published a notice of receipt of SCWA's application in the **Federal Register**, requesting comments and information related to the request for 30 days. We did not receive any comments. SCWA provided a revised draft incorporating minor revisions on November 1, 2016.

SCWA proposes to manage the naturally-formed barrier beach at the mouth of the Russian River in order to minimize potential for flooding adjacent to the estuary and to enhance habitat for juvenile salmonids, as well as to conduct biological and physical monitoring of the barrier beach and estuary. Flood control-related breaching of the barrier beach at the mouth of the river may include artificial breaches, as well as construction and maintenance of a lagoon outlet channel. The latter activity, an alternative management technique conducted to mitigate impacts of flood control on rearing habitat for Endangered Species Act (ESA)-listed salmonids, occurs only from May 15 through October 15 (hereafter, the ''lagoon management period''). Artificial breaching and monitoring activities may occur at any time during the period of validity of the proposed regulations. The requested regulations would be valid for 5 years, from April 21, 2017, through April 20, 2022.

Breaching of the naturally-formed barrier beach at the mouth of the Russian River requires the use of heavy equipment (*e.g.,* bulldozer, excavator) and increased human presence, and monitoring in the estuary requires the use of small boats. As a result, pinnipeds hauled out on the beach or at peripheral haul-outs in the estuary may exhibit behavioral responses that indicate incidental take by Level B harassment under the MMPA. Species known from the haul-out at the mouth of the Russian River or from peripheral haul-outs, and therefore anticipated to be taken incidental to the specified activity, include the harbor seal (*Phoca vitulina richardii*), California sea lion (*Zalophus californianus*), and northern elephant seal (*Mirounga angustirostris*).

Prior to this request for incidental take regulations and a subsequent Letter of Authorization (LOA), we issued seven consecutive incidental harassment authorizations (IHA) to SCWA for incidental take associated with the same ongoing activities. SCWA was first issued an IHA, valid for a period of one year, effective on April 1, 2010 (75 FR 17382), and was subsequently issued one-year IHAs for incidental take associated with the same activities, effective on April 21, 2011 (76 FR 23306), April 21, 2012 (77 FR 24471), April 21, 2013 (78 FR 23746), April 21, 2014 (79 FR 20180), April 21, 2015 (80 FR 24237), and April 21, 2016 (81 FR 22050).

Description of the Specified Activity

Overview

The proposed action involves management of the estuary to prevent flooding while preventing adverse modification to critical habitat for ESA-listed salmonids. Requirements related to the ESA are described in further detail below. During the lagoon management period, this involves construction and maintenance of a lagoon outlet channel that would facilitate formation of a perched lagoon. A perched lagoon, which is an estuary closed to tidal influence in which water surface elevation is above mean high tide, would reduce flooding while maintaining beneficial conditions for juvenile salmonids. Additional breaches of the barrier beach may be conducted for the sole purpose of reducing flood risk. SCWA's proposed activity was described in detail in our notice of proposed authorization prior to the 2011 IHA (76 FR 14924; March 18, 2011); please see that document for a detailed description of SCWA's estuary management activities. Aside from minor additions to SCWA's biological and physical estuary monitoring measures, the specified activity remains the same as that described in the 2011 document.

Dates and Duration

The specified activity may occur at any time during the five-year period of validity for these proposed regulations (April 21, 2017 through April 20, 2022), although construction and maintenance of a lagoon outlet channel would occur only during the lagoon management period. In addition, there are certain restrictions placed on SCWA during the harbor seal pupping season. These, as well as periodicity and frequency of the specified activities, are described in further detail below.

Specified Geographical Region

The estuary is located about 97 kilometers (km) (60 miles (mi)) northwest of San Francisco in Sonoma County, near Jenner, California (see Figure 1 of SCWA's application). The Russian River watershed encompasses 3,847 km^2 (1,485 mi^2) in Sonoma, Mendocino, and Lake Counties. The mouth of the Russian River is located at Goat Rock State Beach (see Figure 2 of SCWA's application); the estuary extends from the mouth upstream approximately 10 to 11 km (6–7 mi) between Austin Creek and the community of Duncans Mills (Heckel and McIver, 1994).

Detailed Description of Activities

Within the Russian River watershed, the U.S. Army Corps of Engineers (Corps), SCWA, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District (District) operate and maintain Federal facilities and conduct activities in addition to the estuary management, including flood control, water diversion and storage, instream flow releases, hydroelectric power generation, channel maintenance, and fish hatchery production. The Corps, SCWA, and the District conducted these activities for many years before salmonid species in the Russian River were protected under the ESA. Upon determination that these actions were likely to affect ESA-listed salmonids, as well as designated critical habitat for these species, formal consultation under section 7 of the ESA was initiated. In 2008, NMFS issued a Biological Opinion (BiOp) for Water Supply, Flood Control Operations, and Channel Maintenance conducted by the Corps, SCWA, and the District in the Russian River watershed (NMFS, 2008). This BiOp found that the activities—including SCWA's estuary management activities—authorized by the Corps and undertaken by SCWA and the District, if continued in a manner similar to recent historic practices, were likely to jeopardize the continued existence of ESA-listed salmonids and were likely to adversely modify critical habitat.

If a project is found to jeopardize a species or adversely modify its critical habitat, NMFS must develop and recommend a non-jeopardizing Reasonable and Prudent Alternative (RPA) to the proposed project, in coordination with the federal action agency and any applicant. A component of the RPA described in the 2008 BiOp requires SCWA to collaborate with NMFS and modify their estuary water level management in order to reduce marine influence (*i.e.,* high salinity and tidal inflow) and promote a higher water surface elevation in the estuary in order to enhance the quality of rearing habitat for juvenile salmonids. A program of potential incremental steps prescribed to reach that goal includes adaptive management of the outlet channel. SCWA is also required to monitor the response of water quality, invertebrate production, and salmonids in and near the estuary to water surface elevation management in the estuary-lagoon system.

The analysis contained in the BiOp found that maintenance of lagoon conditions was necessary only for the lagoon management period. See NMFS's BiOp (2008) for details of that analysis. As a result of that determination, there are three components to SCWA's estuary management activities: (1) Lagoon outlet channel management, during the lagoon management period only, required to accomplish the dual purposes of flood risk abatement and maintenance of juvenile salmonid habitat; (2) traditional artificial breaching, with the sole goal of flood risk abatement; and (3) physical and biological monitoring. The latter activity, physical and biological monitoring, will remain the same as in past years and as described in our 2015 notice of proposed authorization (80 FR 14073; March 18, 2015). Please see the previously referenced **Federal Register** notice (76 FR 14924; March 18, 2011) for detailed discussion of lagoon outlet channel management, artificial breaching, and other monitoring activities.

NMFS's BiOp determined that salmonid estuarine habitat may be improved by managing the Russian River estuary as a perched, freshwater lagoon and, therefore, stipulates as an RPA to existing conditions that the estuary be managed to achieve such conditions between May 15th and October 15th. In recognition of the complexity and uncertainty inherent in attempting to manage conditions in a dynamic beach environment, the BiOp stipulates that the estuarine water surface elevation RPA be managed adaptively, meaning that it should be planned, implemented, and then iteratively refined based on experience gained from implementation. The first phase of adaptive management, which has been implemented since 2010, is limited to outlet channel management (ESA, 2015).

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, ''and other means of effecting the least practicable adverse 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 subsistence uses.'' NMFS's implementing regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

SCWA has proposed to continue the following mitigation measures, as implemented during the previous ITAs, designed to minimize impact to affected species and stocks:

- SCWA crews would cautiously approach (*e.g.,* walking slowly with limited arm movement and minimal sound) the haul-out ahead of heavy equipment to minimize the potential for sudden flushes, which may result in a stampede—a particular concern during pupping season.
- SCWA staff would avoid walking or driving equipment through the seal haul-out.
- Crews on foot would make an effort to be seen by seals from a distance, if possible, rather than appearing suddenly, again preventing sudden flushes.
- During breaching events, all monitoring would be conducted from the overlook on the bluff along Highway 1 adjacent to the haul-out in order to minimize potential for harassment.
- A water level management event may not occur for more than two consecutive days unless flooding threats cannot be controlled.

In addition, SCWA proposes to continue mitigation measures specific to pupping season (March 15–June 30), as implemented in the previous ITAs:

- SCWA will maintain a one week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach.
- If a pup less than one week old is on the beach where heavy machinery would be used or on the path used to access the work location, the management action will be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA would consult with NMFS to determine the appropriate course of action. SCWA will coordinate with the locally established seal monitoring program (Stewards' Seal Watch) to determine if pups less than one week old are on the beach prior to a breaching event.
- Physical and biological monitoring will not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

For all activities, personnel on the beach would include up to two equipment operators, three safety team members on the beach (one on each side of the channel observing the equipment operators, and one at the barrier to warn beach visitors away from the activities), and one safety team member at the overlook on Highway 1 above the beach. Occasionally, there would be two or more additional people (SCWA staff or regulatory agency staff) on the beach to observe the activities. SCWA staff would be followed by the equipment, which would then be followed by an SCWA vehicle (typically a small pickup truck, the vehicle would be parked at the previously posted signs and barriers on the south side of the excavation location). Equipment would be driven slowly on the beach and care would be taken to minimize the number of shut-downs and start-ups when the equipment is on the beach. All work would be completed as efficiently as possible, with the smallest amount of heavy equipment possible, to minimize disturbance of seals at the haul-out. Boats operating near river haul-outs during monitoring would be kept within posted speed limits and driven as far from the haul-outs as safely possible to minimize flushing seals.

We have carefully evaluated SCWA's proposed mitigation measures and considered a range of other measures in the context of ensuring that we prescribed the means of effecting the least practicable adverse 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 a 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 SCWA's proposed measures, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Description of Marine Mammals in the Area of the Specified Activity

Harbor seals are the most common species inhabiting the haul-out at the mouth of the Russian River (Jenner haul-out) and fine-scale local abundance data for harbor seals have been recorded extensively since 1972. California sea lions and northern elephant seals have also been observed infrequently in the project area. In addition to the primary Jenner haul-out, there are eight peripheral haul-outs nearby (see Figure 1 of SCWA's application). These include North Jenner and Odin Cove to the north; Pocked Rock, Kabemali, and Rock Point to the south; and Penny Logs, Patty's Rock, and Chalanchawi upstream within the estuary.

This section provides summary information regarding local occurrence of these species. We have reviewed SCWA's detailed species descriptions, including life history information, for accuracy and completeness and refer the reader to Sections 3 and 4 of SCWA's application instead of reprinting the information here. Please also see NMFS Stock Assessment Reports, which may be accessed online at *www.nmfs.noaa.gov/pr/sars/species.htm.*

Harbor Seals

Harbor seals inhabit coastal and estuarine waters and shoreline areas of the Northern Hemisphere from temperate to polar regions. The eastern North Pacific subspecies is found from Baja California north to the Aleutian Islands and into the Bering Sea. Multiple lines of evidence support the existence of geographic structure among harbor seal populations from California to Alaska (Carretta *et al.,* 2016). However, because stock boundaries are difficult to meaningfully draw from a biological perspective, three separate harbor seal stocks are recognized for management purposes along the west coast of the continental U.S.: (1) Inland waters of Washington, (2) outer coast of Oregon and Washington, and (3) California (Carretta *et al.,* 2016). Placement of a stock boundary at the California-Oregon border is not based on biology but is considered a political and jurisdictional convenience (Carretta *et al.,* 2016). In addition, harbor seals may occur in Mexican waters, but these animals are not considered part of the California stock. Only the California stock is expected to be found in the project area.

California harbor seals are not protected under the ESA or listed as depleted under the MMPA, and are not considered a strategic stock under the MMPA because annual human-caused mortality (43) is significantly less than the calculated potential biological removal (PBR; 1,641) (Carretta *et al.,* 2016). The population appears to be stabilizing at what may be its carrying capacity and the fishery mortality is declining. The best abundance estimate of the California stock of harbor seals is 30,968 and the minimum population size of this stock is 27,348 individuals (Carretta *et al.,* 2016).

Harbor seal pupping normally occurs at the Russian River from March until late June, and sometimes into early July. The Jenner haul-out is the largest in Sonoma County. A substantial amount of monitoring effort has been conducted at the Jenner haul-out and surrounding areas. Concerned local residents formed the Stewards' Seal Watch Public Education Program in 1985 to educate beach visitors and monitor seal populations. State Parks Volunteer Docents continue this effort towards safeguarding local harbor seal habitat. On weekends during the pupping and molting season (approximately March-August), volunteers conduct public outreach and record the numbers of visitors and seals on the beach, other marine mammals observed, and the number of boats and kayaks present.

Ongoing monthly seal counts at the Jenner haul-out were begun by J. Mortenson in January 1987, with additional nearby haul-outs added to the counts thereafter. In addition, local resident E. Twohy began daily observations of seals and people at the Jenner haul-out in November 1989. These datasets note whether the mouth at the Jenner haul-out was opened or closed at each observation, as well as various other daily and annual patterns of haul-out usage (Mortenson and Twohy, 1994). In 2009, SCWA began regular baseline monitoring of the haul-out as a component of its estuary management activity. Table 1 shows average daily numbers of seals observed at the mouth of the Russian River from 1993–2005 and from 2009–15.

TABLE 1—AVERAGE DAILY NUMBER OF SEALS OBSERVED AT RUSSIAN RIVER MOUTH FOR EACH MONTH, 1993–2005 AND 2009–15

Year	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.
1993	140	219	269	210	203	238	197	34	8	38	78	163
1994	138	221	243	213	208	212	246	98	26	31	101	162
1995	133	270	254	261	222	182	216	74	37	24	38	148
1996	144	175	261	247	157	104	142	65	17	29	76	139
1997	154	177	209	188	154	119	186	58	20	29	30	112
1998	119	151	192	93	170	213	232	53	33	21	93	147
1999	161	170	215	210	202	128	216	98	57	20	74	123
2000	151	185	240	180	158	245	256	63	46	50	86	127
2001	155	189	161	168	135	212	275	75	64	20	127	185
2002	117	12	20	154	134	213	215	89	43	26	73	126
2003	—	1	26	161	164	222	282	100	43	51	109	116
2004	2	5	39	180	202	318	307	35	40	47	68	61
2005	0	7	42	222	220	233	320	145	—	—	—	—
Mean, 1993–2005	118	137	167	191	179	203	238	76	36	32	79	134
2009	—	—	—	—	—	—	219	117	17	22	96	80
2010	66	84	129	136	109	136	267	111	59	25	89	26
2011	116	92	162	124	128	145	219	98	31	53	92	48
2012	108	74	115	169	164	166	156	128	100	71	137	51
2013	51	108	158	112	162	139	411	175	77	58	34	94
2014	98	209	243	129	145	156	266	134	53	15	27	172
2015	113	171	145	177	153	219	373	120	48	33	49	138
Mean, 2011–15 [1]	99	131	165	141	151	164	282	133	62	48	68	98

Data from 1993–2005 adapted from Mortenson and Twohy (1994) and E. Twohy (unpublished data). Data from 2009–15 collected by SCWA. Months represented by dash indicate periods where data were missing or incomplete.

[1] Mean calculated as a weighted average to account for unequal sample sizes between years. See Table 4 of SCWA's application.

The number of seals present at the Jenner haul-out generally declines during bar-closed conditions (Mortenson, 1996). SCWA's pinniped monitoring efforts from 1996 to 2000 focused on artificial breaching activities and their effects on the Jenner haul-out. Seal counts and disturbances were recorded from one to two days prior to breaching, the day of breaching, and the day after breaching (MSC, 1997, 1998, 1999, 2000; SCWA and MSC, 2001). In each year, the trend observed was that harbor seal numbers generally declined during a beach closure and increased the day following an artificial breaching event. Heckel and McIver (1994) speculated that the loss of easy access to the haul-out and ready escape to the sea during bar-closed conditions may account for the lower numbers. Table 2 shows average daily seal counts recorded during SCWA monitoring of breaching events from 2009–15, representing bar-closed conditions, when seal numbers decline.

TABLE 2—AVERAGE NUMBER OF HARBOR SEALS OBSERVED AT THE MOUTH OF THE RUSSIAN RIVER DURING BREACHING EVENTS

[*i.e.,* bar-closed conditions—by Month]

Year	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.
2009–15	49	75	133	99	80	98	117	17 [1]	30	28	32	59

[1] No estuary management events occurred; data from earlier monitoring effort (1996–2000).

Mortenson (1996) observed that pups were first seen at the Jenner haul-out in late March, with maximum counts in May. In this study, pups were not counted separately from other age classes at the haul-out after August due to the difficulty in discriminating pups from small yearlings. From 1989 to 1991, Hanson (1993) observed that pupping began at the Jenner haul-out in mid-April, with a maximum number of pups observed during the first two weeks of May. This corresponds with the peaks observed at Point Reyes, where the first viable pups are born in March and the peak is the last week of April to early May (SCWA, 2014). Based on this information, pupping season at the Jenner haul-out is conservatively defined here as March 15 to June 30.

California Sea Lions

California sea lions range from the Gulf of California north to the Gulf of Alaska, with breeding areas located in the Gulf of California, western Baja California, and southern California. Five genetically distinct geographic populations have been identified: (1) Pacific Temperate, (2) Pacific Subtropical, (3) Southern Gulf of California, (4) Central Gulf of California and (5) Northern Gulf of California (Schramm *et al.,* 2009). Rookeries for the Pacific Temperate population are found within U.S. waters and just south of the U.S.-Mexico border, and animals belonging to this population may be found from the Gulf of Alaska to Mexican waters off Baja California. Animals belonging to other populations (*e.g.,* Pacific Subtropical) may range into U.S. waters during non-breeding periods. For management purposes, a stock of California sea lions comprising those animals at rookeries within the U.S. is defined (*i.e.,* the U.S. stock of California sea lions) (Carretta *et al.,* 2016). Pup production at the Coronado Islands rookery in Mexican waters is considered an insignificant contribution to the overall size of the Pacific Temperate population (Lowry and Maravilla-Chavez, 2005).

California sea lions are not protected under the ESA or listed as depleted under the MMPA. Total annual human-caused mortality (389) is substantially less than the PBR (estimated at 9,200); therefore, California sea lions are not considered a strategic stock under the MMPA. The best abundance estimate of the U.S. stock of California sea lions is 296,750 and the minimum population size of this stock is 153,337 individuals (Carretta *et al.,* 2016).

Beginning in January 2013, elevated strandings of California sea lion pups were observed in southern California, with live sea lion strandings nearly three times higher than the historical average. Findings to date indicate that a likely contributor to the large number of stranded, malnourished pups was a change in the availability of sea lion prey for nursing mothers, especially sardines. Although the pups showed signs of some viruses and infections, findings indicate that this event was not caused by disease or a single infectious agent but by the lack of high quality, close-by food sources for nursing mothers. Several different kinds of one sort of virus (astroviruses, including some new species of astrovirus) were identified in a high percentage of the samples; however, the importance of this finding is still under investigation. The causes and mechanisms of this remain under investigation (*www.nmfs.noaa.gov/pr/health/mmume/californiasealions2013.htm;* accessed December 6, 2016).

Solitary California sea lions have occasionally been observed at or in the vicinity of the Russian River estuary (MSC, 1999, 2000), in all months of the year except June. Male California sea lions are occasionally observed hauled out at or near the Russian River mouth in most years: August 2009, January and December 2011, January 2012, December 2013, February 2014, and February and April 2015. Other individuals were observed in the surf at the mouth of the river or swimming inside the estuary. Juvenile sea lions were observed during the summer of 2009 at the Patty's Rock haul-out, and some sea lions were observed during monitoring of peripheral haul-outs in October 2009. The occurrence of individual California sea lions in the action area may occur year-round, but is infrequent and sporadic.

Northern Elephant Seals

Northern elephant seals gather at breeding areas, located primarily on offshore islands of Baja California and California, from approximately December to March before dispersing for feeding. Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, while females feed at sea south of 45 °N (Stewart and Huber, 1993; Le Boeuf *et al.,* 1993). Adults then return to land between March and August to molt, with males returning later than females, before dispersing again to their respective feeding areas between molting and the winter breeding season. Populations of northern elephant seals in the U.S. and Mexico are derived from a few tens or hundreds of individuals surviving in Mexico after being nearly hunted to extinction (Stewart *et al.,* 1994). Given the recent derivation of most rookeries, no genetic differentiation would be expected. Although movement and genetic exchange continues between rookeries, most elephant seals return to their natal rookeries when they start breeding (Huber *et al.,* 1991). The California breeding population is now demographically isolated from the Baja California population and is considered to be a separate stock.

Northern elephant seals are not protected under the ESA or listed as depleted under the MMPA. Total annual human-caused mortality (8.8) is substantially less than the PBR (estimated at 4,882); therefore, northern elephant seals are not considered a strategic stock under the MMPA. The best abundance estimate of the California breeding population of northern elephant seals is 179,000 and the minimum population size of this stock is 81,368 individuals (Carretta *et al.,* 2016).

Censuses of pinnipeds at the mouth of the Russian River have been taken at least semi-monthly since 1987. Elephant seals were noted from 1987–95, with one or two elephant seals typically counted during May censuses, and occasional records during the fall and winter (Mortenson and Follis, 1997). A single, tagged northern elephant seal sub-adult was present at the Jenner haul-out from 2002–07. This individual seal, which was observed harassing harbor seals also present at the haul-out, was generally present during molt and again from late December through March. A single juvenile elephant seal was observed at the Jenner haul-out in June 2009 and, in recent years, a sub-adult seal was observed in late summer of 2013–14. The occurrence of individual northern elephant seals in the action area has generally been infrequent and sporadic in the past ten years.

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity 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 incidents of take expected to occur incidental to this activity. The ''Negligible Impact Analysis'' section will include an 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 these activities on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

A significant body of monitoring data exists for pinnipeds at the mouth of the Russian River. In addition, pinnipeds have co-existed with regular estuary management activity for decades, as well as with regular human use activity at the beach, and are likely habituated to human presence and activity. Nevertheless, SCWA's estuary management activities have the potential to disturb pinnipeds present on the beach or at peripheral haul-outs in the estuary. During breaching operations, past monitoring has revealed that some or all of the seals present typically move or flush from the beach in response to the presence of crew and equipment, though some may remain hauled-out. No stampeding of seals—a potentially dangerous occurrence in which large numbers of animals succumb to mass panic and rush away from a stimulus—has been documented since SCWA developed protocols to prevent such events in 1999. While it is likely impossible to conduct required estuary management activities without provoking some response in hauled-out animals, precautionary mitigation measures, described later in this document, ensure that animals are gradually apprised of human approach. Under these conditions, seals typically exhibit a continuum of responses, beginning with alert movements (*e.g.,* raising the head), which may then escalate to movement away from the stimulus and possible flushing into the water. Flushed seals typically re-occupy the haul-out within minutes to hours of the stimulus.

In the absence of appropriate mitigation measures, it is possible that pinnipeds could be subject to injury, serious injury, or mortality, likely through stampeding or abandonment of pups. However, based on a significant body of site-specific data, harbor seals are unlikely to sustain any harassment that may be considered biologically significant. Individual animals would, at most, flush into the water in response to maintenance activities but may also simply become alert or move across the beach away from equipment and crews. During 2013, SCWA observed that harbor seals are less likely to flush from the beach when the primary aggregation of seals is north of the breaching activity (please refer to Figure 2 of SCWA's application), meaning that personnel and equipment are not required to pass the seals. Four artificial breaching events were implemented in 2013, with two of these events occurring north of the primary aggregation and two to the south (at approximately 250 and 50 m distance) (SCWA, 2014). In both of the former cases, all seals present eventually flushed to the water, but when breaching activity remained to the south of the haul-out, only 11 and 53 percent of seals, respectively, were flushed.

California sea lions and northern elephant seals have been observed as less sensitive to stimulus than harbor seals during monitoring at numerous other sites. For example, monitoring of pinniped disturbance as a result of abalone research in the Channel Islands showed that while harbor seals flushed at a rate of 69 percent, California sea lions flushed at a rate of only 21 percent. The rate for elephant seals declined to 0.1 percent (VanBlaricom, 2010). In the event that either of these species is present during management activities, they would be expected to display a minimal reaction to maintenance activities—less than that expected of harbor seals.

Although the Jenner haul-out is not known as a primary pupping beach, pups have been observed during the pupping season; therefore, we have evaluated the potential for injury, serious injury, or mortality to pups. There is a lack of published data regarding pupping at the mouth of the Russian River, but SCWA monitors have observed pups on the beach. No births were observed during recent monitoring, but may be inferred based on signs indicating pupping (*e.g.,* blood spots on the sand, birds consuming possible placental remains). Pup injury or mortality would be most likely to occur in the event of extended separation of a mother and pup, or trampling in a stampede. As discussed previously, no stampedes have been recorded since development of appropriate protocols in 1999. Any California sea lions or northern elephant seals present would be independent juveniles or adults; therefore, analysis of impacts on pups is not relevant for those species.

Similarly, the period of mother-pup bonding, critical time needed to ensure pup survival and maximize pup health, is not expected to be impacted by estuary management activities. Harbor seal pups are extremely precocious, swimming and diving immediately after birth and throughout the lactation period, unlike most other phocids which normally enter the sea only after weaning (Lawson and Renouf, 1985; Cottrell *et al.,* 2002; Burns *et al.,* 2005). Lawson and Renouf (1987) investigated harbor seal mother-pup bonding in response to natural and anthropogenic disturbance. In summary, they found that the most critical bonding time is within minutes after birth. As described previously, the peak of pupping season is typically concluded by mid-May, when the lagoon management period begins. As such, it is expected that mother-pup bonding would likely be concluded as well. The number of management events during the months of March and April has been relatively low in the past, and the breaching activities occur in a single day over several hours. In addition, mitigation measures described later in this document further reduce the likelihood of any impacts to pups, whether through injury or mortality or interruption of mother-pup bonding (which may lead to abandonment).

In summary, and based on extensive monitoring data, we believe that impacts to hauled-out pinnipeds during estuary management activities would be behavioral harassment of limited duration (*i.e.,* less than one day) and limited intensity (*i.e.,* temporary flushing at most). Stampeding, and therefore injury or mortality, is not expected—nor been documented—in the years since appropriate protocols were established (see ''Mitigation'' for more details). Further, the continued, and increasingly heavy (see SCWA's monitoring reports), use of the haul-out despite decades of breaching events indicates that abandonment of the haul-out is unlikely.

Anticipated Effects on Marine Mammal Habitat

The purposes of the estuary management activities are to improve summer rearing habitat for juvenile salmonids in the Russian River estuary and/or to minimize potential flood risk to properties adjacent to the estuary. These activities would result in temporary physical alteration of the Jenner haul-out, but are essential to conserving and recovering endangered salmonid species, as prescribed by the BiOp. These salmonids are themselves prey for pinnipeds. In addition, with barrier beach closure, seal usage of the beach haul-out declines, and the three nearby river haul-outs may not be available for usage due to rising water surface elevations. Breaching of the barrier beach, subsequent to the temporary habitat disturbance, likely increases suitability and availability of habitat for pinnipeds. Biological and water quality monitoring would not physically alter pinniped habitat. Please see the previously referenced **Federal Register** notice (76 FR 14924; March 18, 2011) for a more detailed discussion of anticipated effects on habitat.

During SCWA's pinniped monitoring associated with artificial breaching activities from 1996 to 2000, the number of harbor seals hauled out declined when the barrier beach closed and then increased the day following an artificial breaching event (MSC, 1997, 1998, 1999, and 2000; SCWA and MSC, 2001). This response to barrier beach closure followed by artificial breaching has remained consistent in recent years and is anticipated to continue. However, it is possible that the number of pinnipeds using the haul-out could decline during the extended lagoon management period, when SCWA would seek to maintain a shallow outlet channel rather than the deeper channel associated with artificial breaching. Collection of baseline information during the lagoon management period is included in the monitoring requirements described later in this document. SCWA's previous monitoring, as well as Twohy's daily counts of seals at the sandbar (Table 1) indicate that the number of seals at the haul-out declines from August to October, so management of the lagoon outlet channel (and managing the sandbar as a summer lagoon) would have little effect on haul-out use during the latter portion of the lagoon management period. The early portion of the lagoon management period coincides with the pupping season. Past monitoring during this period, which represents some of the longest beach closures in the late spring and early summer months, shows that the number of pinnipeds at the haul-out tends to fluctuate, rather than showing the more straightforward declines and increases associated with closures and openings seen at other times of year (MSC, 1998). This may indicate that seal haul-out usage during the pupping season is less dependent on bar status. As such, the number of seals hauled out from May through July would be expected to fluctuate but is unlikely to respond dramatically to the absence of artificial breaching events. Regardless, any impacts to habitat resulting from

SCWA's management of the estuary during the lagoon management period are not in relation to natural conditions but, rather, in relation to conditions resulting from SCWA's discontinued approach of artificial breaching during this period.

In summary, there will be temporary physical alteration of the beach. However, natural opening and closure of the beach results in the same impacts to habitat. Therefore, seals are likely adapted to this cycle. In addition, the increase in rearing habitat quality has the goal of increasing salmonid abundance, ultimately providing more food for seals present within the action area. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

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).''

SCWA has requested, and NMFS proposes, authorization to take harbor seals, California sea lions, and northern elephant seals, by Level B harassment only, incidental to estuary management activities. These activities, involving increased human presence and the use of heavy equipment and support vehicles, are expected to harass pinnipeds present at the haul-out through disturbance only. In addition, monitoring activities prescribed in the BiOp may harass additional animals at the Jenner haul-out and at the three haul-outs located in the estuary (Penny Logs, Patty's Rock, and Chalanchawi). Estimates of the number of harbor seals, California sea lions, and northern elephant seals that may be harassed by the proposed activities is based upon the number of potential events associated with Russian River estuary management activities and the average number of individuals of each species that are present during conditions appropriate to the activity. As described previously in this document, monitoring effort at the mouth of the Russian River has shown that the number of seals utilizing the haul-out declines during bar-closed conditions. Table 3 details the total number of estimated takes for harbor seals.

Events associated with lagoon outlet channel management would occur only during the lagoon management period and are split into two categories: (1) Initial channel implementation, which would likely occur between May and September; and (2) maintenance and monitoring of the outlet channel, which would continue until October 15. In addition, it is possible that the initial outlet channel could close through natural processes, requiring additional channel implementation events. Based on past experience, SCWA estimates that a maximum of three outlet channel implementation events could be required, with each event lasting up to two days. Outlet channel implementation events would only occur when the bar is closed. Therefore, it is appropriate to use data from bar-closed monitoring events in estimating take (Table 2). Construction of the outlet channel is designed to produce a perched outflow, resulting in conditions that more closely resemble bar-closed than bar-open with regard to pinniped haul-out usage. As such, bar-closed data is appropriate for estimating take during all lagoon management period maintenance and monitoring activity. As dates of outlet channel implementation cannot be known in advance, the highest daily average of seals per month—the March average for 2009–15—is used in estimating take. For maintenance and monitoring activities associated with the lagoon outlet channel, which would occur on a weekly basis following implementation of the outlet channel, the average number of harbor seals for each month was used.

Artificial breaching activities would also occur during bar-closed conditions. Data collected specifically during bar-closed conditions may be used for estimating take associated with artificial breaching (Table 2). The number of estimated artificial breaching events is also informed by experience. For those months with more frequent historical bar closure events, we assume that two such events could occur in any given year. For other months, we assume that only one such event would occur in a given year. Please see Table 1 in SCWA's application for more information.

For monthly topographic surveys on the barrier beach, potential incidental take of harbor seals is typically calculated as one hundred percent of the seals expected to be encountered. The exception is during the month of April, when surveyors would avoid seals to reduce harassment of pups and/or mothers with neonates. For the monthly topographic survey during April, a pinniped monitor is positioned at the Highway 1 overlook and would notify the surveyors via radio when any seals on the haul-out begin to alert to their presence. This enables the surveyors to retreat slowly away from the haul-out, typically resulting in no disturbance. For that survey, the assumption is therefore that only ten percent of seals present would be harassed. The number of seals expected to be encountered is based on the average monthly number of seals hauled out as recorded during baseline surveys conducted by SCWA in 2011–15 (Table 1).

For biological and physical habitat monitoring activities in the estuary, it was assumed that pinnipeds may be encountered once per event and flush from a river haul-out. The potential for harassment associated with these events is limited to the three haul-outs located in the estuary. In past experience, SCWA typically sees no more than a single harbor seal at these haul-outs, which consist of scattered logs and rocks that often submerge at high tide.

As described previously, California sea lions and northern elephant seals are occasional visitors to the estuary. Based on limited information regarding occurrence of these species at the mouth of the Russian River estuary, we assume there is the potential to encounter one animal of each species per month throughout the year. Lagoon outlet channel activities could potentially occur over six months of the year, artificial breaching activities over eight months, topographic surveys year-round, and biological and physical monitoring in the estuary over eight months. Therefore, we assume that up to 34 incidents of take could occur per year for both the California sea lion and northern elephant seal. Based on past occurrence records, the proposed take authorization for these two species is likely a precautionary overestimate.

TABLE 3—ESTIMATED NUMBER OF HARBOR SEAL TAKES RESULTING FROM RUSSIAN RIVER ESTUARY MANAGEMENT ACTIVITIES

Number of animals expected to occur [a]	Number of events [b c]	Potential total number of individual animals that may be taken
Lagoon Outlet Channel Management (May 15 to October 15)		
Implementation: 117 [d]	Implementation: 3	Implementation: 702
Maintenance and Monitoring: May: 80 June: 98 July: 117 Aug: 17 Sept: 30 Oct: 28	Maintenance: May: 1 June–Sept: 4/month Oct: 1 Monitoring: June–Sept: 2/month Oct: 1	Maintenance: 1,156 Monitoring: 552 Total: 2,410
Artificial Breaching		
Oct: 28	Oct: 2	Oct: 56
Nov: 32	Nov: 2	Nov: 64
Dec: 59	Dec: 2	Dec: 118
Jan: 49	Jan: 1	Jan: 49
Feb: 75	Feb: 1	Feb: 75
Mar: 133	Mar: 1	Mar: 133
Apr: 99	Apr: 1	Apr: 99
May: 80	May: 2	May: 160
	12 events maximum	Total: 754
Topographic and Geophysical Beach Surveys		
Jan: 99	1 topographic survey/month; 100 percent of animals present Jun–Feb; 10 percent of animals present Mar–May.	Jan: 99
Feb: 131		Feb: 131
Mar: 165		Mar: 165
Apr: 141		Apr: 14
May: 151		May: 151
Jun: 164		Jun: 164
Jul: 282		Jul: 282
Aug: 133		Aug: 133
Sep: 62		Sep: 62
Oct: 48		Oct: 48
Nov: 68		Nov: 68
Dec: 98		Total: 1,415
Biological and Physical Habitat Monitoring in the Estuary		
1 [e]	113	113
Total		4,692

[a] For Lagoon Outlet Channel Management and Artificial Breaching, average daily number of animals corresponds with data from Table 2. For Topographic and Geophysical Beach Surveys, average daily number of animals corresponds with 2011–15 data from Table 1.

[b] For implementation of the lagoon outlet channel, an event is defined as a single, two-day episode. For the remaining activities, an event is defined as a single day on which an activity occurs. Some events may include multiple activities.

[c] Number of events for artificial breaching derived from historical data. The average number of events for each month was rounded up to the nearest whole number; estimated number of events for December was increased from one to two because multiple closures resulting from storm events have occurred in recent years during that month. The total numbers (12) likely represent an overestimate, as the average annual number of events is five.

[d] Although implementation could occur at any time during the lagoon management period, the highest daily average per month from the lagoon management period was used.

[e] Based on past experience, SCWA expects that no more than one seal may be present, and thus have the potential to be disturbed, at the three river haul-outs.

The take numbers described in the preceding text are annual estimates. Therefore, over the course of the 5-year period of validity of the proposed regulations, we propose to authorize a total of 23,460 incidents of take for harbor seals and 170 such incidents each for the California sea lion and northern elephant seal.

Analyses and Preliminary Determinations

Negligible Impact Analysis

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.'' 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 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, we consider other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as the number and nature of estimated Level A harassment takes (if any), and effects on habitat. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status.

Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into these analyses via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, sources of human-caused mortality).

Although SCWA's estuary management activities may disturb pinnipeds hauled out at the mouth of the Russian River, as well as those hauled out at several locations in the estuary during recurring monitoring activities, impacts are occurring to a small, localized group of animals. While these impacts can occur year-round, they occur sporadically and for limited duration (*e.g.,* a maximum of two consecutive days for water level management events). Seals will likely become alert or, at most, flush into the water in reaction to the presence of crews and equipment on the beach. While disturbance may occur during a sensitive time (during the March 15–June 30 pupping season), mitigation measures have been specifically designed to further minimize harm during this period and eliminate the possibility of pup injury or mother-pup separation.

No injury, serious injury, or mortality is anticipated, nor is the proposed action likely to result in long-term impacts such as permanent abandonment of the haul-out. Injury, serious injury, or mortality to pinnipeds would likely result from startling animals inhabiting the haul-out into a stampede reaction, or from extended mother-pup separation as a result of such a stampede. Long-term impacts to pinniped usage of the haul-out could result from significantly increased presence of humans and equipment on the beach. To avoid these possibilities, we have worked with SCWA to develop the previously described mitigation measures. These are designed to reduce the possibility of startling pinnipeds, by gradually apprising them of the presence of humans and equipment on the beach, and to reduce the possibility of impacts to pups by eliminating or altering management activities on the beach when pups are present and by setting limits on the frequency and duration of events during pupping season. During the past fifteen years of flood control management, implementation of similar mitigation measures has resulted in no known stampede events and no known injury, serious injury, or mortality. Over the course of that time period, management events have generally been infrequent and of limited duration.

No pinniped stocks for which incidental take authorization is proposed are listed as threatened or endangered under the ESA or determined to be strategic or depleted under the MMPA. Recent data suggests that harbor seal populations have reached carrying capacity; populations of California sea lions and northern elephant seals in California are also considered healthy.

In summary, and based on extensive monitoring data, we believe that impacts to hauled-out pinnipeds during estuary management activities would be behavioral harassment of limited duration (*i.e.,* less than one day) and limited intensity (*i.e.,* temporary flushing at most). Stampeding, and therefore injury or mortality, is not expected—nor been documented—in the years since appropriate protocols were established (see ''Proposed Mitigation'' for more details). Further, the continued, and increasingly heavy (see figures in SCWA documents), use of the haul-out despite decades of breaching events indicates that abandonment of the haul-out is unlikely. 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, we preliminarily find that the total marine mammal take from SCWA's estuary management activities will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers Analysis

The proposed number of animals taken for each species of pinniped can be considered small relative to the population size. There are an estimated 30,968 harbor seals in the California stock, 296,750 California sea lions, and 179,000 northern elephant seals in the California breeding population. Based on extensive monitoring effort specific to the affected haul-out and historical data on the frequency of the specified activity, we are proposing to authorize annual levels of take, by Level B harassment only, of 4,692 incidents of harassment for harbor seals, 34 incidents of harassment for California sea lions, and 34 incidents of harassment for northern elephant seals, representing 15.2, 0.01, and 0.02 percent of the populations, respectively. However, this represents an overestimate of the number of individuals harassed annually over the duration of the proposed regulations, because these totals represent much smaller numbers of individuals that may be harassed multiple times. 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 preliminarily find that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Proposed Monitoring and Reporting

In order to issue an incidental take authorization for an activity, section 101(a)(5)(A) 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:

• Occurrence of marine mammal species in action area (*e.g.,* presence, abundance, distribution, density).

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving, or feeding areas).

• Individual responses to acute stressors, or impacts of chronic exposures (behavioral or physiological).

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of an individual; or (2) population, species, or stock.

• Effects on marine mammal habitat and resultant impacts to marine mammals.

• Mitigation and monitoring effectiveness.

SCWA submitted a marine mammal monitoring plan as part of the ITA application. It can be found online at *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* The plan, which has been successfully implemented (in slightly different form from the currently proposed plan) by SCWA under previous ITAs, may be modified or supplemented based on comments or new information received from the public during the public comment period. The purpose of this monitoring plan, which is carried out collaboratively with the Stewards of the Coasts and Redwoods (Stewards) organization, is to detect the response of pinnipeds to estuary management activities at the Russian River estuary. SCWA has designed the plan both to satisfy the requirements of the IHA, and to address the following questions of interest:

1. Under what conditions do pinnipeds haul out at the Russian River estuary mouth at Jenner?

2. How do seals at the Jenner haul-out respond to activities associated with the construction and maintenance of the lagoon outlet channel and artificial breaching activities?

3. Does the number of seals at the Jenner haul-out significantly differ from historic averages with formation of a summer (May 15 to October 15) lagoon in the Russian River estuary?

4. Are seals at the Jenner haul-out displaced to nearby river and coastal haul-outs when the mouth remains closed in the summer?

Proposed Monitoring Measures

Baseline Monitoring—Seals at the Jenner haul-out would be counted for four hours every week, with no more than four baseline surveys each month. Two monitoring events each month would occur in the morning and two would occur in the afternoon with an effort to schedule a morning survey at low and high tide each month and an afternoon survey at low and high tide each month. This baseline information will provide SCWA with details that may help to plan estuary management activities in the future to minimize pinniped interaction. Survey protocols are as follows: All seals hauled out on the beach are counted every 30 minutes from the overlook on the bluff along Highway 1 adjacent to the haul-out using spotting scopes. Monitoring may conclude for the day if weather conditions affect visibility (*e.g.,* heavy fog in the afternoon). Depending on how the sandbar is formed, seals may haul out in multiple groups at the mouth. At each 30-minute count, the observer indicates where groups of seals are hauled out on the sandbar and provides a total count for each group. If possible, adults and pups are counted separately.

This primary haul-out is where the majority of seals are found and where pupping occurs, and SCWA's proposed monitoring would allow continued development in understanding the physical and biological factors that influence seal abundance and behavior at the site. In particular, SCWA notes that the proposed frequency of surveys would allow them to be able to observe the influence of physical changes that do not persist for more than ten days, like brief periods of barrier beach closures or other environmental changes, and would allow for assessment of how seals respond to barrier beach closures as well as accurate estimation of the number of harbor seal pups born at Jenner each year.

In addition to the census data, disturbances of the haul-out are recorded. The method for recording disturbances follows those in Mortenson (1996). Disturbances would be recorded on a three-point scale that represents an increasing seal response to the disturbance (Table 4). The time, source, and duration of the disturbance, as well as an estimated distance between the source and haul-out, are recorded. It should be noted that only responses falling into Mortenson's Levels 2 and 3 will be considered as harassment under the MMPA, under the terms of these proposed regulations.

TABLE 4—SEAL RESPONSE TO DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flight	All retreats (flushes) to the water.

Weather conditions are recorded at the beginning of each census. These include temperature, Beaufort sea state, precipitation/visibility, and wind speed. Tide levels and estuary water surface elevations are correlated to the monitoring start and end times.

In an effort towards understanding possible relationships between use of the Jenner haul-out and nearby coastal and river haul-outs, several other haul-outs on the coast and in the Russian River estuary are monitored as well (see Figure 1 of SCWA's application). Peripheral site monitoring would occur only in the event of an extended period of lagoon conditions (*i.e.,* barrier beach closed with perched outlet channel for three weeks or more). Abundance at these sites has been observed to generally be very low regardless of river mouth condition. These sites are generally very small physically, composed of small rocks or outcrops or logs in the river, and therefore could not accommodate significant displacement from the main beach haul-out. Monitoring of peripheral sites under extended lagoon conditions will allow for possible detection of any changed use patterns.

Estuary Management Event Monitoring, Lagoon Outlet Channel—Should the mouth close during the lagoon management period, SCWA would construct a lagoon outlet channel as required by the BiOp. Activities associated with the initial construction of the outlet channel, as well as the maintenance of the channel that may be required, would be monitored for disturbances to the seals at the Jenner haul-out.

A one-day pre-event channel survey would be made within one to three days prior to constructing the outlet channel. The haul-out would be monitored on the day the outlet channel is constructed and daily for up to the maximum two days allowed for channel excavation activities. Monitoring would also occur on each day that the outlet channel is maintained using heavy equipment for the duration of the lagoon management period. Monitoring of outlet channel construction and maintenance would correspond with that described under the ''Baseline Monitoring'' section previously, with the exception that management activity monitoring duration is defined by event duration. On the day of the management event, pinniped monitoring begins at least one hour prior to the crew and equipment accessing the beach work area and continues through the duration of the event, until at least one hour after the crew and equipment leave the beach.

In an attempt to understand whether seals from the Jenner haul-out are displaced to coastal and river haul-outs nearby when management events occur, other nearby haul-outs are monitored concurrently with monitoring of outlet channel construction and maintenance activities. This provides an opportunity to qualitatively assess whether these haul-outs are being used by seals displaced from the Jenner haul-out during lagoon outlet channel excavation and maintenance. This monitoring would not provide definitive results regarding displacement to nearby coastal and river haul-outs, as individual seals are not marked or photo-identified, but is useful in tracking general trends in haul-out use during lagoon outlet channel excavation and maintenance. As volunteers are required to monitor these peripheral haul-outs, haul-out locations may need to be prioritized if there are not enough volunteers available. In that case, priority would be assigned to the nearest haul-outs (North Jenner and Odin Cove), followed by the Russian River estuary haul-outs, and finally the more distant coastal haul-outs.

Estuary Management Event Monitoring, Artificial Breaching Events—In accordance with the Russian River BiOp, SCWA may artificially breach the barrier beach outside of the summer lagoon management period, and may conduct a maximum of two such breachings during the lagoon management period, when estuary water surface elevations rise above seven feet. In that case, NMFS may be consulted regarding potential scheduling of an artificial breaching event to open the barrier beach and reduce flooding risk.

Pinniped response to artificial breaching will be monitored at each such event during the period of validity of these proposed regulations. Methods would follow the census and disturbance monitoring protocols described in the ''Baseline Monitoring'' section, which were also used for the 1996 to 2000 monitoring events (MSC, 1997, 1998, 1999, 2000; SCWA and MSC, 2001). The exception, as for lagoon management events, is that duration of monitoring is dependent upon duration of the event. On the day of the management event, pinniped monitoring begins at least one hour prior to the crew and equipment accessing the beach work area and continues through the duration of the event, until at least one hour after the crew and equipment leave the beach.

For all counts, the following information would be recorded in thirty-minute intervals: (1) Pinniped counts, by species; (2) behavior; (3) time, source and duration of any disturbance; (4) estimated distances between source of disturbance and pinnipeds; (5) weather conditions (*e.g.,* temperature, wind); and (5) tide levels and estuary water surface elevation.

Monitoring During Pupping Season—The pupping season is defined as March 15 to June 30. Baseline, lagoon outlet channel, and artificial breaching monitoring during the pupping season will include records of neonate (pups less than one week old) observations. Characteristics of a neonate pup include: Body weight less than 15 kg; thin for their body length; an umbilicus or natal pelage present; wrinkled skin; and awkward or jerky movements on land. SCWA will coordinate with the Seal Watch monitoring program to determine if pups less than one week old are on the beach prior to a water level management event.

If, during monitoring, observers sight any pup that might be abandoned, SCWA would contact the NMFS stranding response network immediately and also report the incident to NMFS's West Coast Regional Office and Office of Protected Resources within 48 hours. Observers will not approach or move the pup. Potential indications that a pup may be abandoned are no observed contact with adult seals, no movement of the pup, and the pup's attempts to nurse are rebuffed.

Staffing—Monitoring is conducted by qualified individuals, which may include professional biologists employed by NMFS or SCWA or volunteers trained by the Stewards' Seal Watch program (Stewards). All volunteer monitors are required to attend classroom-style training and field site visits to the haul-outs. Training covers the MMPA and conditions of the ITA, SCWA's pinniped monitoring protocols, pinniped species identification, age class identification (including a specific discussion regarding neonates), recording of count and disturbance observations (including completion of datasheets), and use of equipment. Pinniped identification includes the harbor seal, California sea lion, and northern elephant seal, as well as other pinniped species with potential to occur in the area. Generally, SCWA staff and volunteers collect baseline data on Jenner haul-out use during the twice-monthly monitoring events. A schedule for this monitoring would be established with Stewards once volunteers are available for the monitoring effort. SCWA staff monitors lagoon outlet channel excavation and maintenance activities and artificial breaching events at the Jenner haul-out, with assistance from Stewards volunteers as available. Stewards volunteers monitor the coastal and river haul-out locations during lagoon outlet channel excavation and maintenance activities.

Training on the MMPA, pinniped identification, and the conditions of the ITA is held for staff and contractors assigned to estuary management activities. The training includes equipment operators, safety crew members, and surveyors. In addition, prior to beginning each water surface elevation management event, the biologist monitoring the event participates in the onsite safety meeting to discuss the location(s) of pinnipeds at the Jenner haul-out that day and methods of avoiding and minimizing disturbances to the haul-out as outlined in the ITA.

Reporting

SCWA is required to submit an annual report on all activities and marine mammal monitoring results to NMFS within ninety days following the end of the monitoring period. These reports would contain the following information:

- The number of pinnipeds taken, by species and age class (if possible);
- Behavior prior to and during water level management events;
- Start and end time of activity;
- Estimated distances between source and pinnipeds when disturbance occurs;
- Weather conditions (*e.g.,* temperature, wind, etc.);

• Haul-out reoccupation time of any pinnipeds based on post-activity monitoring;
• Tide levels and estuary water surface elevation; and
• Pinniped census from bi-monthly and nearby haul-out monitoring.

The annual report includes descriptions of monitoring methodology, tabulation of estuary management events, summary of monitoring results, and discussion of problems noted and proposed remedial measures.

SCWA must also submit a comprehensive summary report with any future application for renewed regulations and Letters of Authorization.

Summary of Previous Monitoring

SCWA complied with the mitigation and monitoring required under previous authorizations. Prior notices of proposed authorization have provided summaries of monitoring results from 2009–15; please see those documents for more information. Previous monitoring reports are available online at *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.*

While the observed take in all years was significantly lower than the level authorized, it is possible that incidental take in future years could approach the level authorized. Actual take is dependent largely upon the number of water level management events that occur, which is unpredictable. Take of species other than harbor seals depends upon whether those species, which do not consistently utilize the Jenner haul-out, are present. The authorized take, though much higher than the actual take, is justified based on conservative estimated scenarios for animal presence and necessity of water level management. No significant departure from the method of estimation is used for these proposed regulations (see ''Estimated Take by Incidental Harassment'') for the same activities in 2017–22.

SCWA has continued to investigate the relative disturbance caused by their activities versus that caused by other sources (see Figures 5–6 of SCWA's 2015 monitoring report as well as the 2014 report). Harbor seals are most frequently disturbed by people on foot, with an increase in frequency of people present during bar-closed conditions (see Figure 5 of SCWA's 2015 monitoring report). Kayakers are the next most frequent source of disturbance overall, also with an increase during bar-closed conditions. For any disturbance event it is often only a fraction of the total haul-out that responds. Some sources of disturbance, though rare, have a larger disturbing effect when they occur. For example, disturbances from dogs occur less frequently, but these incidents often disturb over half of the seals hauled out.

Conclusions

The following section provides a summary of information available in SCWA's 2015 monitoring report. The primary purpose of SCWA's pinniped monitoring plan is to detect the response of pinnipeds to estuary management activities at the Russian River estuary. However, as described previously, the questions listed below are also of specific interest. The limited data available thus far precludes drawing definitive conclusions regarding the key questions in SCWA's monitoring plan, but we discuss preliminary conclusions and available evidence below.

1. Under what conditions do pinnipeds haul out at the Russian River estuary mouth at Jenner?

Although multiple factors likely influence harbor seal presence at the haul-out, SCWA has shown that since 2009 harbor seal attendance is influenced by hour of day (increasing from morning through early afternoon; see Figure 2 in SCWA's monitoring plan), tidal state (decrease with higher tides; see Figure 3 of SCWA's monitoring plan), month of year (peak in July and decrease in fall; see Figure 4 of SCWA's monitoring plan), and river mouth condition (*i.e.,* open or closed).

Daily average abundance of seals was lower during bar-closed conditions compared to bar-open conditions. This effect is likely due to a combination of factors, including increased human disturbance, reduced access to the ocean from the estuary side of the barrier beach, and the increased disturbance from wave action when seals utilize the ocean side of the barrier beach. Baseline data indicate that the highest numbers of seals are observed at the Jenner haul-out in July (during the molting season; see Figure 2 of SCWA's 2015 monitoring report), as would be expected on the basis of harbor seal biological and physiological requirements (Herder, 1986; Allen *et al.,* 1989; Stewart and Yochem, 1994; Hanan, 1996; Gemmer, 2002).

Overall, seals appear to utilize the Jenner haul-out throughout the tidal cycle. Seal abundance is significantly lower during the highest of tides when the haul-out is subject to an increase in wave overwash. Time of day had some effect on seal abundance at the Jenner haul-out, as abundance was greater in the afternoon hours compared to the morning hours. More analysis exploring the relationship of ambient temperature, incidence of disturbance, and season on time of day effects would help to explain why these variations in seal abundance occur. It is likely that a combination of multiple factors (*e.g.,* season, tides, wave heights, level of beach disturbance) influence when the haul-out is most utilized.

2. How do seals at the Jenner haul-out respond to activities associated with the construction and maintenance of the lagoon outlet channel and artificial breaching activities?

SCWA has, thus far, implemented the lagoon outlet channel only once, in 2010. The response of harbor seals at the Jenner haul-out to the outlet channel implementation activities was similar to responses observed during past artificial breaching events (MSC, 1997, 1998, 1999, 2000; SCWA and MSC, 2001). The harbor seals typically alert to the sound of equipment on the beach and leave the haul-out as the crew and equipment approach. Individuals then haul out on the beach while equipment is operating, leaving the beach again when equipment and staff depart, and typically begin to return to the haul-out within thirty minutes of the work ending. Because the barrier beach reformed soon after outlet channel implementation and subsequently breached on its own following the 2010 event, maintenance of the outlet channel was not necessary and monitoring of the continued response of pinnipeds at the Jenner haul-out to maintenance of the outlet channel and management of the lagoon for the duration of the lagoon management period has not yet been possible. As noted previously, when breaching activities were conducted south of the haul-out location seals often remained on the beach during all or some of the breaching activity. This indicates that seals are less disturbed by activities when equipment and crew do not pass directly past their haul-out.

3. Does the number of seals at the Jenner haul-out significantly differ from historic averages with formation of a summer lagoon in the Russian River estuary?

The duration of closures in recent years has not generally been dissimilar from the duration of closures that have been previously observed at the estuary, and lagoon outlet channel implementation has occurred only once, meaning that there has been a lack of opportunity to study harbor seal response to extended lagoon conditions. A barrier beach has formed during the lagoon management period sixteen times since SCWA began implementing the lagoon outlet channel adaptive management plan, with an average duration of fourteen days. However, the sustained river outlet closures observed in 2014–15 during the lagoon management period provide some information regarding the abundance of seals during the formation of a summer lagoon. While seal abundance was lower overall during bar-closed conditions, overall there continues to be a slight increasing trend in seal abundance. These observations may indicate that, while seal abundance exhibits a short-term decline following bar closure, the number of seals utilizing the Jenner haul-out overall during such conditions is not affected. Short-term fluctuations in abundance aside, it appears that the general trends of increased abundance during summer and decreased abundance during fall, which coincide with the annual molt and likely foraging dispersal, respectively, are not affected. Such short-term fluctuations are likely not an indicator that seals are less likely to use the Jenner haul-out at any time.

4. Are seals at the Jenner haul-out displaced to nearby river and coastal haul-outs when the mouth remains closed in the summer?

Initial comparisons of peripheral (river and coastal) haul-out count data to the Jenner haul-out counts have been inconclusive (see Table 2 and Figures 6–7 of SCWA's 2015 monitoring report). As noted above, SCWA will focus ongoing effort at peripheral sites during periods of extended bar-closure and lagoon formation.

Adaptive Management

The regulations governing the take of marine mammals incidental to SCWA estuary management activities would contain an adaptive management component.

The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from SCWA regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

SCWA's monitoring program (see ''Proposed Monitoring and Reporting'') would be managed adaptively. Changes to the proposed monitoring program may be adopted if they are reasonably likely to better accomplish the MMPA monitoring goals described previously or may better answer the specific questions associated with SCWA's monitoring plan.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by the specified activity. Therefore, we have 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)

No marine mammal species listed under the ESA are expected to be affected by these activities. Therefore, we have determined that section 7 consultation under the ESA is not required.

National Environmental Policy Act

NMFS prepared an EA (2010) and associated FONSI in accordance with NEPA and the regulations published by the Council on Environmental Quality. These documents are posted at the aforementioned Internet address. Information in SCWA's application, NMFS's EA (2010), and this notice collectively provide the environmental information related to proposed issuance of these regulations for public review and comment. We will review all comments submitted in response to this notice as we complete the NEPA process, including a decision of whether the existing EA and FONSI provide adequate analysis related to the potential environmental effects of issuing an incidental take authorization to SCWA, prior to a final decision on the request.

Request for Information

NMFS requests interested persons to submit comments, information, and suggestions concerning SCWA's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare the final rule and make final determinations on whether to issue the requested authorizations. This notice and referenced documents provide all environmental information relating to our proposed action for public review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. SCWA is the sole entity that would be subject to the requirements in these proposed regulations, and the Sonoma County Water Agency is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Under the RFA, governmental jurisdictions are considered to be small if they are ''. . . governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000 . . . .'' As of the 2010 census, Sonoma County, CA had a population of nearly 500,000 people. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see **ADDRESSES**).

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 23, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

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

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add subpart A to part 217 to read as follows:

Subpart A—Taking Marine Mammals Incidental to Russian River Estuary Management Activities

Sec.

Subpart A—Taking Marine Mammals Incidental to Russian River Estuary Management Activities

§ 217.1 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Sonoma County Water Agency (SCWA) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to estuary management activities.

(b) The taking of marine mammals by SCWA may be authorized in a Letter of Authorization (LOA) only if it occurs at Goat Rock State Beach or in the Russian River estuary in California.

§ 217.2 Effective dates.

Regulations in this subpart are effective from [EFFECTIVE DATE OF FINAL RULE] through [DATE 5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE].

§ 217.3 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.7 of this chapter, the Holder of the LOA (hereinafter ''SCWA'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.1(b) of this chapter by Level B harassment associated with estuary management activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.4 Prohibitions.

Notwithstanding takings contemplated in § 217.1 and authorized by an LOA issued under §§ 216.106 and 217.7 of this chapter, no person in connection with the activities described in § 217.1 of this chapter may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 and 217.7 of this chapter;

(b) Take any marine mammal not specified in such LOAs;

(c) Take any marine mammal specified in such LOAs in any manner other than as specified;

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.5 Mitigation requirements.

When conducting the activities identified in § 217.1(a) of this chapter, the mitigation measures contained in any LOA issued under §§ 216.106 and 217.7 of this chapter must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions:* (1) A copy of any issued LOA must be in the possession of SCWA, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) If SCWA observes a pup that may be abandoned, it shall contact the National Marine Fisheries Service (NMFS) West Coast Regional Stranding Coordinator immediately and also report the incident to NMFS Office of Protected Resources within 48 hours. Observers shall not approach or move the pup.

(b) SCWA crews shall cautiously approach the haul-out ahead of heavy equipment.

(c) SCWA staff shall avoid walking or driving equipment through the seal haul-out.

(d) Crews on foot shall make an effort to be seen by seals from a distance.

(e) During breaching events, all monitoring shall be conducted from the overlook on the bluff along Highway 1 adjacent to the haul-out.

(f) A water level management event may not occur for more than two consecutive days unless flooding threats cannot be controlled.

(g) All work shall be completed as efficiently as possible and with the smallest amount of heavy equipment possible.

(h) Boats operating near river haul-outs during monitoring shall be kept within posted speed limits and driven as far from the haul-outs as safely possible.

(i) SCWA shall implement the following mitigation measures during pupping season (March 15–June 30):

(1) SCWA shall maintain a one week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach.

(2) If a pup less than one week old is on the beach where heavy machinery will be used or on the path used to access the work location, the management action shall be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA shall consult with NMFS and the California Department of Fish and Wildlife to determine the appropriate course of action. SCWA shall coordinate with the locally established seal monitoring program (Stewards of the Coast and Redwoods) to determine if pups less than one week old are on the beach prior to a breaching event.

(3) Physical and biological monitoring shall not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

§ 217.6 Requirements for monitoring and reporting.

(a) Monitoring and reporting shall be conducted in accordance with the approved Pinniped Monitoring Plan.

(b) Baseline monitoring shall be conducted each week, with two events per month occurring in the morning and two per month in the afternoon. These censuses shall continue for four hours, weather permitting; the census days shall be chosen to ensure that monitoring encompasses a low and high tide each in the morning and afternoon. All seals hauled out on the beach shall be counted every 30 minutes from the overlook on the bluff along Highway 1 adjacent to the haul-out using high-powered spotting scopes. Observers shall indicate where groups of seals are hauled out on the sandbar and provide a total count for each group. If possible, adults and pups shall be counted separately.

(c) Peripheral coastal haul-outs shall be visited concurrently with baseline monitoring in the event that a lagoon outlet channel is implemented and maintained for a prolonged period of over 21 days.

(d) During estuary management events, monitoring shall occur on all days that activity is occurring using the same protocols as described for baseline monitoring, with the difference that monitoring shall begin at least one hour prior to the crew and equipment accessing the beach work area and continue through the duration of the event, until at least one hour after the crew and equipment leave the beach. In addition, a one-day pre-event survey of the area shall be made within one to three days of the event and a one-day post-event survey shall be made after the event, weather permitting.

(e) For all monitoring, the following information shall be recorded in 30-minute intervals:

(1) Pinniped counts by species;

(2) Behavior;

(3) Time, source and duration of any disturbance, with takes incidental to SCWA actions recorded only for responses involving movement away from the disturbance or responses of greater intensity (*e.g.,* not for alerts);

(4) Estimated distances between source of disturbance and pinnipeds;

(5) Weather conditions (*e.g.,* temperature, percent cloud cover, and wind speed); and

(6) Tide levels and estuary water surface elevation.

(f) *Reporting:* (1) Annual reporting: (i) SCWA shall submit an annual summary report to NMFS not later than ninety days following the end of a given reporting period. SCWA shall provide a final report within thirty days following resolution of comments on the draft report.

(ii) These reports shall contain, at minimum, the following:

(A) The number of seals taken, by species and age class (if possible);

(B) Behavior prior to and during water level management events;

(C) Start and end time of activity;

(D) Estimated distances between source and seals when disturbance occurs;

(E) Weather conditions (*e.g.,* temperature, wind, etc.);

(F) Haul-out reoccupation time of any seals based on post-activity monitoring;

(G) Tide levels and estuary water surface elevation;

(H) Seal census from bi-monthly and nearby haul-out monitoring; and

(I) Specific conclusions that may be drawn from the data in relation to the four questions of interest in SCWA's Pinniped Monitoring Plan, if possible.

(2) SCWA shall submit a comprehensive summary report to NMFS in conjunction with any future submitted request for incidental take authorization.

(g) Reporting of injured or dead marine mammals:

(1) In the unanticipated event that the activity defined in § 217.1(a) clearly causes the take of a marine mammal in a prohibited manner, SCWA shall immediately cease such activity and report the incident to the Office of Protected Resources (OPR), NMFS and the West Coast Regional Stranding Coordinator, NMFS. Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with SCWA to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. SCWA may not resume their activities until notified by NMFS. The report must include the following information:

(i) Time and date of the incident;

(ii) Description of the incident;

(iii) Environmental conditions;

(iv) Description of all marine mammal observations in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Fate of the animal(s); and

(vii) Photographs or video footage of the animal(s).

(2) In the event that SCWA discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), SCWA shall immediately report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (g)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with SCWA to determine whether additional mitigation measures or modifications to the activities are appropriate.

(3) In the event that SCWA discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.1(a) (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), SCWA shall report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. SCWA shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

(4) Pursuant to paragraphs (g)(2) and (3) of this section, SCWA may use discretion in determining what injuries (*i.e.,* nature and severity) are appropriate for reporting. At minimum, SCWA must report those injuries considered to be serious (*i.e.,* will likely result in death) or that are likely caused by human interaction (*e.g.,* entanglement, gunshot). Also pursuant to sections paragraphs (g)(2) and (3) of this section, SCWA may use discretion in determining the appropriate vantage point for obtaining photographs of injured/dead marine mammals.

§ 217.7 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, SCWA must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, SCWA may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, SCWA must apply for and obtain a modification of the LOA as described in § 217.8 of this chapter.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.8 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 and 217.7 of this chapter for the activity identified in § 217.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the

anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.7 of this chapter for the activity identified in § 217.1(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with SCWA regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from SCWA's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 and 217.7 of this chapter, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§§ 217.9–217.10 [Reserved]

[FR Doc. 2016–31592 Filed 12–29–16; 8:45 am]

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Notices

Federal Register

Vol. 81, No. 251

Friday, December 30, 2016

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 27, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 30, 2017 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Business-Cooperative Service

Title: Rural Economic Development Loan and Grant Program.

OMB Control Number: 0570–0035.

Summary of Collection: The information collected is necessary to implement Section 313(b) (2) of the Rural Electrification Act of 1936 (7 U.S.C. 940(c)) that established a loan and grant program. Rural Business Service (RBS) mission is to improve the quality of life in rural America by financing community facilities and businesses, providing technical assistance and creating effective strategies for rural development. Under this program, zero interest loans and grants are provided to electric and telecommunications utilities that have borrowed funds from RUS. The purpose of the program is to encourage these electric and telecommunications utilities to promote rural economic development and job creation projects such as business start-up costs, business expansion, community development, and business incubator projects.

Need and Use of the Information: Various forms and narrative requirements will be used to collect the necessary information. RBS needs this collected information to select the projects it believes will provide the most long-term economic benefit to rural areas. The selection process is competitive and RBS has generally received more applications than it could fund. RBS also needs to make sure the funds are used for the intended purpose, and in the case of the loan, the funds will be repaid. RBS must determine that loans made from revolving loan funds established with grants are used for eligible purposes.

Description of Respondents: Not-for-profit Institutions; Business or other for-profit.

Number of Respondents: 120.

Frequency of Responses: Reporting: On Occasion, Annually.

Total Burden Hours: 4,781.

Rural Business-Cooperative Service

Title: Rural Micro-Entrepreneur Assistance Program.

OMB Control Number: 0570–0062.

Summary of Collection: Section 6022 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) authorizes the Rural Microentrepreneur Assistance Program (RMAP). The Secretary makes direct loans to rural microenterprise development organizations (MDOs) that are participating in the program (who are referred to as "microlenders") for the purpose of capitalizing microloan revolving funds to provide fixed interest rate business loans of $50,000 or less to microentrepreneurs, as defined in the 2008 Farm Bill.

Need and Use of the Information: The program provides rural microentrepreneurs with the skills necessary to establish new rural microenterprises; to provide continuing technical and financial assistance related to the successful operation of rural microenterprises; and to assist with the cost of providing other activities and services related to the successful operation of MDOs and rural microenterprises. Microlenders seeking loans and/or grants will have to submit applications that include specified information, certifications, and agreements to the Agency. This information will be used to determine applicant eligibility and to ensure that funds are used for authorized purposes.

Description of Respondents: Business or other for-profit; Not-for-profit Institutions; State, Local or Tribal governments.

Number of Respondents: 75.

Frequency of Responses: Reporting: Quarterly, Annually.

Total Burden Hours: 3,254.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–31692 Filed 12–29–16; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–801]

Solid Urea From the Russian Federation: Rescission of Antidumping Duty Administrative Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is rescinding the administrative review of the antidumping duty order on solid urea from the Russian Federation for the period of July 1, 2015 through June 30, 2016.

DATES: Effective December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Denisa Ursu, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1766 or (202) 482–2285, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 5, 2016, the Department published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on solid urea from the Russian Federation for the period of July 1, 2015 through June 30, 2016.[1] On July 29 2016, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), the Department received a timely request from the petitioners, the Ad Hoc Committee of Domestic Nitrogen Producers and its individual members, CF Industries, Inc. and PCS Nitrogen Fertilizer L.P., to conduct an administrative review of the antidumping duty order on solid urea from the Russian Federation manufactured or exported by MCC EuroChem, or its urea production subsidiaries OJSC Nevinnomysskiy Azot and OJSC NAKAzot (MCC EuroChem), and Joint Stock Company PhosAgro-Cherepovets.[2]

On September 12, 2016, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order.[3] This administrative review covers MCC EuroChem and Joint Stock Company PhosAgro-Cherepovets during the period July 1, 2015 through June 30, 2016. On November 21, 2016, the petitioners timely withdrew their request for an administrative review for both MCC EuroChem and Joint Stock Company PhosAgro-Cherepovets.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, if the party that requested the review withdraws its request within 90 days of the date of publication of notice of initiation of the requested review. The petitioner withdrew its review request before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order. Therefore, in response to the timely withdrawal of the review request, the Department is rescinding in its entirety the administrative review of the antidumping duty order on solid urea from the Russian Federation for the review period July 1, 2015 through June 30, 2016.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as the only reminder to importers whose entries will be liquidated as a result of this rescission notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement may result in the presumption that reimbursement of antidumping duties and/or countervailing duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 751 of the Act and 19 CFR 351.213(d)(4).

Dated: December 23, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–31718 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 81 FR 43584 (July 5, 2016).

[2] *See* Petitioner's letter, ''Solid Urea from the Russian Federation; Request for Administrative Review,'' dated July 29, 2016.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 62720 (September 12, 2016).

[4] *See* Letter from Counsel to the Ad Hoc Committee of Domestic Nitrogen Producers dated November 21, 2016.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–801, A–823–801]

Solid Urea From the Russian Federation and Ukraine: Final Results of Sunset Reviews and Revocation of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 1, 2016, the Department of Commerce (Department) initiated the sunset reviews of the antidumping duty orders on solid urea from the Russian Federation and Ukraine. Because the domestic interested parties did not participate in these sunset reviews, the Department is revoking these antidumping duty orders.

DATES: Effective December 20, 2016.

FOR FURTHER INFORMATION CONTACT: Robert James or John Anwesen, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–0649 and 202–482–0131, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 14, 1987, the Department issued an antidumping duty order on solid urea from the Union of Soviet Socialist Republics (USSR).[1] In December 1991, the USSR divided into 15 republics. In response to the dissolution, the Department transferred the original order to all 15 republics and applied a uniform cash deposit rate.[2]

[1] *See Urea from the Union of Soviet Socialist Republics,* 52 FR 26367 (July 14, 1987).

[2] *See Solid Urea from the Union of Soviet Socialist Republics; Transfer of the Antidumping*

On March 1, 1999, the Department initiated sunset reviews on these orders and later published its notice of continuation of the antidumping duty orders for certain countries.[3] On October 1, 2004, the Department initiated the second sunset reviews of these orders and later published its notice of continuation of the antidumping duty orders on solid urea from the Russian Federation and Ukraine.[4] On December 1, 2010, the Department initiated the third sunset reviews of these orders and later published its notice of continuation of the antidumping duty orders.[5] On November 1, 2016, the Department initiated the fourth sunset reviews of these orders.[6]

We did not receive a notice of intent to participate from domestic interested parties in these fourth sunset reviews by the deadline date.[7] As a result, the Department determined that no domestic interested party intends to participate in the sunset reviews,[8] and on November 21, 2016, we notified the International Trade Commission, in writing, that we intended to issue a final determination revoking these antidumping duty orders.[9] On December 1, 2016, the Department received a submission from the Ministry of Economic Development and Trade of Ukraine regarding its position on this matter.[10]

Duty Order on Solid Urea from the Union of Soviet Socialist Republics to the Commonwealth of Independent States and the Baltic States and Opportunity to Comment, 57 FR 28828 (June 29, 1992).

[3] *See Continuation of Antidumping Duty Orders: Solid Urea from Belarus, Estonia, Lithuania, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan,* 64 FR 62653 (November 17, 1999); *see also Antidumping Duty Order; Urea from the Socialist Republic of Romania,* 52 FR 2636 (July 14, 1987) and *Final Results of Expedited Sunset Review: Solid Urea from Romania,* 64 FR 48360 (September 3, 1999) (Because Romania was not part of the USSR, the initial investigation and the first five-year review on urea from Romania were conducted separately, but the continuation order combined the remaining former Soviet Socialist Republics and Romania together.); *Revocation of Antidumping Duty Order: Solid Urea from Armenia,* 64 FR 62654 (November 17, 1999); *March 1999 Sunset Reviews: Final Results and Revocations,* 64 FR 24137 (May 5, 1999) (revoking the antidumping duty orders on solid urea from Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, and Moldova); and *March and April 1999 Sunset Reviews: Final Results and Revocations,* 64 FR 28974 (May 28, 1999) (revoking the antidumping duty order on solid urea from Latvia).

[4] *See Notice of Continuation of Antidumping Duty Orders: Solid Urea from the Russian Federation and Ukraine,* 71 FR 581 (January 5, 2006); *see also Solid Urea from Belarus, Estonia, Lithuania, Romania, Tajikistan, Turkmenistan, and Uzbekistan: Final Results and Revocation of Orders,* 69 FR 77993 (December 29, 2004).

[5] *Solid Urea from the Russian Federation and Ukraine: Continuation of Antidumping Duty Orders,* 76 FR 78885 (December 20, 2011).

[6] See *Initiation of Five-Year (''Sunset'') Reviews,* 81 FR 75808 (November 1, 2016).

[7] *See* 19 CFR 351.218(d)(1)(i).

[8] *See* 19 CFR 351.218(d)(1)(iii)(A).

[9] *See* 19 CFR 351.218(d)(1)(iii)(B)(2).

Scope of the Orders

The merchandise subject to the orders is solid urea, a high-nitrogen content fertilizer which is produced by reacting ammonia with carbon dioxide. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) item number 3102.10.00.00. Previously such merchandise was classified under item number 480.3000 of the Tariff Schedules of the United States. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the orders is dispositive.

Determination To Revoke

Pursuant to section 751(c)(3)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.218(d)(1)(iii)(B)(3), if no domestic interested party files a notice of intent to participate, the Department shall, within 90 days after the initiation of the review, issue a final determination revoking the order. Because the domestic interested parties did not file a notice of intent to participate in these sunset reviews, the Department finds that no domestic interested party is participating in these sunset reviews. Therefore, consistent with 19 CFR 351.222(i)(2)(i) we are revoking these antidumping duty orders effective December 20, 2016, the fifth anniversary of the date the Department published its most recent notice of continuation of the antidumping duty orders.

Effective Date of Revocation

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.222(i)(2)(i), the Department will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation of the merchandise subject to these orders entered, or withdrawn from warehouse, on or after December 20, 2016. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of these orders and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

[10] *See* Letter from Ministry of Economic Development and Trade of Ukraine, ''Solid Urea from Ukraine, 4th Sunset Review: A–823–801,'' dated December 1, 2016.

We are issuing and publishing the final determination in these five-year (sunset) reviews and notice in accordance with sections 751(c) and 777(i)(1) of the Act.

Dated: December 23, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–31719 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–810]

Welded ASTM A–312 Stainless Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on welded ASTM A–312 stainless steel pipe from Republic of Korea (Korea). The period of review (POR) is December 1, 2014, through November 30, 2015. The review covers two exporters and/or producers of the subject merchandise: SeAH Steel Corporation (SeAH) and LS Metal Co., Ltd. (LS Metal). The Department preliminarily determines that during the POR SeAH made sales of subject merchandise at less than normal value and LS Metal had no shipments. We invite interested parties to comment on these preliminary results.

DATES: Effective December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Lingjun Wang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2316.

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2016, the Department published a notice of initiation of this review.[1] On January 27, 2016, the Department exercised its discretion to toll all administrative deadlines by four

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 6832 (February 9, 2016).

business days.[2] On May 3, 2016 and December 13, 2016, the Department extended the deadline for the preliminary results to December 20, 2016.[3] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[4] A list of topics included in the Preliminary Decision Memorandum is included as Appendix I.

Scope of the Order

The products covered by this order are shipments of welded austenitic stainless steel pipe (WSSP) from Korea that meets the standards and specifications set forth by the American Society for Testing and Materials (ASTM) for the welded form of chromium-nickel pipe designated ASTM A–312. Imports of these products are currently classifiable under the following United States Harmonized Tariff Schedule (HTSUS) subheadings: 7306.40.5005, 7306.40.5015, 7306.40.5040, 7306.40.5065, and 7306.40.5085.[5]

Preliminary Determination of No Shipments

LS Metal, in its questionnaire response, claimed that it made no sales or shipments of subject merchandise during the POR. We issued a no shipments inquiry to, and received no contradictory information from, U.S. Customs and Border Protection (CBP). As there is no record information contrary to LS Metal's claim, we preliminarily determine that LS Metal had no shipments of the subject merchandise and, therefore, no reviewable transactions during the POR. The Department intends to complete the review with respect to LS Metal and will issue appropriate instructions to CBP based on the final results of this review. *See* the Preliminary Decision Memorandum for further discussion of this issue.

Methodology

The Department is conducting this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export prices or export prices are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, room B8024 of the Department's main building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/enforcement/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the weighted-average dumping margin for the POR is as follows:

Producer and/or exporter	Margin (percent)
SeAH Steel Corporation	1.91

Assessment Rate

Upon issuance of the final results, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[6] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results is above *de minimis* (*i.e.,* 0.50 percent). Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review where applicable.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003.[7] This clarification applies to entries of subject merchandise during the POR produced by a respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company or companies involved in the transaction.

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of this review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies under review will be equal to the weighted-average dumping margin established in the final results of this review except if that rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, then the cash deposit rate will be the

[2] *See* the Department's January 27, 2016 memorandum, ''Tolling of Administrative Deadlines as a Result of the Government Closure during Snowstorm 'Jonas.' ''

[3] *See* the Department's August 15, 2016 memorandum, ''Certain Welded ASTM A–312 Stainless Steel Pipe from the Republic of Korea: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review;'' *see also,* the Department's December 13, 2016 memorandum, ''Certain Welded ASTM A–312 Stainless Steel Pipe from the Republic of Korea: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review.''

[4] *See* ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Welded ASTM A–312 Stainless Steel Pipe from the Republic of Korea; 2014–2015,'' dated concurrently with this notice (Preliminary Decision Memorandum).

[5] For a full description of the scope of the *Order, see* Preliminary Decision Memorandum.

[6] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101, 8102 (February 14, 2012).

[7] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

rate established for the most recently completed segment of this proceeding for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previously completed segment of this proceeding, then the cash deposit rate will be the ''all-others'' rate of 7.00 percent established in the *Amended Final Determination and Order*.[8] These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

The Department intends to disclose the calculations performed in connection with these preliminary results within five days after the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties may submit case briefs no later than 30 days after the publication date of this notice.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[10] Parties who submit case briefs or rebuttal briefs are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11] Executive summaries should be limited to five pages total, including footnotes.[12] All briefs must be filed electronically via ACCESS.[13] An electronically filed document must be received successfully in its entirety by ACCESS, by 5:00 p.m. Eastern Time on the on which it is due.[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of the publication date of this notice, filed electronically via ACCESS. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a date and time to be determined.[15] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

We intend to issue the final results of this review within 120 days after the date of publication of this notice, unless otherwise extended.[16]

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

These preliminary results of this review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h).

Dated: December 20, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum:

I. Summary
II. Background
III. Scope of the Order
IV. No Shipments
V. Discussion of Methodology
  A. Comparisons to Normal Value
  B. Date of Sale
  C. Product Comparisons
  D. Constructed Export Price
  E. Normal Value
  F. Cost of Production Analysis
  G. Calculation of Normal Value Based on Comparison Market Prices
  H. Currency Conversion
VI. Recommendation

[FR Doc. 2016–31728 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–DS–P

[8] *See Notice of Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Pipe from the Republic of Korea,* 60 FR 10064 (February 23, 1995) (*Amended Final Determination and Order*).

[9] *See* 19 CFR 351.303 (for general filing requirements).

[10] *See* 19 CFR 351.309(c) and (d).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *Id.*

[13] *See* 19 CFR 351.303.

[14] *See* 19 CFR 351.303(b)(1).

[15] *See* 19 CFR 351.310(d).

[16] *See* section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF068

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Application for an Exempted Fishing Permit (EFP)

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

ACTION: Notice; receipt of EFP application; request for comments.

SUMMARY: NMFS announces the receipt of an exempted fishing permit (EFP) application from the West Coast Seafood Processors Association, Environmental Defense Fund, Oregon Trawl Commission, and Pacific Seafoods for an EFP Program to monitor and minimize salmon bycatch when vessels target rockfish in the shorebased individual fishing quota (IFQ) fishery. The NMFS West Coast Region's Assistant Regional Administrator for Sustainable Fisheries has made a preliminary determination that the subject EFP application contains all the required information and the EFP Program warrants further consideration. Therefore, NMFS announces that the Assistant Regional Administrator for Sustainable Fisheries proposes to recommend that EFPs be issued under an EFP Program that would allow as many as 50 commercial fishing vessels to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the west coast of the United States. If awarded, the EFP Program would exempt participating limited entry bottom trawl vessels from the requirement to use selective flatfish trawl gear shoreward of the Trawl Rockfish Conservation Area (RCA) north of 40°10′ N. latitude in waters off the west coast. In addition, if awarded, the EFP Program would also allow participating bottom trawl vessels that fish any place along the west coast an exemption to the minimum mesh size requirement of 4.5 inches.

The EFP Program is intended to provide additional flexibility in the configuration and use of bottom trawl gear for the vessels, as well as provide additional information on potential impacts to protected resources, particularly Chinook salmon bycatch, resulting from this added flexibility. The additional information would be used to enhance the management of the groundfish fishery and promote the objectives of the Pacific Coast

Groundfish Fishery Management Plan (FMP). This EFP would be effective for 2017 and would expire no later than December 31, 2017, but could be terminated earlier under the terms and conditions of the EFP and other applicable laws. Additionally, NMFS, with input from the Pacific Fishery Management Council (Council), may extend the EFP beyond 2017, if appropriate. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received no later than 5 p.m., local time on January 24, 2017.

ADDRESSES: You may submit comments, identified by 0648–XF068, by any one of the following methods:

- *Email: nmfs.wcr.trawlgearefp@noaa.gov.*
- *Mail:* Barry Thom, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070, Attn: Melissa Hooper.

FOR FURTHER INFORMATION CONTACT: Melissa Hooper: (206) 526–4357 or *melissa.hooper@noaa.gov.*

SUPPLEMENTARY INFORMATION: This action is authorized by the FMP and implementing regulations at 50 CFR 600.745, which states that EFPs may be used to authorize fishing activities that would otherwise be prohibited.

If awarded, the EFP Program would give participating vessels an exemption from the current requirement at 50 CFR 660.130(b)(3)(ii)(A) to use selective flatfish trawl gear shoreward of the RCA and north of 40°10′ N. lat. EFP vessels would instead be subject to a small footrope requirement similar to what is required south of 40°10′ N. lat. Additionally, if awarded, the EFP Program would give participating vessels an exemption from the current requirement at 50 CFR 660.130(b)(2) to use a 4.5 inch (11.4 cm) mesh throughout the net for bottom trawl vessels with a Federal limited entry permit. Participating vessels would carry observers or electronic monitoring on 100-percent of trips, as is currently required in the IFQ program.

This exempted fishing activity is designed to provide participants with additional flexibility to configure their gear to re-establish a targeted rockfish fishery for widow, yellowtail, and chilipepper rockfish. The annual catch limits (ACLs) for both widow and chilipepper rockfish are increasing to levels not seen in several years, and the additional fish available could provide an opportunity for the redevelopment of processing and harvesting in those areas of the coast that had been constrained by the lower ACLs for these overfished species. Additionally, according to the applicants, the two-seam design of the nets can make it difficult to include some types of bycatch excluders. Eliminating the selective flatfish trawl gear requirement could provide vessels with more flexibility in designing their gear and would increase the opportunity for using bycatch reduction devices of different types.

Changes to the minimum mesh size would provide participating vessels with the flexibility to set their mesh size for the size of fish they intend to target. It is unlikely that vessels would set their mesh size much lower than the current minimum of 4.5 inches as smaller fish tend to be less marketable. However, a smaller mesh size may reduce the number of fish that are gilled (*i.e.* stuck in the mesh) and, as a result, are unmarketable.

Information collected during under the EFP Program would be used to support the analysis for potential new and modification to existing gear regulations, including the Council's trawl gear modifications regulatory amendment which the Council took final action on earlier in 2016. With many of the current gear regulations having been in place for more than ten years, it is difficult for NMFS, the Council, and industry to predict the impacts of removing these regulations. In the past ten years, the industry has changed significantly. Reduction in capacity, innovations in gear technologies, and changes in management have all contributed to these changes. The EFP Program would help demonstrate what potential impacts today's fleet could have when some of the current gear regulations are eliminated.

In the early 1990s, the Council redefined bottom trawl gear and established 4.5 inches as the minimum mesh size for bottom trawl codends coastwide, and then required the larger mesh throughout the remainder of the trawl nets. These initial mesh regulations were intended to: (1) Reduce the harvest of small and unmarketable fish, (2) reduce the incidental harvest of unwanted species, and (3) establish a standard, coastwide mesh requirement. However, the two different sizes throughout the mesh created a loophole for some vessels. By 1995, regulations were implemented by the Council to address this loophole. The new regulations required all bottom trawl nets to have a minimum of 4.5 inch mesh throughout the net (60 FR 13377, March 13, 1995). These measures were intended to give smaller-size fish the opportunity to escape from the entire trawl net, reducing the likelihood those fish would be caught.

Beginning in 2005, the Council required the use of selective flatfish trawl for all groundfish trawling on the west coast north of 40°10′ N. lat. shoreward of the RCA. The selective flatfish trawl gear was originally designed and implemented to reduce the bycatch of round fish, such as canary rockfish and salmon, while increasing the catch of flatfish species. Previously, management actions to protect vulnerable rockfish had greatly expanded the boundaries of the trawl RCA, moving the eastern boundary shoreward. These changes, while addressing the issues with vulnerable rockfish, also severely limited access to productive flatfish stocks. Selective flatfish trawl was seen as a way for the fleet to still access the fishing grounds while protecting the vulnerable rockfish species.

NMFS is concerned with the potential impacts a selective flatfish trawl exemption and minimum mesh size exemption may have on protected species. Available information suggests that bycatch rates of ESA-listed salmon, eulachon, and green sturgeon could increase as a result of the increased effort resulting from this EFP Program. NMFS is focused on developing an EFP that would meet the applicants' objectives to better target pelagic rockfish species while collecting information about bycatch and minimizing bycatch to the extent practicable. To address NMFS' concerns, the applicants are proposing that bycatch information, as well as haul level data and genetics will be collected on all salmon caught. Because a targeted fishery for chilipepper, widow, and yellowtail rockfish has not existed in more than a decade, there is limited information about expected bycatch in these target fisheries. The applicants are proposing that all salmon caught under this EFP Program would be counted against a salmon bycatch limit set by the NMFS for the EFP.

The applicants are proposing the following additional measures to minimize and monitor bycatch under the EFP Program:

- *Enrollment provisions*—Vessels will be required to contact NMFS prior to a specified deadline to enroll in the EFP for a minimum of one month. Vessels may opt in or out of the EFP Program on a monthly basis only, with the exception of the month of May, by notifying NMFS. During May, vessels using midwater gear after May 15th must declare out before they begin to use the gear and can only declare back in once they revert back to bottom trawl gear.

• *Salmon bycatch provisions*—Vessels will be required to operate under a 3,500 Chinook salmon bycatch cap under this EFP, and a specific Chinook salmon sub-cap of 595 Chinook (17 percent of the total Chinook salmon cap) on EFP Program trips south of 43° N, also known as the Eureka Management Area. Once the sub-cap limit is reached, the Eureka Management Area would be closed to participating vessels, but participating vessels could continue to fish under this EFP north of 43° N. If the Chinook salmon bycatch cap for the EFP Program (3,500 Chinook) is reached, the entire EFP Program would be closed for the remainder of the year. Vessels will be required to retain and land all salmon bycatch on all trips that fall under this EFP. Vessels participating in the EFP Program are also required to provide all salmon bycatch information as quickly as possible and without any restrictions on confidentiality.

• *Monitoring provisions*—Vessels participating in this EFP will be required to use 100 percent monitoring on all EFP Program trips, as is consistent with the requirements of the shoreside IFQ fishery. Vessels carrying observers must continue to sort their salmon bycatch by haul. Vessels participating in both the electronic monitoring EFP Program and this EFP Program must continue using the same monitoring and reporting provisions required under the electronic monitoring EFP Program. All vessels, regardless of using electronic monitoring or observers, will be required to have 100 percent shoreside monitoring.

○ *Real-Time Bycatch Monitoring provisions*—The participating vessels would work with Pacific States Marine Fisheries Commission to provide real-time, or close to it, monitoring of salmon bycatch on all EFP Program trips through fishtickets and shoreside monitoring reports. The reports would include number of landing events (total and since last report) and number of Chinook salmon landed (total and since last report).

• *Fleet accountability provisions*—In this EFP, the applicants have developed rules and definitions for bycatch avoidance and mitigation. These include definitions of a ''high bycatch tow'', ''adult salmon'', and ''high bycatch trip.'' Bycatch avoidances measures include moving locations when experiencing a ''high bycatch tow'' and a ''stand down'' rule where a participating vessel would have to declare out of the EFP Program following a series of high bycatch trips as defined in the application.

• *Area-based Avoidance provisions*—The EFP Program includes provisions regarding two closed areas:

○ Klamath River Salmon Conservation Zone—The Klamath River Conservation Zone, as defined in regulation at 50 CFR 660.131(c)(1), will be closed to participating vessels for the duration of the EFP Program.

○ Columbia River Salmon Conservation Zone—The Columbia River Salmon Conservation Zone, as defined in regulation at 50 CFR 660.131(c)(2), will be closed to participating vessels for the duration of the EFP Program.

The Pacific Fishery Management Council reviewed the EFP application at its September and November 2016 meetings and recommended that NMFS issue permits, under this EFP Program, as proposed with the following amendments:

• Set the Chinook salmon bycatch limit for this EFP Program at no more than 4,000 fish.

• Include a sub-limit of 17 percent, or 680 Chinook, for the Eureka management area.

• Remove the provision to trigger a closure of the Columbia River Salmon Conservation Zone to EFP fishing when 1,000 Chinook have been caught by EFP participants.

• Include the following criteria in the definition of a high bycatch trip: 1 adult Chinook (defined as 20 inches or greater) caught in the California portion of the Klamath Management Zone (KMZ) defined consistent with salmon regulations as waters from the California/Oregon border south to Horse Mountain.

• Vessels could fish concurrently under both this EFP Program and the electronic monitoring EFP Program.

• Participants must submit an informal report for the April 2017 Council meeting and a formal report for the June 2017 Council meeting.

• The permits under this EFP Program will not automatically renew for the 2018 year, but a resubmission of an application can be made to the Council in September 2017.

The applicants have not proposed a specific list of participating vessels, as is traditionally the case, but rather are proposing an overall EFP program that any vessel in the fleet could enroll in by applying to NMFS. Depending on the diversity of interested vessels, NMFS may need to develop several EFPs within the overall EFP program to accommodate different protocols for different gear configurations and monitoring types (*e.g.,* electronic monitoring vs. observers). Therefore, NMFS is proposing to approve an overall EFP program, covering all of the individual EFPs, with consistent general requirements following the conclusion of the public comment period. Subsequently, we will issue the actual permits for the EFPs to individual participants according to the nature of their fishing activities. NMFS intends to use an adaptive management approach in which NMFS may revise requirements and protocols to improve the program without issuing another **Federal Register** notice, provided that the modifications fall within the scope of the original EFP Program. In addition, the applicants may request minor modifications and extensions to the EFP Program throughout the course of research. EFP Program modifications and extensions may be granted without further public notice if they are deemed essential to facilitate completion of the proposed research and result in only a minimal change in the scope or impacts of the initially approved EFP request.

In accordance with NAO Administrative Order 216–6, a Categorical Exclusion or other appropriate National Environmental Policy Act document would be completed prior to the issuance of any permits under this EFP Program. Further review and consultation may be necessary before a final determination is made to issue the permits. After publication of this document in the **Federal Register**, the EFP Program, if approved by NMFS, may be implemented following the public comment period. NMFS will consider comments submitted, as well as the Council's discussion at their November 2016 Council meeting, in deciding whether or not to approve the application as requested. NMFS may approve the application in its entirety or may make any alternations needed to achieve the goals of the EFP Program.

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

Dated: December 27, 2016.

Alan D. Risenhoover,

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

[FR Doc. 2016–31704 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: American Lobster—Annual Trap Transfer Program.

OMB Control Number: 0648–0673.

Form Number(s): None.

Type of Request: Regular (revision and extension of a currently approved information collection).

Number of Respondents: 204.

Average Hours Per Response: 10 minutes.

Burden Hours: 17.

Needs and Uses: This is a request for revision and extension of a currently approved information collection.

The American lobster resource and fishery are cooperatively managed by the states and NMFS under the authority of the Atlantic Coastal Fisheries Cooperative Management Act, according to the framework set forth by the Atlantic States Marine Fisheries Commission (ASMFC) in Amendment 3 of its Interstate Fishery Management Plan (ISFMP). This collection of information is in response to several addenda to Amendment 3 of the ISFMP that work to reduce trap fishing effort through limited entry fishing and trap allocation limit reductions. This program is intended to help control fishing efforts while increasing economic flexibility in the American lobster trap fishery.

Currently, Federal lobster permit holders qualified to fish with trap gear in Lobster Conservation Management Areas 2 and 3 are undergoing scheduled annual trap allocation reductions of 5 percent per year until 2021 (Area 2) and 2020 (Area 3). In 2015, in an effort to help mitigate the initial economic burden of these reductions, NMFS and state agencies implemented the Lobster Trap Transfer Program that allows all qualified Federal lobster permit holders to buy and sell trap allocation from Areas 2, 3, or Outer Cape Cod. Each transaction includes a conservation tax of 10 percent, which deducts a number of traps equal to 10 percent of the total number of traps with each transfer, permanently removing them from the fishery.

NMFS collects annual application forms from Lobster permit holders who wish to buy and/or sell Area 2, 3, or Outer Cape trap allocation through the Trap Transfer Program. The transfer applications are only accepted during a 2-month period (from August 1 through September 30) each year, and the revised allocations for each participating lobster permit resulting from the transfers become effective at the start of the following Federal lobster fishing year, on May 1. Both the seller and buyer of the traps are required to sign the application form, which includes each permit holder's permit and vessel information, the number of traps sold, and the revised number of traps received by the buyer, inclusive of the amount removed according to the transfer tax. The parties must date the document and clearly show that the transferring permit holder has sufficient allocation to transfer and the permit holder receiving the traps has sufficient room under any applicable trap cap. This information allows NMFS to process and track transfers of lobster trap allocations through the Trap Transfer Program, and better enables the monitoring and management of the American lobster fishery as a whole.

Originally, this collection was part of a new rulemaking action, and included efforts to obtain information from American lobster permit holders to implement a limited access permit program. NMFS used the information to qualify permit holders for participation in Area 2 and/or the Outer Cape Area, and to allocate traps to each qualified permit. This limited access portion of the collection is complete and no longer necessary, so a revision is requested to remove it from the collection.

Affected Public: Business or other for-profit organizations; individuals or households; state, local or tribal governments.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *reginfo.gov*. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 27, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–31716 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

BroadbandUSA Webinar Series

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of Open Meetings; Monthly Webinars.

SUMMARY: The National Telecommunications and Information Administration (NTIA), as part of its BroadbandUSA program, will host a series of webinars on a monthly basis to engage the public and stakeholders with information to accelerate broadband access, improve digital inclusion, strengthen policies, and support local community priorities. The webinar series will provide ongoing source information on the range of topics and issues being addressed by BroadbandUSA, including best practices for improving broadband deployment, digital literacy, and e-government.

DATES: BroadbandUSA will hold the webinars from 2:00 p.m. to 3:00 p.m. Eastern Time on the third Wednesday of every month, beginning February 15, 2017, and continuing through September 20, 2017.

ADDRESSES: These are virtual meetings. NTIA will post the registration information on its BroadbandUSA Web site, *http://www2.ntia.doc.gov/,* under *Events.*

FOR FURTHER INFORMATION CONTACT: Lynn Chadwick, National Telecommunications and Information Administration, U.S. Department of Commerce, Room 4627, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–8338; email: *lchadwick@ntia.doc.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002; email *press@ntia.doc.gov.*

SUPPLEMENTARY INFORMATION: NTIA's BroadbandUSA program provides expert advice and field-proven tools for assessing broadband adoption, planning new infrastructure and engaging a wide range of partners in broadband projects. BroadbandUSA convenes workshops on a regular basis to bring stakeholders together to discuss ways to improve broadband policies, share best practices, and connect communities to other federal agencies and funding sources for the purpose of expanding broadband infrastructure and adoption throughout America's communities. Experts from NTIA's BroadbandUSA program are available to provide technical assistance and to connect communities with additional resources, such as best practices, guides and program models. NTIA's BroadbandUSA team is developing tools to support communities working to expand broadband access, adoption and use. These webinars are among the tools BroadbandUSA uses to provide broadband information to the public, broadband stakeholders, tribal, local, and state governments, and federal programs. Other tools include publications, workshops, meetings and co-hosted events with stakeholder organizations and agencies.

The public is invited to participate in these webinars. General questions and comments are welcome at any time via email to *BroadbandUSA@ntia.doc.gov.* The webinars are open to the public and press. Pre-registration is recommended. NTIA asks registrants to provide their first and last names, city, state, organization, job title, and email addresses for both registration purposes and to receive any updates on BroadbandUSA via email at *BroadbandUSA@ntia.doc.gov.* Information on webinar content and how to register for one or more webinars will available on NTIA's Web site at *http://www2.ntia.doc.gov/WEBINARS.*

Individuals requiring accommodations should review the PowerPoint slides, transcript and recording from the webinar posted at the BroadbandUSA Web site, *http://www2.ntia.doc.gov/,* within 7 days following the live webinar.

Dated: December 27, 2016.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2016–31717 Filed 12–29–16; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes products and services from the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Effective January 29, 2017.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 11/28/2016 (81 FR 85538–85540), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the products and services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSN(s)—Product Name(s): Combat Identification Panel (CIP) Kits and Components

2320–01–484–7838
2590–01–540–1552
2590–01–539–4003
2320–00–NSH–0003
2320–01–398–5161
2350–01–398–5164
2350–01–398–5165
2350–01–398–5166
2350–01–398–5167
2350–01–398–5169
2350–01–398–5172
2350–01–398–5175
2350–01–398–5176
2350–01–398–5177
2350–01–398–5179
2320–01–398–7187
2320–01–398–7189
2320–01–398–7191
2320–01–398–7192
2320–01–398–7193
2320–01–398–7194
2320–01–398–7195
2320–01–398–7196
2350–01–398–7198
2320–01–406–0481
2320–01–411–2566
2320–01–411–4390
2320–01–411–4391
2320–01–411–4393
2320–01–483–9051
2320–01–484–7833
2320–01–484–7836
2320–01–484–8700
2320–01–501–9531
2350–01–392–1565
2350–01–394–2530
2350–01–394–7838
2590–01–421–7060
2350–01–421–7067
2590–01–392–0285
2590–01–392–0286
2590–01–392–0287
2590–01–392–6898
2590–01–394–5635
2590–01–394–5638
2590–01–394–7635
2590–01–394–7636
2590–01–398–3172
2590–01–398–3836
2590–01–398–3838
2590–01–398–3839
2590–01–398–3841
2590–01–398–3843
2590–01–398–3844
2590–01–398–3846
2590–01–398–6291
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2590–01–398–8090
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2590–01–399–1364
2590–01–399–1365
2590–01–399–2933
2590–01–399–2934
2590–01–399–5100

2590–01–399–5863
2590–01–399–5864
2590–01–399–5865
2590–01–399–5866
2590–01–399–5867
2590–01–399–7502
2590–01–400–0372
2350–01–400–1810
2590–01–411–3170
2590–01–411–3171
2590–01–411–3172
2590–01–411–3174
2590–01–420–2877
2590–01–420–2878
2590–01–420–5984
2590–01–484–8507
2590–01–501–9505
2590–01–501–9557
2590–01–501–XXXX
2590–01–507–XXXX
2320–01–398–7198
2350–01–398–5174
2350–01–399–6773
2350–01–598–5170
2590–01–394–2530
2590–01–398–5161
2590–01–398–5164
2590–01–398–5165
2590–01–398–5166
2590–01–398–5172
2590–01–398–7187
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2590–01–398–7195
2590–01–398–7196
2590–01–398–8083
2590–01–399–6773
2590–01–406–0481
2590–01–411–2566
2590–01–411–4390
2590–01–411–4391
2320–01–472–5882
2590–01–472–5889

Mandatory Source(s) of Supply: Crossroads Rehabilitation Center, Inc., Indianapolis, IN
Contracting Activity: W4GG HQ US ARMY TACOM
NSN(s)—Product Name(s): 4220–01–181–3154—Fishing Kit, Emergency
Mandatory Source(s) of Supply: Opportunity Resources, Inc., Missoula, MT
Contracting Activity: Defense Logistics Agency Troop Support

Services

Service Type: Mail Delivery Service
Mandatory for: 11 Army Secure Operating Systems: 22019 53rd Street, Building 22019, Fort Hood, TX
712 Army Secure Operating Systems: 22020 53rd Street, Building 22020, Fort Hood, TX
9 Army Secure Operating Systems & 3 WS: 90042 Clarke Road, Building 90042, Fort Hood, TX
Dormitory: Building 91220, Fort Hood, TX
III Corps Building: 1001 761st Tank Battalion Avenue Fort Hood, TX
Mandatory Source(s) of Supply: Professional Contract Services, Inc., Austin, TX
Contracting Activity: DEPT OF THE AIR FORCE, FA4608 2 CONS LGC
Service Type: Secure Document Destruction Service
Mandatory for: Internal Revenue Service Offices at the following locations:
124 South Tennessee, Lakeland, FL
129 Hibiscus Boulevard, Melbourne, FL
Mandatory Source(s) of Supply: Brevard Achievement Center, Inc., Rockledge, FL
Mandatory for: 10 Spiral Drive, Florence, KY
Mandatory Source(s) of Supply: Employment Solutions, Inc., Lexington, KY
Contracting Activity: Dept of the Treasury/ Internal Revenue Service

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–31732 Filed 12–29–16; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the procurement list.

SUMMARY: The Committee is proposing to add products to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products previously furnished by such agency.

DATES: Comments must be received on or before January 29, 2017.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Products

NSN(s)—Product Name(s):
9905–00–NIB–0376—Flag, Marking, 2½″ x 3½″, 21″ Staff, Fluorescent Orange
9905–00–NIB–0377—Flag, Marking, 2½″ x 3½″, 21″ Staff, Fluorescent Pink
9905–00–NIB–0378—Flag, Marking, 2½″ x 3½″, 21″ Staff, Orange
9905–00–NIB–0379—Flag, Marking, 2½″ x 3½″, 21″ Staff, Red
9905–00–NIB–0380—Flag, Marking, 2½″ x 3½″, 21″ Staff, Yellow
9905–00–NIB–0384—Flag, Marking, 2½″ x 3½″, 15″ Staff, Yellow
9905–00–NIB–0386—Flag, Marking, 2½″ x 3½″, 15″ Staff, Red
9905–00–NIB–0387—Flag, Marking, 2½″ x 3½″, 15″ Staff, Orange
9905–00–NIB–0389—Flag, Marking, 4″ x 5″, 21″ Staff, Fluorescent Orange
9905–00–NIB–0390—Flag, Marking, 4″ x 5″, 21″ Staff, Fluorescent Pink
9905–00–NIB–0391—Flag, Marking, 4″ x 5″, 21″ Staff, Orange
9905–00–NIB–0392—Flag, Marking, 4″ x 5″, 21″ Staff, Red
9905–00–NIB–0393—Flag, Marking, 4″ x 5″, 21″ Staff, Yellow
Mandatory for: Total Government Requirement
Mandatory Source(s) of Supply: West Texas Lighthouse for the Blind, San Angelo, TX
Contracting Activity: General Services Administration, Fort Worth, TX
Distribution: B-List
NSN(s)—Product Name(s):
6530–00–NIB–0209—Hot Pack, Instant, Disposable, 6″ x 8″
6530–00–NIB–0217—Cold Pack, Instant, Disposable, 5″ x 6″
6530–00–NIB–0219—Cold Pack, Instant, Disposable, 5″ x 7″
6530–00–NIB–0221—Cold Pack, Instant, Disposable, 6″ x 8.75″
6530–00–NIB–0222—Hot Pack, Instant, Disposable, 5″ x 6″
6530–00–NIB–0223—Hot Pack, Instant, Disposable, 5″ x 7″
Mandatory Source(s) of Supply: Central Association for the Blind and Visually Impaired, Utica, NY
Mandatory for: Total Government Requirement
Contracting Activity: Defense Logistics Agency Troop Support
Distribution: B-List

Deletions

The following products are proposed for deletion from the Procurement List:

Products

NSN(s)—Product Name(s):
8410–01–415–2906—Slacks, Serge, Army, Women's, Green, 4MR
8410–01–415–2909—Slacks, Serge, Army, Women's, Green, 6WR
8410–01–415–2911—Slacks, Serge, Army, Women's, Green, 6MR
8410–01–415–5138—Slacks, Serge, Army, Women's, Green, 6MT
8410–01–415–5139—Slacks, Serge, Army, Women's, Green, 6WT
8410–01–415–5140—Slacks, Serge, Army, Women's, Green, 8WR
8410–01–415–5141—Slacks, Serge, Army, Women's, Green, 8MR

8410–01–415–5142—Slacks, Serge, Army, Women's, Green, 8WP
8410–01–415–5143—Slacks, Serge, Army, Women's, Green, 10MT
8410–01–415–5144—Slacks, Serge, Army, Women's, Green, 8MT
8410–01–415–5145—Slacks, Serge, Army, Women's, Green, 10JR
8410–01–415–6989—Slacks, Serge, Army, Women's, Green, 10WR
8410–01–415–6990—Slacks, Serge, Army, Women's, Green, 10MR
8410–01–415–6991—Slacks, Serge, Army, Women's, Green, 12MP
8410–01–415–6992—Slacks, Serge, Army, Women's, Green, 10JT
8410–01–415–6993—Slacks, Serge, Army, Women's, Green, 10MT
8410–01–415–6994—Slacks, Serge, Army, Women's, Green, 12WP
8410–01–415–6995—Slacks, Serge, Army, Women's, Green, 12JT
8410–01–415–6996—Slacks, Serge, Army, Women's, Green, 14WP
8410–01–415–6997—Slacks, Serge, Army, Women's, Green, 14JR
8410–01–415–6998—Slacks, Serge, Army, Women's, Green, 14JP
8410–01–415–6999—Slacks, Serge, Army, Women's, Green, 14MR
8410–01–415–7000—Slacks, Serge, Army, Women's, Green, 14WR
8410–01–415–7001—Slacks, Serge, Army, Women's, Green, 14WT
8410–01–415–7007—Slacks, Serge, Army, Women's, Green, 16JP
8410–01–415–7008—Slacks, Serge, Army, Women's, Green, 16WR
8410–01–415–7009—Slacks, Serge, Army, Women's, Green, 16MR
8410–01–415–7010—Slacks, Serge, Army, Women's, Green, 18WR
8410–01–415–7011—Slacks, Serge, Army, Women's, Green, 18MR
8410–01–415–7012—Slacks, Serge, Army, Women's, Green, 14MT
8410–01–415–7013—Slacks, Serge, Army, Women's, Green, 16WT
8410–01–415–7014—Slacks, Serge, Army, Women's, Green, 16MP
8410–01–415–7015—Slacks, Serge, Army, Women's, Green, 16MT
8410–01–415–7016—Slacks, Serge, Army, Women's, Green, 20MR
8410–01–415–7017—Slacks, Serge, Army, Women's, Green, 14JT
8410–01–415–7018—Slacks, Serge, Army, Women's, Green, 26MR
8410–01–415–7019—Slacks, Serge, Army, Women's, Green, 18MT
8410–01–415–7021—Slacks, Serge, Army, Women's, Green, 12MR
8410–01–415–7022—Slacks, Serge, Army, Women's, Green, 16JR
8410–01–415–7024—Slacks, Serge, Army, Women's, Green, 16JR
8410–01–415–7025—Slacks, Serge, Army, Women's, Green, 22MR
8410–01–415–7026—Slacks, Serge, Army, Women's, Green, 24MR
8410–01–415–7028—Slacks, Serge, Army, Women's, Green, 12JR
8410–01–415–7029—Slacks, Serge, Army, Women's, Green, 12WR
8410–01–415–7030—Slacks, Serge, Army, Women's, Green, 16JT
8410–01–415–8446—Slacks, Serge, Army, Women's, Green, 10WT
8410–01–415–8450—Slacks, Serge, Army, Women's, Green, 12JP
8410–01–415–8453—Slacks, Serge, Army, Women's, Green, 12MT
8410–01–415–8455—Slacks, Serge, Army, Women's, Green, 12WT
8410–01–415–8457—Slacks, Serge, Army, Women's, Green, 14MP
8410–01–415–8460—Slacks, Serge, Army, Women's, Green, 16WP
8410–01–415–8572—Slacks, Serge, Army, Women's, Green, 10JP
8410–01–415–8573—Slacks, Serge, Army, Women's, Green, 10WP
8410–01–455–5486—Slacks, Serge, Army, Women's, Green, 4MP
8410–01–455–5488—Slacks, Serge, Army, Women's, Green, 6MP
8410–01–455–5490—Slacks, Serge, Army, Women's, Green, 6WP
8410–01–455–5494—Slacks, Serge, Army, Women's, Green, 8MP
8410–01–455–5496—Slacks, Serge, Army, Women's, Green, 8WP
8410–01–455–5500—Slacks, Serge, Army, Women's, Green, 20WR

Mandatory Source(s) of Supply: VGS, Inc., Cleveland, OH
Contracting Activity: Defense Logistics Agency Troop Support

Barry S. Lineback,
Director, Business Operations.

[FR Doc. 2016–31721 Filed 12–29–16; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2016–0040; OMB Control Number 0704–0232]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement, Contract Pricing

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. The Office of Management and Budget (OMB) has approved this information collection requirement for use through March 31, 2017. DoD proposes that OMB extend its approval for an additional three years.

DATES: DoD will consider all comments received by February 28, 2017.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0232 regarding this public burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, using any of the following methods:

○ *Federal eRulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0232 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Tom Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov* approximately two to three days after submission to verify posting. Please allow 30 days for posting of comments submitted by postal mail.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Ruckdaschel, telephone 571–372–6088. The information collection requirements addresses in this notice are available at *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html* Paper copies are available from Mr. Tom Ruckdaschel, OUSD (AT&L) DPAP DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION:

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), *DoD invites comments on:* (a) whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 215.4, Contract Pricing, and related clause at DFARS 252.215; OMB Control Number 0704–0232.

Needs and Uses: DoD contracting officers use this information to determine if the contractor has an adequate system for generating cost estimates, which forecasts costs based on appropriate source information available at the time, and has the ability to monitor the correction of significant deficiencies. The need for information collection decreases as contractor estimating systems improve and gain contracting officer approval.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Number of Respondents: 302.

Responses per Respondent: 1.4 (approximately).

Annual Responses: 427.

Hours per Response: 40.7 (approximately).

Estimated Hours: 17,400.

Frequency: On occasion.

Summary of Information Collection

The clause at DFARS 252.215–7002, Cost Estimating System Requirements, requires that certain large business contractors—

- Establish an acceptable cost estimating system and disclose the estimating system to the administrative contracting officer (ACO) in writing;
- Maintain the estimating system and disclose significant changes in the system to the ACO on a timely basis; and
- Respond in writing to written reports from the Government that identify deficiencies in the estimating system.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2016–31749 Filed 12–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2016–0046; OMB Control Number 0704–0359]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement, Contract Financing

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. The Office of Management and Budget (OMB) has approved this information collection requirement for use through March 31, 2017. DoD proposes that OMB extend its approval for an additional three years.

DATES: DoD will consider all comments received by February 28, 2017.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0359, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0359 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Tom Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov* approximately two to three days after submission to verify posting. Please allow 30 days for posting of comments submitted by postal mail.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Ruckdaschel, telephone 571–372–6088. The information collection requirements addresses in this notice are available at: *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.* Paper copies are available from Mr. Tom Ruckdaschel, OUSD (AT&L) DPAP (DARS), Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 232, Contract Financing and Related Clauses at 252.232; OMB Control Number 0704–0359.

Needs and Uses:

- *DFARS 252.232–7007, Limitation of Government's Obligation.* The data submitted by contractors enables contracting officers to calculate improved financing opportunities that will provide benefit to both industry (prime and subcontractor level) and the taxpayer.
- *DFARS 252.232–7012, Performance Based Payments—Whole Contract Basis, and 252.232–7013, Performance Based Payments—Deliverable-Item Basis.* Contracting officers use the information provided by contractors to create a cash-flow model for use in evaluating alternative financing arrangements. The analysis tool calculates improved financing opportunities that will provide benefit to both industry (prime and subcontractor level) and the taxpayer.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Number of Respondents: 1,800.

Responses per Respondent: 1.

Annual Responses: 1,800.

Average Burden per Response: 1 hour.

Annual Burden Hours: 1,800.

Frequency: On occasion.

Summary of Information Collection

- DFARS 252.232–7007 is prescribed for use in solicitations and resultant incrementally-funded fixed-price contracts. Paragraph (c) of the clause requires a written notification from the contractor that: (1) States the estimated date when the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable items; (2) states an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds, or to a mutually agreed upon substitute date; and (3) advises the contracting officer of the estimated amount of additional funds that will be required for the timely performance of the items funded pursuant to the clause, for a subsequent period as may be specified in the allotment schedule, or otherwise agreed to by the parties to the contract.
- DFARS 252.232–7012 is prescribed for use at DFARS 232.1005–70(a). This clause requires contractors to report the negotiated value of all previously completed performance-based payments; negotiated value of current performance-based payment(s) event(s); cumulative negotiated value of performance-based payment(s) events completed to date; total costs incurred to date; cumulative amount of payments previously requested; and the payment amount requested for the current performance based payment.

• DFARS 252.232–7013 is prescribed for use at 232.1005–70(b). This clause requires contractors to report the negotiated value of current performance-based payment(s) event(s); cumulative negotiated value of performance-based payment(s) events completed to date; total costs incurred to date; cumulative amount of payments previously requested; and the payment amount requested for the current performance based payment.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2016–31757 Filed 12–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2016–0039; OMB Control Number 0704–0229]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement, Foreign Acquisition

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. The Office of Management and Budget (OMB) has approved this information collection requirement for use through March 31, 2017. DoD proposes that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD will consider all comments received by February 28, 2017.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0398, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0229 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov* approximately two to three days after submission to verify posting. Please allow 30 days for posting of comments submitted by postal mail.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (571) 372–6106. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.* Paper copies are available from Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), *DoD invites comments on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

Title, Associated Form, and OMB Number: Defense Federal Acquisition Regulation Supplement Part 225, Foreign Acquisition, and Related Clauses at 252.225; DD Form 2139; OMB Control Number 0704–0229.

Needs and Uses: DoD needs this information to ensure compliance with restrictions on the acquisition of foreign products imposed by statute or policy to protect the industrial base; to ensure compliance with U.S. trade agreements and memoranda of understanding that promote reciprocal trade with U.S. allies; and to prepare reports for submission to the Department of Commerce on the Balance of Payments Program.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Number of Respondents: 26,669.

Responses Per Respondent: About 10.

Annual Responses: 263,863.

Average Burden Per Response: .29 hours.

Annual Burden Hours: 77,209 (76,944 reporting hours and 265 recordkeeping hours).

Reporting Frequency: On occasion.

Summary of Information Collection

This information collection includes requirements related to foreign acquisition in DFARS Part 225, Foreign Acquisition, and the related clause at DFARS 252.225.

DFARS 252.225–7000, Buy American Act—Balance of Payments Program Certificate, as prescribed in 225.1101(1), requires an offeror to identify, in its proposal, supplies that are not domestic end products, separately listing qualifying country and other foreign end products.

DFARS 252.225–7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, and 252.225–7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, as prescribed in 225.7204(a) and (b) respectively, require offerors and contractors to submit a Report of Contract Performance Outside the United States for subcontracts to be performed outside the United States. The reporting threshold is $700,000 for contracts that exceed $13.5 million. The contractor may submit the report on DD Form 2139, Report of Contract Performance Outside the United States, or a computer-generated report that contains all information required by DD Form 2139.

DFARS 252.225–7005, Identification of Expenditures in the United States, as prescribed in 225.1103(1), requires contractors incorporated or located in the United States to identify, on each request for payment under contracts for supplies to be used, or for construction or services to be performed, outside the United States, that part of the requested payment representing estimated expenditures in the United States.

DFARS 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed at 225.7003–5(b), requires the offeror to certify that it will take certain actions with regard to specialty metals if the offeror chooses to use the alternative compliance approach when providing commercial derivative military articles to the Government.

DFARS 252.225–7013, Duty-Free Entry, as prescribed in 225.1101(4), requires the contractor to provide information on shipping documents and customs forms regarding products that are eligible for duty-free entry.

DFARS 252.225–7018, Photovoltaic Devices—Certificate, as prescribed at 225.7017–4(b), requires offerors to certify that no photovoltaic devices with an estimated value exceeding $3,000 will be utilized in performance of the contract or to specify the country of origin.

DFARS 252.225–7020, Trade Agreements Certificate, as prescribed in 225.1101(5), requires an offeror to list the item number and country of origin of any nondesignated country end product that it intends to furnish under the contract. Either 252.225–7020 or 252.225–7022 is used in any solicitation for products subject to the World Trade Organization Government Procurement Agreement.

DFARS 252.225–7021, Alternate II, Trade Agreements, as prescribed in 225.1101(6)(ii), in order to comply with a condition of the waiver authority provided by the United States Trade Representative to the Secretary of Defense, requires contractors from a south Caucasus/central or south Asian state to inform the government of its participation in the acquisition and also advise their governments that they generally will not have such opportunities in the future unless their governments provide reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

DFARS 252.225–7023, Preference for Products or Services from Afghanistan, as prescribed in 225.7703–5(a), requires an offeror to identify, in its proposal, products or services that are not products or services from Iraq or Afghanistan.

DFARS 252.225–7025, Restriction on Acquisition of Forgings, as prescribed in 225.7102–4, requires the contractor to retain records showing compliance with the requirement that end items and their components delivered under the contract contain forging items that are of domestic manufacture only. The contractor must retain the records for 3 years after final payment and must make the records available upon request of the contracting officer. The contractor may request a waiver of this requirement in accordance with DFARS 225.7102–3.

DFARS 252.225–7032, Waiver of United Kingdom Levies—Evaluation of Offers, and 252.225–7033, Waiver of United Kingdom Levies, as prescribed in 225.1101(7) and (8), require an offeror to provide information to the contracting officer regarding any United Kingdom levies included in the offered price, and require the contractor to provide information to the contracting officer regarding any United Kingdom levies to be included in a subcontract that exceeds $1 million, before award of the subcontract.

DFARS 252.225–7035, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, as prescribed in 225.1101(9), requires an offeror to list any qualifying country, NAFTA country, or other foreign end product that it intends to furnish under the contract. The Buy American Act no longer applies to acquisitions of commercial information technology.

DFARS 252.225–7046, Exports of Approved Community Members in Response to the Solicitation, requires a representation whether exports or transfers of qualifying defense articles were made in preparing the response to the solicitation. If yes, the offeror represents that such exports or transfers complied with the requirements of the provision.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2016–31744 Filed 12–29–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0147]

Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection

AGENCY: Office for Civil Rights (OCR), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 28, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0147. 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 224–82, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Rosa Olmeda, 202–453–5968.

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: Mandatory Civil Rights Data Collection.

OMB Control Number: 1870–0504.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 17,620.

Total Estimated Number of Annual Burden Hours: 1,511,450.

Abstract: The collection, use and reporting of education data is an integral component of the mission of the U.S. Department of Education (ED). EDFacts, an ED initiative to put performance data at the center of ED's policy, management, and budget decision-making processes for all K–12 education programs, has transformed the way in which ED collects and uses data. For school years 2009–10 and 2011–12, the Civil Rights Data Collection (CRDC) was approved by OMB as part of the EDFacts information collection (1875–0240). For school years 2013–14 and 2015–16, the Office for Civil Rights (OCR) cleared the CRDC as a separate collection from

EDFacts. OCR used the most current EDFacts information collection approved by OMB (1875–0240) as a model for the 2013–14 and 2015–16 CRDC information collections that were approved by OMB (1870–0504). Similarly, the currently proposed revised CRDC information collection for school year 2017–18 is modeled after the most recent OMB-approved EDFacts information collection (1850–0925). For the 2017–18 CRDC, OCR is proposing few changes, and those changes will have the net effect of reducing burden on school districts. As with previous CRDC collections, the purpose of the 2017–18 CRDC is to obtain vital data related to the civil rights laws' requirement that public local educational agencies and elementary and secondary schools provide equal educational opportunity. ED has analyzed the uses of many data elements collected in the 2013–14 CRDC and sought advice from experts across ED to refine, improve, and where appropriate, add or remove data elements from the collection. ED also made the CRDC data definitions and metrics consistent with other mandatory collections across ED wherever possible. ED seeks OMB approval under the Paperwork Reduction Act to collect from LEAs, the elementary and secondary education data described in the sections of Attachment A. In addition, ED requests that LEAs and other stakeholders respond to the directed questions found in Attachment A–5.

Dated: December 27, 2016.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–31727 Filed 12–29–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC16–199–000]

Central Kentucky Transmission Company; Notice of Filing

Take notice that on September 19, 2016, pursuant to Rule 212 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 385.212, Central Kentucky Transmission Company submitted a request for a waiver of the reporting requirement to file the FERC Form 2–A for calendar year ending 2016 and all subsequent years; and a waiver of the reporting requirement to file the FERC Form 3–Q for quarter ending September 30, 2016 and all subsequent quarters.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 3, 2017.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31656 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–623–000]

Rubicon NYP Corp; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Rubicon NYP Corp's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 12, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31661 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–23–000]

Florida Gas Transmission Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on December 13, 2016, Florida Gas Transmission Company, LLC (FGT), 1300 Main Street, Houston, Texas 77002, filed in Docket No. CP17–23–000 a prior notice request pursuant to sections 157.205, 157.208, and 157.210 of the Commission's regulations under the Natural Gas Act (NGA), as amended, requesting authorization to construct, install, own, maintain, and operate its Western Division Project. Specifically, FGT proposes to construct approximately one mile of 36-inch-diameter pipeline loop, relocate an existing receiver, and install one new mainline valve downstream of Compressor Station 11 in Santa Rosa County, Florida. Additionally, FGT proposes to install approximately 100 feet of 8-inch-diameter connection piping, a custody transfer flange, and other auxiliary and appurtenant facilities at a new interconnection to be constructed with Florida Public Utilities Company (FPU) in Escambia County, Alabama, near the Alabama/Florida border. FGT states that the Western Division Project will provide 68,500 million British thermal units per day of natural gas to FPU and Ascend Performance Materials, Inc. FGT estimates the cost of the Western Division Project to be approximately $10,655,060, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Stephen T. Veatch, Senior Director of Certificates, Florida Gas Transmission Company, LLC, 1300 Main Street, Houston, Texas 77002, by telephone at (713) 989–2024, by fax at (713) 989–1205, or by email at *stephen.veatch@energytransfer.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31659 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–37–000.
Applicants: Westar Energy, Inc.
Description: Supplement to November 18, 2016 Application of Westar Energy, Inc. for Authorization for Consolidation of Jurisdictional Facilities, et al.
Filed Date: 12/21/16.
Accession Number: 20161221–5461.
Comments Due: 5 p.m. ET 12/28/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3376–003; ER11–3377–003; ER11–3378–003.
Applicants: North Hurlburt Wind, LLC, Horseshoe Bend Wind, LLC, South Hurlburt Wind, LLC.
Description: Triennial Report for Northwest Region of North Hurlburt Wind, LLC, et. al.
Filed Date: 12/22/16.
Accession Number: 20161222–5571.
Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER14–225–004.
Applicants: New Brunswick Energy Marketing Corporation.
Description: Triennial Market Power Update for the Northeast Region of New Brunswick Energy Marketing Corporation.
Filed Date: 12/22/16.
Accession Number: 20161222–5577.
Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER17–238–001.
Applicants: Southwestern Public Service Company.
Description: Tariff Amendment: SAP Ministerial_Amend to be effective 4/16/2016.
Filed Date: 12/23/16.
Accession Number: 20161223–5102.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–267–001.
Applicants: Southwestern Public Service Company.
Description: Tariff Amendment: Tri County Formula Rate_Amend to be effective 1/1/2017.

Filed Date: 12/23/16.
Accession Number: 20161223–5103.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–478–001.
Applicants: Mankato Energy Center, LLC.
Description: Supplement to December 15, 2016 Mankato Energy Center, LLC tariff filing.
Filed Date: 12/22/16.
Accession Number: 20161222–5572.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–647–000.
Applicants: Emera Energy Services Subsidiary No. 11.
Description: § 205(d) Rate Filing: Tariff Amendment to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5141.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–648–000.
Applicants: Emera Energy Services Subsidiary No. 12.
Description: § 205(d) Rate Filing: Tariff Amendment to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5142.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–649–000.
Applicants: Emera Energy Services Subsidiary No. 13.
Description: § 205(d) Rate Filing: Tariff Amendment to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5143.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–650–000.
Applicants: Emera Energy Services Subsidiary No. 14.
Description: § 205(d) Rate Filing: Tariff Amendment to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5144.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–651–000.
Applicants: Emera Energy Services Subsidiary No. 15.
Description: § 205(d) Rate Filing: Tariff Amendment to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5145.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–652–000.
Applicants: Lightstone Marketing LLC.
Description: Baseline eTariff Filing: Lightstone Marketing LLC MBR Application to be effective 1/10/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5158.
Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–653–000.
Applicants: Arizona Public Service Company.
Description: Tariff Cancellation: Cancellation of Rate Schedule No. 272 to be effective 2/22/2017.
Filed Date: 12/23/16.
Accession Number: 20161223–5166.
Comments Due: 5 p.m. ET 1/13/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31658 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–615–000]

Albany Green Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Albany Green Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 12, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31660 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3145–008; ER10–3116–008; ER10–3210–008; ER11–2036–008; ER13–1544–005; ER10–3128–008; ER10–1800–009; ER10–3136–008; ER11–2701–010; ER10–1728–008; ER16–930–002.
Applicants: AES Alamitos, LLC, AES Energy Storage, LLC, AES Huntington Beach, L.L.C., AES Laurel Mountain, LLC, AES ES Tait, LLC, AES Redondo

Beach, L.L.C., Indianapolis Power & Light Company, Mountain View Power Partners, LLC, Mountain View Power Partners IV, LLC, The Dayton Power and Light Company, AES Ohio Generation, LLC.

Description: Triennial Market Power Analysis for Northeast Region of the AES MBR Affiliates.

Filed Date: 12/21/16.

Accession Number: 20161221–5469.

Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER10–3246–011; ER10–2475–017; ER10–2474–017; ER13–1266–012; ER15–2211–009.

Applicants: PacifiCorp, Nevada Power Company, Sierra Pacific Power Company, CalEnergy, LLC, MidAmerican Energy Services, LLC.

Description: Notice of Non-Material Change in Status of the PacifiCorp, et al.

Filed Date: 12/21/16.

Accession Number: 20161221–5471.

Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–236–001.

Applicants: Southwestern Public Service Company.

Description: Tariff Amendment: 12–23–16_ER17–236 Admend to be effective 1/1/2016.

Filed Date: 12/23/16.

Accession Number: 20161223–5096.

Comments Due: 5 p.m. ET 1/13/17.

Docket Numbers: ER17–646–000.

Applicants: Orange and Rockland Utilities, Inc.

Description: § 205(d) Rate Filing: Amendment to Revised Power Supply Agreement to be effective 12/22/2016.

Filed Date: 12/23/16.

Accession Number: 20161223–5006.

Comments Due: 5 p.m. ET 1/13/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 23, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31657 Filed 12–29–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2016–0773; FRL 9957–82–OGC]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA''), notice is hereby given of a proposed settlement agreement to address a consolidated set of petitions for review filed by several parties in the United States Court of Appeals for the Tenth Circuit. Basin Electric Power Cooperative (''Basin Electric'') and the State of Wyoming (''Wyoming'') (collectively, ''Petitioners'') filed petitions for review of an EPA rule addressing the regional haze requirements in Wyoming. Specifically, Basin Electric challenged the rule as it pertained to the NO_X BART emission limits for Laramie River Units 1–3. Wyoming also challenged the rule based on EPA's action on the Laramie River Units and on other grounds. The proposed settlement agreement would establish deadlines for EPA to take specified actions.

DATES: Written comments on the proposed settlement agreement must be received by January 30, 2017.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2016–0773, online at *www.regulations.gov.* For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (''CBI'') or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Lea Anderson, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–5571; fax number (202) 564–5603; email address: *anderson.lea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

Petitioners filed petitions for review of EPA's rule titled ''Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze,'' 79 FR 5032 (Jan. 30, 2014) (''Final Rule''). In the Final Rule, EPA disapproved, in part, the Wyoming regional haze SIP, including the NO_X BART requirements as to Laramie River Units 1–3, and promulgated a federal implementation plan (''FIP'') that imposed a NO_X BART emission limit of 0.07 lb/MMBtu (30-day rolling average) at Laramie River Units 1–3. Petitioners have raised various challenges to the Final Rule. This settlement agreement would resolve all of Basin Electric's challenges to the Final Rule and those portions of Wyoming's challenge to the Final Rule related to the establishment of NO_X BART emission limits for Laramie River Units 1–3.

Under the terms of the proposed settlement agreement, after the settlement agreement becomes final the parties will take specified actions as provided for in the settlement agreement. Please review the settlement agreement for additional details, available in the public docket at EPA–HQ–OGC–2016–0773.

For a period of 30 days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement agreement from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to the agreement should be withdrawn or withheld, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the proposed settlement agreement?

The official public docket for this action under Docket ID No. EPA–HQ–OGC–2016–0773 contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use the *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 22, 2016.

Gautam Srinivasan,

Acting Associate General Counsel.

[FR Doc. 2016–31748 Filed 12–29–16; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9031–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EISs) Filed 12/19/2016 Through 12/23/2016.

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20160312, Draft, USFWS, CA, City of San Diego Vernal Pool Habitat Conservation Plan, Comment Period Ends: 03/06/2017, Contact: Dan Cox 916–414–6539.

EIS No. 20160313, Final, NASA, FL, Center-wide Operations at the Kennedy Space Center, Review Period Ends: 01/30/2017, Contact: Donald Dankert 321–861–1196.

EIS No. 20160314, Draft, USFS, CA, Mitsubishi Cement Corporation South Quarry Plan of Operation, Comment Period Ends: 02/13/2017, Contact: Scott Eliason 909–382–2830.

EIS No. 20160315, Draft, FHWA, IL, Interstate 290 (Eisenhower Expressway), Comment Period Ends: 02/13/2017, Contact: Catherine A. Batey 217–492–4600.

EIS No. 20160316, Final, Caltrans, FHWA, CA, Eureka Arcata Route 101 Corridor Improvement Project, Review Period Ends: 01/30/2017, Contact: David Tedrick 916–498–5024.

EIS No. 20160317, Draft, BLM, NV, Sagebrush Focal Areas Withdrawal, Comment Period Ends: 03/31/2017, Contact: Mark Mackiewicz 801–636–3616.

EIS No. 20160318, Final, BR, CA, Bay Delta Conservation Plan/California WaterFix, Review Period Ends: 01/30/2017, Contact: Brooke White 916–414–2402.

Dated: December 27, 2016.

Dawn Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–31758 Filed 12–29–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0157 and 3060–1163]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 28, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0157.

Title: Section 73.99, Presunrise Service Authorization (PSRA) and Postsunset Service Authorization (PSSA).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 200 respondents; 200 responses.

Frequency of Response: Annual and on occasion reporting requirements.

Estimated Time per Response: 0.25 hours.

Total Annual Burden: 50 hours.

Total Annual Costs: $15,000.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements contained in 47 CFR 73.99(e) requires the licensee of an AM broadcast station intending to operate with a presunrise or postsunset service authorization to submit by letter to the Commission the licensee's name, call letters, location, the intended service, and a description of the method whereby any necessary power reduction will be achieved. Upon submission of this information, operation may begin without further authority. The FCC staff uses the letter to maintain complete technical information about the station to ensure that the licensee is in full compliance with the Commission's rules and will not cause interference to other stations.

OMB Control Number: 3060–0288.

Title: 47 CFR 78.33, Special Temporary Authority (Cable Television Relay Stations).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents and Responses: 35 respondents and 35 responses.

Estimated Time per Response: 4 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 140 hours.

Total Annual Costs: $5,250.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impacts.

Needs and Uses: The information collection requirements contained in 47 CFR 78.33 permits cable television relay station (CARS) operators to file informal requests for special temporary authority (STA) to install and operate equipment in a manner different than the way normally authorized in the station license. The special temporary authority also may be used by cable operators to conduct field surveys to determine necessary data in connection with a formal application for installation of a radio system, or to conduct equipment, program, service, and path tests.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–31710 Filed 12–29–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0863]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 28, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0863.

Title: Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 848 respondents; 250,000 responses.

Estimated Time per Response: 0.50 hours.

Frequency of Response: Recordkeeping requirement, On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection action is contained in the Satellite Home Viewer Act, 17 U.S.C. 119. The Satellite Home Viewer Act is an amendment of the Copyright Act; and Satellite Television Extension and Localism Act of 2010, Title V of the ''American Workers, State, and Business Relief Act of 2010,'' Public Law 111–175, 124 Stat. 1218 (2010) (STELA), see footnote 3.

Total Annual Burden to Respondents: 125,000 hours.

Total Annual Costs: None.

Privacy Impact Assessment(s): No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The information collection requirements contained in 47 CFR 73.686 describes a method for measuring signal strength at a household so that the satellite and broadcast industries would have a uniform method for making an actual determination of the signal strength that a household received. The information gathered as part of the Grade B contour signal strength tests will be used to indicate whether a household is ''unserved'' by over-the-air network signals.

Satellite and broadcast industries making field strength measurements for formal submission to the Commission in rulemaking proceedings, or making such measurements upon the request of the Commission, shall follow the procedure for making and reporting such measurements which shall be included in a report to the Commission and submitted in affidavit form, in triplicate. The report shall contain the following information:

(a) Tables of field strength measurements, which for each measuring location; (b) U.S. Geological Survey topographic maps; (c) All information necessary to determine the pertinent characteristics of the transmitting installation; (d) A list of calibrated equipment used in the field strength survey; (e) A detailed description of the calibration of the measuring equipment, and (f) Terrain profiles in each direction in which measurements were made.

The information collection requirements contained in 47 CFR 73.686 also requires satellite and broadcast companies to maintain a written record describing, for each location, factors which may affect the recorded field (*i.e.,* the approximate time or measurement, weather, topography, overhead wiring, heights and types of vegetation, buildings and other structures, the orientation of the measuring location, objects of such shape and size that cause shadows or reflections, signals received that arrived from a direction other than that of the transmitter, survey, list of the measured value field strength, time and date of the measurements and signature of the person making the measurements).

The information collection requirements contained in 47 CFR 73.686(e) describes the procedures for measuring the field strength of digital television signals. These procedures will be used to determine whether a household is eligible to receive a distant digital network signal from a satellite television provider, largely rely on existing, proven methods the Commission has already established for measuring analog television signal strength at any individual location, as set forth in Section 73.686(d) of the existing rules, but include modifications as necessary to accommodate the inherent differences between analog and digital TV signals. The new digital signal measurement procedures include provisions for the location of the measurement antenna, antenna height, signal measurement method, antenna orientation and polarization, and data recording.

Therefore, satellite and broadcast industries making field strength measurements shall maintain written records and include the following information: (a) A list of calibrated equipment used in the field strength survey, which for each instrument specifies the manufacturer, type, serial number and rated accuracy, and the date of the most recent calibration by the manufacturer or by a laboratory. Include complete details of any instrument not of standard manufacture; (b) A detailed description of the calibration of the measuring equipment, including field strength meters, measuring antenna, and connecting cable; (c) For each spot at the measuring site, all factors which may affect the recorded field, such as topography, height and types of vegetation, buildings, obstacles, weather, and other local features; (d) A description of where the cluster measurements were made; (e) Time and date of the measurements and signature of the person making the measurements; (f) For each channel being measured, a list of the measured value of field strength (in units of dBµ after adjustment for line loss and antenna factor) of the five readings made during the cluster measurement process, with the median value highlighted.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer. Office of the Secretary.

[FR Doc. 2016–31711 Filed 12–29–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX]

Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the

quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 30, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Kimberly R. Keravuori, OMB, via email *Kimberly_R_Keravuori@omb.eop.gov;* and to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov*. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Connect America Fund—High Cost Portal Filing.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 1,526 unique respondents; 3,595 responses.

Estimated Time per Response: 8 hours—30 hours.

Frequency of Response: On occasion, quarterly reporting requirements, annual reporting requirements, one-time reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 405, 410, and 1302.

Total Annual Burden: 65,713 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: We note that USAC must preserve the confidentiality of certain data obtained from respondents; must not use the data except for purposes of administering the universal service programs or other purposes specified by the Commission; and must not disclose data in company-specific form unless directed to do so by the Commission. Respondents may request materials or information submitted to the Commission or the Administrator believed confidential to be withheld from public inspection under 47 CFR 0.459 of the FCC's rules.

Needs and Uses: The Commission is requesting approval for this new information collection. In March 2016, the Commission adopted an order reforming its universal service support program in areas served by rate-of-return carriers. Connect America Fund *et al.*, WC Docket Nos. 10–90 *et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16–33 (*Rate-of-Return Order*). Also, in May 2016, the Commission adopted rules to implement a competitive bidding process for Phase II of the Connect America Fund. Connect America Fund *et al.*, WC Docket Nos. 10–90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 16–64 (*Phase II Auction Order*).

This information collection addresses the requirement that certain carriers with high cost reporting obligations must file information about their locations which meet their broadband deployment public interest obligations via an electronic portal (''portal''). *The Rate-of-Return Order* required that the Universal Service Administrative Company (USAC) establish the portal so that carriers could file their location data with the portal starting in 2017. The *Rate-of-Return Order* required all recipients of Phase II model-based support and rate-of-return carriers to submit geocoded location data and related certifications to the portal. Recipients of Phase II model-based support had been required to file such information in their annual reports due by July 1. The *Phase II Auction Order* requires auction winners to build-out networks capable of meeting their public interest obligations and report, to an online portal, locations to which auction winners had deployed such networks. This collection also implements the Rate-of-Return Order by moving and revising the currently approved requirements under OMB Control Numbers 3060–1200 and 3060–0986 to enable recipients of Phase II model-based support and rural broadband experiment funding to file their location information and associated reports and certifications in the portal instead of on the FCC Form 481 or as is currently required.

Federal Communications Commission.

Katura Howard,

Federal Register Liaison Officer. Office of the Secretary.

[FR Doc. 2016–31722 Filed 12–29–16; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[60Day–17–17IY; Docket No. ATSDR–2016–0122]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Agency for Toxic Substances and Disease Registry (ATSDR), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on ''Biomonitoring of Great Lakes Populations Program III.'' The purpose of the proposed study is to evaluate body burden levels of priority contaminants in Great Lakes residents,

particularly those who are at high exposure risk, in the Milwaukee Bay Estuary Area of Concern (AOC) area that was not previously addressed in ATSDR's previous biomonitoring programs around the Great Lakes.

DATES: Written comments must be received on or before February 28, 2017.

ADDRESSES: You may submit comments, identified by Docket No. ATSDR–2016–0122 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov*.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Biomonitoring of Great Lakes Populations Program III—New—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The Agency for Toxic Substances and Disease Registry (ATSDR) is requesting a three-year Paperwork Reduction Act (PRA) clearance for a new information collection request (ICR) titled ''Biomonitoring of Great Lakes Populations Program III.'' ATSDR awarded funds to the Wisconsin Department of Health Services (WIDHS) to conduct this information collection under cooperative agreement #NU61TS000269–01–00. The purpose of the current program is to evaluate body burden levels of legacy and emerging contaminants in susceptible Great Lakes populations in the Milwaukee Estuary Area of Concern (AOC) in Wisconsin, an area that has not been previously covered by other Great Lakes initiatives.

The Great Lakes Basin has suffered decades of pollution and ecosystem damage. Many chemicals persist in Great Lakes waters and sediments, as well as in wildlife. These chemicals can build up in the aquatic food chain, and eating contaminated fish is a known route of human exposure.

In 2009, the Great Lakes Restoration Initiative (GLRI) was enacted by Public Law 111–88 to make restoration and protection of the Great Lakes a national priority. The GLRI is led by the U.S. Environmental Protection Agency (US EPA). Under a 2015 interagency agreement with the US EPA, ATSDR initiated the Biomonitoring of Great Lakes Populations Program III program. This project will provide additional public health information to supplement the previous cooperative agreement programs CDC–RFA–TS10–1001 ''Biomonitoring of Great Lakes Populations'' (hereafter referred to as ''Program I,'' OMB Control Number 0923–0044) and CDC–RFA–TS13–1302 ''Biomonitoring of Great Lakes Populations-II'' (hereafter referred to as ''Program II,'' OMB Control Number 0923–0052) initiated in FY2010 and FY2013, respectively.

WIDHS received funding for the current program. WIDHS will recruit and enroll two subpopulations of adults in the Milwaukee Bay Estuary Area of Concern (AOC) who are known to eat fish from the Milwaukee River Basin and Lake Michigan. This study will not include pregnant women.

The target populations are: (1) Licensed anglers living in proximity to the Milwaukee Estuary AOC and (2) Burmese refugees who are known to eat a substantial amount of fish from this area. WIDHS study staff will work closely with local refugee and citizen support organizations on participant recruitment.

The aims of the information collection in this surveillance project are:

1. Assess levels of contaminants (metals, polychlorinated biphenyls, chlorinated pesticides, perfluorinated compounds, and polyaromatic hydrocarbons) in blood and urine of residents who consume fish from contaminated areas that had not been studied in previous Programs I and II;

2. Use the project findings to inform public health officials and offer guidance on public health actions to reduce exposure to Great Lakes contaminants.

This applied public health program aims to measure contaminants in biological samples (blood, urine and hair) from people who may be at high risk of chemical exposure in the Great Lakes area. These measurements will provide a baseline for current and future restoration activities. The results will be compared to available national estimates, such as those reported by the National Health and Nutrition Examination Survey (NHANES).

Respondents will be screened for eligibility and consent will be obtained. Participants who consent will respond to a questionnaire and participate in clinic visits for body measurements and biological specimen collection (blood, urine, and hair). Their blood will be tested for polychlorinated biphenyls, metals, perfluorinated compounds, persistent pesticides, and lipids. Urine will be tested for polycyclic aromatic hydrocarbons and creatinine. The hair samples (optional) will be saved for a later analysis.

Respondents will also be interviewed. They will be asked about demographic and lifestyle factors, hobbies, health conditions that may affect fish consumption and fishing habits, and types of jobs which can contribute to chemical exposure. Some dietary questions will be asked with a focus on consumption of Great Lakes fish.

Participation in the study is voluntary and there is no cost to respondents other than their time. The estimated annualized burden for the program averaged over the three-year study period is 231 hours among 166 respondents. There is no cost to respondents other than their time spent in the study.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Licensed Anglers	Eligibility Screening Survey (paper)	156	1	5/60	13
	Eligibility Screening Survey (online)	28	1	5/60	2
	Study Questionnaire (paper)	58	1	30/60	29
	Study Questionnaire (online)	87	1	30/60	44
	Clinic Visit Checklist and Body Measurements	133	1	35/60	78
	Follow-up Survey	133	1	5/60	11
Burmese Refugees	Eligibility Screening Survey	42	1	5/60	4
	Contact Information Form	33	1	5/60	3
	Study Questionnaire	33	1	40/60	22
	Clinic Visit Checklist and Body Measurements	33	1	35/60	19
	Network Size Questions	33	1	5/60	3
	Follow-up Survey	33	1	5/60	3
Total					231

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31738 Filed 12–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–0576; Docket No. CDC–2016–0125]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed revision of the CDC information collection project entitled ''Possession, Use, and Transfer of Select Agents and Toxins.''

DATES: Written comments must be received on or before February 28, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0125 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comments should be submitted through the Federal eRulemaking portal (Regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden is the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel to respond to a collection of information, search data sources, and complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Possession, Use, and Transfer of Select Agents and Toxins (42 CFR 73) (OMB Control No. 0920–0576, exp. 12/31/2018)—Revision—Office of Public Health Preparedness and Response (OPHPR), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Subtitle A of the *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, (42 U.S.C. 262a),* requires the United States Department of Health and Human Services (HHS) to regulate the possession, use, and transfer of biological agents or toxins that have the potential to pose a severe threat to public health and safety (select agents and toxins). Subtitle B of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (which may be cited as the *Agricultural Bioterrorism Protection Act of 2002), (7 U.S.C. 8401),* requires the United States Department of Agriculture (USDA) to regulate the possession, use, and transfer of biological agents or toxins that have the potential to pose a severe threat to animal or plant health, or animal or plant products (select agents and toxins). The HHS Secretary delegated the responsibility for promulgating and implementing select agent regulations found at 42 CFR part 73 to CDC Division of Select Agents and Toxins (DSAT). The Animal and Plant Health Inspection Service (APHIS)/Agriculture Select Agent Services (AgSAS) was delegated responsibility by USDA for select agent regulations (7 CFR part 331, and 9 CFR part 121). The Federal Select Agent Program (FSAP) is the collaboration of the DSAT and AgSAS to administer the select agent regulations in a manner to minimize the administrative burden on persons subject to the select agent regulations. Accordingly, CDC and APHIS have adopted an identical system to collect information for the possession, use, and transfer of select agents and toxins.

CDC is requesting OMB approval to revise the collected information under the select agent regulations through the use of the APHIS/CDC Form 3 (Report of Theft, Loss, or Release of Select Agents and Toxins). The Report of Theft, Loss, or Release of Select Agent and Toxin form (42 CFR 73.19(a),(b)) must be completed by an individual or an entity whenever the individual or entity experiences a theft, loss, or release of a select agent or toxin.

CDC is proposing to revise the form to further clarify what needs to be reported as a ''release'' and ''loss'' and additional fields to assist with categorizing the type of release (*e.g.,* spill within secondary containment, occupational exposure, possible breach of facility containment, etc.), type of exposure, and the understanding of safety and security risk levels relative to human illness. Estimated average time to complete this form is one hour.

The total estimated annualized burden for this collection was calculated using data obtained from the FSAP database and is estimated as 430 hours. Information will be collected via fax, email and hard copy mail from respondents. Upon OMB approval, CDC will continue use of the revised form through November 2018. There is no cost to the respondents.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
73.19 Section	Report of Theft, Loss, or Release of Select Agents and Toxins.	215	1	2	430
Total	....	....	....	....	430

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31739 Filed 12–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–1074; Docket No. CDC–2016–0123]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the revision of the information collection entitled ''Colorectal Cancer Control Program (CRCCP) Monitoring Activities.'' The change to the collection will include a

redesigned survey and a redesigned clinic-level data collection template.

DATES: Written comments must be received on or before February 28, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0123 by any of the following methods:

• *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.

• *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (Regulations.gov) *or by U.S. mail to the address listed above.*

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Colorectal Cancer Control Program (CRCCP) Monitoring Activities—(OMB Control No. 0920–1074, exp. 6/30/2018)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC is requesting a revision of the information collection approved under OMB Control Number 0920–1074. Based on feedback from grantees and internal subject matter experts, CDC proposes use of a revised annual grantee survey instrument, as well as a revised clinic-level data collection template. The number of respondents will also decrease from 31 to 30 grantees. Total estimated annualized burden will decrease. OMB approval is requested for three years.

Colorectal cancer (CRC) is the second leading cause of death from cancer in the United States among cancers that affect both men and women. CRC screening has been shown to reduce incidence of and death from the disease. Screening for CRC can detect disease early when treatment is more effective and prevent cancer by finding and removing precancerous polyps. Of individuals diagnosed with early stage CRC, more than 90% live five or more years. Despite strong evidence supporting screening, only 65% of adults currently report being up-to-date with CRC screening as recommended by the U.S. Preventive Services Task Force, with more than 22 million age-eligible adults estimated to be untested. To reduce CRC morbidity, mortality, and associated costs, use of CRC screening tests must be increased among age-eligible adults with the lowest CRC screening rates.

CDC's Colorectal Cancer Control Program (CRCCP) currently provides funding to 30 grantees under ''Organized Approaches to Increase Colorectal Cancer Screening'' (CDC–RFA–DP15–1502). CRCCP grantees include state governments or bona-fide agents, universities, and tribal organizations. The purpose of the cooperative agreement program is to increase CRC screening rates among an applicant defined target population of persons 50–75 years of age within a partner health system serving a defined geographical area or disparate population. The CDC significantly redesigned the CRCCP in 2015. The CRCCP has two components.

Component 1: Funding for component 1 is limited to partnerships with health systems to implement up to four priority evidence-based interventions (EBIs) described in the Guide to Community Preventive Services as well as other supporting strategies. Grantees must implement at least two EBIs in each partnering health system. All 30 CRCCP grantees received Component 1 funding.

Component 2: Funding for component 2 is used by grantees to provide direct screening and follow-up clinical services for a limited number of individuals aged 50–64 in the program's priority population who are asymptomatic, at average risk for CRC, have inadequate or no health insurance for CRC screening, and are low income. Six of the 30 CRCCP grantees received Component 2 funding.

Two forms of data collection have been implemented to assess program processes and outcomes. In Program Year 1, the annual grantee survey monitored grantee program implementation, including (1) program management, (2) implementation of the EBIs and Supporting Activities (SAs) (3) health information technology (IT), (4) partnerships, (5) data use, (6) training and technical assistance (TA), and (7) clinical service delivery (for programs receiving Component 2 funding only). Clinic-level data collection assessed CRCCP's primary outcome of interest—CRC screening rates within partner health systems—by measuring the following components: (1) Partner health system, clinic, and patient population characteristics, (2) reporting period (for screening rates), (3) Chart review screening rate data, (4) Electronic Health Record (EHR) screening rate, and (5) Priority evidence-based EBIs and SAs. CRCCP grantees collected and reported CRCCP clinic-level information for all partnering health system primary care clinic sites.

For Program Years 2–5, based on feedback from grantees, CDC proposes use of updated data collection instruments. Specifically, CDC plans to implement a revised CRCCP annual grantee survey that eliminates survey items related to implementation of EBIs and SAs as these data are more accurately reported at the clinic level. Conversely, CDC plans to implement a revised CRCCP clinic-level data collection template that includes additional data variables related to implementation of EBIs and SAs, as well as monitoring and evaluation activities, at the clinic level.

Redesigned data elements will enable CDC to better gauge progress in meeting CRCCP program goals and monitor implementation activities, evaluate outcomes, and identify grantee technical assistance needs. In addition, data collected will inform program improvement and help identify successful activities that need to be maintained, replicated, or expanded.

OMB approval is requested for three years. The number of grantees decreased from 31 grantees in program year one to 30 grantees in program year two. In addition, the total estimated annualized burden hours have decreased from 210 to 204 hours. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
CRCCP Grantees	CRCCP Annual Grantee Survey	30	1	24/60	12
	CRCCP Clinic-level Information Collection Template.	30	12	32/60	192
Total					204

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31740 Filed 12–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Electronic Filing of Certain Import Data Into the Document Image System Through the Automated Commercial Environment

AGENCY: Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: Through publication of this notice, the Centers for Disease Control and Prevention (CDC) located within the Department of Health and Human Services (HHS) announces a new policy and guidance for the electronic submission of data related to the importation of CDC-regulated items in the International Trade Data System (ITDS). Certain data, forms, and documents required to be submitted to HHS/CDC will be submitted through the U.S. Customs and Border Protection (CBP)'s Automated Commercial Environment (ACE) system, using the Document Image System (DIS). This electronic process will replace certain paper-based processes in keeping with Federal policy and improve operations to further assist HHS/CDC's mission to protect public health.

DATES: This action is effective December 30, 2016.

FOR FURTHER INFORMATION CONTACT: For information regarding this Notice: Ashley A. Marrone, J.D., Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–E03, Atlanta, GA 30329. For information regarding CDC operations related to this Notice: Kendra Stauffer, D.V.M., Division of Global Migration and Quarantine, Quarantine and Border Health Services Branch, Importations and Animal Contact Team, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–E28, Atlanta, GA 30345. Either may also be reached by telephone 404–498–1600 or email *CDCAnimalImports@cdc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On February 19, 2014, the President signed Executive Order 13659, *Streamlining the Export/Import Process for America's Businesses* (79 FR 10655), that requires the completion and government-wide utilization by December 31, 2016 of the International Trade Data System (ITDS) and establishes a two-tiered governance process to oversee its implementation. Once fully implemented, ITDS, through the Automated Commercial Environment (ACE), will allow importers to submit the data required by U.S. Customs and Border Protection and its Partner Government Agencies (PGAs) relating to the import or export of cargo through a ''single window'' concept. CBP has developed ACE as the single window for the trade community to transmit electronically all required cargo-related information.

This notice announces HHS/CDC's updated policy concerning the electronic transmission of HHS/CDC permits, forms, and documents using CBP's Document Image System (DIS). This DIS capability will satisfy the HHS/CDC data and electronic document requirements for any entry filed electronically in ACE and enable the trade community to have a CBP-managed single window for the electronic submission of data and documents required by HHS/CDC during the cargo importation and review process. The list of PGA forms and documents, including documents required by HHS/CDC, which may be transmitted using DIS may be found at *http://www.cbp.gov/trade/ace/features* under the DIS tab by clicking on the ''ACE PGA Forms List'' hyperlink in the ''References'' column. The HHS/CDC permits, forms, and documents listed in the ACE PGA Forms List are those eligible to be transmitted using DIS.

II. Current HHS/CDC Paper-Based Procedures

Under current applicable HHS/CDC policy and operations, the importation of HHS/CDC-regulated commodities into the customs territory of the United States typically requires the submission of one or more of the following documents:

(1) Animal and Plant Health Inspection Service (APHIS)/CDC Form 2—Request to Transfer Select Agents and Toxins (42 CFR 73);

(2) CDC Form 0.0728—Permit to Import or Transfer Etiologic Agents or Vectors of Human Disease (42 CFR 71.54);

(3) Rabies Vaccination Certificate (42 CFR 71.51);

(4) CDC Approval of Confinement Agreement Issuance Letter (42 CFR 71.51);

(5) CDC Permission Letter—Permit to Import African Rodents, Civets, or Turtles (42 CFR 71.56, 42 CFR 71.32(b), 42 CFR 71.52);

(6) CDC Nonhuman Primate Notification Message—Confirmation from CDC to the importer that CDC has given permission to import the nonhuman primate shipment (42 CFR 71.53); and

(7) Certification statement of a material that is not known to contain or suspected of containing an infectious biological agent, or has been rendered noninfectious (42 CFR 71.54).

Under the new policy, for those HHS/CDC items filed within ACE, individuals will continue to use the designated HHS/CDC application and filing processes; however, the processes will be electronic rather than paper-based.

III. Implementation of E.O. 13659

Under this new Federal policy, which HHS/CDC has adopted, importers and brokers who file electronic entries for HHS/CDC-regulated items are now required to:

• Obtain the copy of the permit/permission letter, form, or document for submission to DIS:

(1) The APHIS/CDC Form 2, Request to Transfer Select Agents and Toxins, is used by entities to request prior authorization of a transfer including importation into the United States of select agent(s) or toxin(s) from the Federal Select Agent Program as required by regulations (7 CFR 331, 9 CFR 121, and 42 CFR 73). The form is available at: *http://www.selectagents.gov/form2.html.*

(2) CDC Form 0.0728—Permit to Import or Transfer Etiologic Agents or Vectors of Human Disease: *http://www.cdc.gov/od/eaipp/index.htm.* For infectious biological agents, infectious substances, and vectors of human disease, importers must have a permit from HHS/CDC's Import Permit Program.

(3) A rabies vaccination certificate for a dog must be issued by a licensed veterinarian.

(4) and (5) For certain animals and animal products capable of causing human disease, you must have a permit or letter of permission. See *https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/index.html.* Email inquiries about these importations to *CDCAnimalImports@cdc.gov.* Note that CDC is transitioning to the CDC Import Permit for a Dog not immunized against Rabies during the first quarter of 2017. Permits will be issued using an online application process.

(6) Only registered importers may bring nonhuman primates into the United States. HHS/CDC emails this approval to the broker after receiving notification of an incoming shipment by a registered importer. For information on how to become a registered importer, see *http://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/monkeys.html.* The HHS/CDC Nonhuman Primate Notification Message is automatically generated when a registered importer notifies HHS/CDC of an incoming shipment.

(7) For material that is not known to contain or suspected of containing an infectious biological agent, or has been rendered noninfectious, importers must provide an importer certification statement with the imported material. The certification statement must include a detailed description of the material and a statement on official letterhead signed by the sender or recipient clearly stating that (1) the material is not known or suspected to contain an infectious biological agent and (2) how the person making the certification knows that the specimen does not contain an infectious biological agent; or why that person believes there is no reason to suspect that the specimen contains an infectious biological agent; or a detailed description of how the material was rendered noninfectious. For more information, see the Import Regulations for Infectious Biological Agents, Infectious Substances and Vectors at *http://www.cdc.gov/phpr/ipp/regulations.htm.*

• Follow all applicable rules for obtaining and certifying DIS software as set forth by CBP. For more information, see *https://www.cbp.gov/trade/automated/systems.*

• Transmit import filings to CBP via ACE.

• Transmit only information to CBP that has been requested by CBP or CDC.

• Check CDC's Importation Web site *http://www.cdc.gov/importation/index.html* regularly for updated guidance for electronic filing.

The following processes will remain as paper-based submissions:

A. Human remains for interment or cremation after entering the United States will not have an electronic entry within ACE. The required paper-based documents must continue to accompany the human remains, including those required by 42 CFR 71.55. For more information, see *http://www.cdc.gov/quarantine/human-remains.html.*

B. Form 75.37—''Notice to Owners and Importers of Dogs (Requirement for Dog Confinement)'' Dogs imported into the United States are expected to be healthy and vaccinated against rabies. There is no requirement to have this information electronically available within ACE. CBP issues a notice to owners and importers post-arrival only when dogs arrive in the U.S. port of entry without the required vaccination, meet certain criteria, and have been preapproved by HHS/CDC. For more information, visit the CDC Web page for how to bring an animal into the United States at *http://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/dogs.html.*

For more information on this policy and updates or changes to the forms eligible for electronic submission, please see *http://www.cdc.gov/importation/index.html.*

IV. Paperwork Reduction Act

This change does not institute a new collection of information. The collection of information, including the use of the DIS, has been previously approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) and assigned the following OMB control numbers: (1) Foreign Quarantine: OMB Control No. 0920–0134, expiration date 5/31/2019; (2) Import Permit Applications: OMB Control No. 0920–0199, expiration date 1/31/2017; (3) Requirements for the Importation of Nonhuman Primates into the United States: OMB Control No. 0920–0263, expiration date 9/30/2017; and (4) Possession, Use, and Transfer of Select Agents and Toxins: OMB Control No. 0920–0576, expiration date 12/31/18.

Dated: December 27, 2016.

Lauren Hoffmann,

Acting Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2016–31750 Filed 12–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17IX; Docket No. CDC–2016–0124]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project entitled ''Assessment of Interventions Intended to Protect Pregnant Women in Puerto Rico from Zika Infections.'' This project consists of telephone interviews with pregnant WIC participants in Puerto Rico.

DATES: Written comments must be received on or before February 28, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0124 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Assessment of Interventions Intended to Protect Pregnant Women in Puerto Rico from Zika Infections—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC proposes to continue the information collection initially cleared by OMB as an emergency ICR in June, 2016 (OMB Control No. 0920–1118). The expiration date for 0920–1118 is December 31, 2016. However, CDC intends to continue information collection for an additional nine months and is seeking OMB clearance to do so.

In December 2015, the Commonwealth of Puerto Rico, a United States territory, reported its first confirmed locally transmitted Zika virus case.

Starting in March 2016, The Centers for Disease Control and Prevention's (CDC) National Center for Emerging and Zoonotic Infections Diseases (NCEZID) initiated several interventions targeting pregnant women. The ultimate goal of these interventions is/was to protect pregnant women from Zika virus and encourage Zika prevention behaviors among pregnant women. The interventions include the following:

1. Zika Education Sessions (at WIC clinics;
2. Zika Prevention Kits;
3. Communication activities; and
4. Vector control services in the community.

This ICR is for data collection over the next nine months related to Zika prevention efforts that have been and will be implemented in Puerto Rico. Specifically, CDC needs this assessment to ensure that Zika prevention activities effectively educate, equip, and encourage women to participate in as many Zika prevention behaviors as possible. On-going evaluation is an important part of this program because it can reveal novel ways that women protect themselves from Zika, how effective the distribution of the Zika Prevention Kit has been in Puerto Rico, perceived severity and susceptibility to Zika, pregnant women's self-efficacy in protecting themselves from Zika after the interventions have been implemented, as well as the extent to which target populations are using contents of the Zika Prevention Kit.

Interviews with pregnant women in Puerto Rico can help articulate motivations for and against engaging in Zika prevention behaviors that are critical for preventing Zika-associated birth defects and morbidities. Implementing changes based on results from this assessment is expected to facilitate program improvement and ensure the most efficient allocation of resources for this public health emergency. The goal of this project is to find out if interventions are reaching pregnant women and having the intended effects along with getting feedback from pregnant women about the Zika prevention activities that have been implemented (*e.g.,* Zika education sessions and prevention kits, vector control activities, and communication activities).

Findings will be used to improve the delivery of interventions and to inform decisions about future Zika prevention activities for pregnant women in Puerto Rico. The plan is to conduct up to 500 telephone interviews every two months over a 9-month period, (a total of four rounds), analyze the data, and generate a report for leaders of the response to offer insights on the delivery of interventions to pregnant women. The information will be used to make recommendations for improving interventions. Information may also be used to develop presentations, reports, and manuscripts to document the program and lessons learned in order to inform future programs of this sort.

The purpose of this assessment is also to assess core components of CDC's Zika response in communicating prevention behaviors, risk messages to the public about vector control activities, and the Zika Prevention kit.

The following factors will be assessed:

- Knowledge about Zika virus and related prevention behaviors
- Self-efficacy in engaging in Zika prevention behaviors
- Engagement in Zika prevention behaviors (*e.g.,* protective clothing use, condom use, and bed net use)
- Knowledge about, attitudes about, and use of the Zika Prevention Kit materials
- Knowledge about, attitudes about, and use of environmental vector control activities
- Risk perceptions of Zika
- Exposures to communications along with other factors that may be important considerations in their taking action or not (*e.g.,* does their house have screens, etc.)

CDC will conduct telephone interviews with a mix of closed-ended and open-ended questions with pregnant women. We estimate 2,000 pregnant women will participate in the project over a nine month period.

Another component of this project is to conduct qualitative inquiry to explore emerging issues related to vector control, sexual transmission, contraception, mental health/emotional support, service/support needs of families with babies affected by Zika, or vaccine communications (if applicable). While pregnant women will be the main focus of most inquiry, other audiences could include community leaders, community members, and health care providers. The goal is to identify specific unmet needs, which can then be shared with the Department of Health and other human service agencies. The plan is to hold up to 7 focus groups (with up to 10 persons each), or up to 20 in-depth individual interviews or up to 75 brief intercept interviews. A maximum of 75 individuals would participate in this part.

Results of this project will have limited generalizability. However, results of this evaluation should provide information that can be used to enhance and revise the existing program as well as offer lessons learned to inform infectious disease control programs that use education materials.

Authorizing legislation comes from Section 301 of the Public Health Service Act (42 U.S.C. 241). There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)	Total burden (in hrs.)
Pregnant WIC participant	Initial Telephone Interview.	2,000	1	20/60	667
WIC participants, other families affected by Zika	Focus group	70	1	120/60	140
WIC participants, other families	In-depth Interviews	20	1	60/60	20
General population in Zika affected neighborhood.	Brief intercept interview	75	1	10/60	13
Total					840

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31737 Filed 12–29–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1155]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of our food labeling regulations and on Form FDA 3570, Model Small Business Nutrition Labeling Exemption Notice, which small businesses may use to claim the small business exemption from nutrition labeling.

DATES: Submit either electronic or written comments on the collection of information by February 28, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–1155 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Food Labeling Regulations.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Food Labeling Regulations—21 CFR Parts 101, 102, 104, and 105; OMB Control Number 0910–0381—Extension

Our food labeling regulations require food producers to disclose to consumers and others specific information about themselves or their products on the label or labeling of their products. Related regulations require that food producers retain records establishing the basis for the information contained in the label or labeling of their products and provide those records to regulatory officials. Finally, certain regulations provide for the submission of food labeling petitions to us. We issued our food labeling regulations under parts 101, 102, 104, and 105 (21 CFR parts 101, 102, 104, and 105) under the authority of sections 4, 5, and 6 of the Fair Packaging and Labeling Act (the FPLA) (15 U.S.C. 1453, 1454, and 1455) and sections 201, 301, 402, 403, 409, 411, 701, and 721 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321, 331, 342, 343, 348, 350, 371, and 379e). Most of these regulations derive from section 403 of the FD&C Act, which provides that a food product shall be deemed to be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the food product, is false or misleading in any particular, or bears certain types of unauthorized claims. The disclosure requirements and other collections of information in the regulations in parts 101, 102, 104, and 105 are necessary to ensure that food products produced or sold in the United States are in compliance with the labeling provisions of the FD&C Act and the FPLA.

Section 101.3 of our food labeling regulations requires that the label of a food product in packaged form bear a statement of identity (*i.e.,* the name of the product), including, as appropriate, the form of the food or the name of the food imitated. Section 101.4 prescribes requirements for the declaration of ingredients on the label or labeling of food products in packaged form. Section 101.5 requires that the label of a food product in packaged form specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the manufacturer of the food product, its connection with the food product. Section 101.9 requires that nutrition information be provided for all food products intended for human consumption and offered for sale, unless an exemption in § 101.9(j) applies to the product. In particular, § 101.9(c)(2)(ii) requires that the amount of *trans* fatty acids present in a food must be declared on the nutrition label on a separate line immediately under the line for the declaration of saturated fat. Section 101.9(g)(9) provides that interested parties may submit to us requests for alternative approaches to nutrition labeling requirements. Finally, § 101.9(j)(18) provides that firms claiming the small business exemption from nutrition labeling must submit notice to us supporting their claim exemption. We developed Form FDA 3570 to assist small businesses in claiming the small business exemption from nutrition labeling. The form contains all the elements required by § 101.9(j)(18).

Section 101.10 requires that restaurants provide nutrition information, upon request, for any food or meal for which a nutrient content claim or health claim is made. Section 101.12(b) provides the reference amount that is used for determining the serving sizes for specific products, including baking powder, baking soda, and pectin. Section 101.12(e) provides that a manufacturer that adjusts the reference amount customarily consumed (RACC) of an aerated food for the difference in density of the aerated food relative to the density of the appropriate nonaerated reference food must be prepared to show us detailed protocols and records of all data that were used to determine the density-adjusted RACC. Section 101.12(g) requires that the label or labeling of a food product disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC. Section 101.12(h) provides for the submission of petitions requesting that we change the reference amounts defined by regulation.

Section 101.13 requires that nutrition information be provided in accordance with § 101.9 for any food product for which a nutrient content claim is made. Under some circumstances, § 101.13 also requires the disclosure of other types of information as a condition for the use of a nutrient content claim. For example, under § 101.13(j), if the claim compares the level of a nutrient in the food with the level of the same nutrient in another ''reference'' food, the claim must also disclose the identity of the reference food, the amount of the nutrient in each food, and the percentage or fractional amount by which the amount of the nutrient in the labeled food differs from the amount of the nutrient in the reference food. It also requires that when this comparison is based on an average of food products, this information must be provided to consumers or regulatory officials upon request. Section 101.13(q)(5) requires that restaurants document and provide to appropriate regulatory officials, upon request, the basis for any nutrient content claims they have made for the foods they sell.

Section 101.14(d)(2) and (d)(3) provides for the disclosure of nutrition information in accordance with § 101.9 and, under some circumstances, certain other information as a condition for making a health claim for a food product. Section 101.15 provides that, if the label of a food product contains any representation in a foreign language, all words, statements, and other information required by or under authority of the FD&C Act to appear on the label must appear in both the foreign language and in English. Section 101.22 contains labeling requirements for the disclosure of spices, flavorings, colorings, and chemical preservatives in food products. Section 101.22(i)(4) sets forth disclosure and recordkeeping requirements pertaining to certifications for flavors designated as containing no artificial flavors. Section 101.30 specifies the conditions under which a beverage that purports to contain any fruit or vegetable juice must declare the percentage of juice present in the beverage and the manner in which the declaration is to be made.

Section 101.36 requires that nutrition information be provided for dietary supplements offered for sale, unless an exemption in § 101.36(h) applies. In particular, § 101.36(b)(2) requires that the amount of *trans* fatty acids present in dietary supplements must be declared on the nutrition label on a separate line immediately under the line for the declaration of saturated fat. Section 101.36(e) permits the voluntary declaration of the quantitative amount and the percent of Daily Value of a dietary ingredient on a ''per day'' basis in addition to the required ''per serving'' basis, if a dietary supplement label recommends that the dietary supplement be consumed more than once per day. Section 101.36(f)(2) cross-references the provisions in § 101.9(g)(9) for the submission to us of requests for alternative approaches to nutrition labeling requirements. Also, § 101.36(h)(2) cross-references the provisions in § 101.9(j)(18) for the submission of small business exemption notices. As noted previously, we developed Form FDA 3570 to assist small businesses in claiming the small business exemption from nutrition labeling. The form contains all the elements required by § 101.36(h)(2).

Section 101.42 requests that food retailers voluntarily provide nutrition information for raw fruits, vegetables, and fish at the point of purchase, and § 101.45 contains guidelines for providing such information. Also, § 101.45(c) provides for the submission to us of nutrient databases and proposed nutrition labeling values for raw fruit, vegetables, and fish for review and approval.

Sections 101.54, 101.56, 101.60, 101.61, and 101.62 specify information that must be disclosed as a condition for making particular nutrient content claims. Section 101.67 provides for the use of nutrient content claims for butter, and cross-references requirements in other regulations for information declaration (§ 101.4) and disclosure of information concerning performance characteristics (§ 101.13(d)). Section 101.69 provides for the submission of a petition requesting that we authorize a particular nutrient content claim by regulation. Section 101.70 provides for the submission of a petition requesting that we authorize a particular health claim by regulation. Section 101.77(c)(2)(ii)(D) requires the disclosure of soluble fiber per serving in the nutrition labeling of a food bearing a health claim about the relationship between soluble fiber and a reduced risk of coronary heart disease. Section 101.79(c)(2)(iv) requires the disclosure of the amount of folate in the nutrition label of a food bearing a health claim about the relationship between folate and a reduced risk of neural tube defects.

Section 101.100(d) provides that any agreement that forms the basis for an exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the FD&C Act be in writing and that a copy of the agreement be made available to us upon request. Section 101.100 also contains reporting and disclosure requirements as conditions for claiming certain labeling exemptions (*e.g.,* 101.100(h)).

Section 101.105 specifies requirements for the declaration of the net quantity of contents on the label of a food in packaged form and prescribes conditions under which a food whose label does not accurately reflect the actual quantity of contents may be sold, with appropriate disclosures, to an institution operated by a Federal, State, or local government. Section 101.108 provides for the submission to us of a written proposal requesting a temporary exemption from certain requirements of §§ 101.9 and 105.66 for the purpose of conducting food labeling experiments with our authorization.

Regulations in part 102 define the information that must be included as part of the statement of identity for particular foods and prescribe related labeling requirements for some of these foods. For example, § 102.22 requires that the name of a protein hydrolysate will include the identity of the food source from which the protein was derived.

Part 104, which pertains to nutritional quality guidelines for foods, cross references several labeling provisions in part 101 but contains no separate information collection requirements.

Part 105 contains special labeling requirements for hypoallergenic foods, infant foods, and certain foods represented as useful in reducing or maintaining body weight.

The purpose of our food labeling requirements is to allow consumers to be knowledgeable about the foods they purchase. Nutrition labeling provides information for use by consumers in selecting a nutritious diet. Other information enables a consumer to comparison shop. Ingredient information also enables consumers to avoid substances to which they may be sensitive. Petitions or other requests submitted to us provide the basis for us to permit new labeling statements or to grant exemptions from certain labeling requirements. Recordkeeping requirements enable us to monitor the basis upon which certain label statements are made for food products and whether those statements are in compliance with the requirements of the FD&C Act or the FPLA.

Description of Respondents: Respondents to this information collection are manufacturers, packers, and distributors of food products. Because of the existence of exemptions and exceptions, not all of the requirements apply to all food producers or to all of their products. Some of the regulations affect food retailers, such as supermarkets and restaurants.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN [1]

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
101.3, 101.22, 102 and 104; statement of identity labeling requirements.	25,000	1.03	25,750	.5 (30 minutes)	12,875
101.4, 101.22, 101.100, 102, 104 and 105; ingredient labeling requirements.	25,000	1.03	25,750	1	25,750
101.5; requirement to specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the manufacturer of the food product, its connection with the food product.	25,000	1.03	25,750	0.25 (15 minutes)	6,438
101.9, 101.13(n), 101.14(d)(3), 101.62, and 104; labeling requirements for disclosure of nutrition information.	25,000	1.03	25,750	.40 (24 minutes)	103,000
101.9(g)(9) and 101.36(f)(2); alternative means of compliance permitted.	12	1	12	4	48
101.10; requirements for nutrition labeling of restaurant foods.	300,000	1.5	450,000	0.25 (15 minutes)	112,500
101.12(b); RACC for baking powder, baking soda and pectin.	29	2.3	67	1	67
101.12(e); adjustment to the RACC of an aerated food permitted.	25	1	25	1	25
101.12(g); requirement to disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC.	5,000	1	5,000	1	5,000
101.13(d)(1) and 101.67; requirements to disclose nutrition information for any food product for which a nutrient content claim is made.	200	1	200	1	200
101.13(j)(2), 101.13(k), 101.54, 101.56, 101.60, 101.61, and 101.62; additional disclosure required if the nutrient content claim compares the level of a nutrient in one food with the level of the same nutrient in another food.	5,000	1	5,000	1	5,000
101.13(q)(5); requirement that restaurants disclose the basis for nutrient content claims made for their food.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); general requirements for disclosure of nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500

TABLE 1—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN [1]—Continued

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
101.15; requirements pertaining to prominence of required statements and use of foreign language.	160	10	1,600	8	12,800
101.22(i)(4); supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.30 and 102.33; labeling requirements for fruit or vegetable juice beverages.	1,500	5	7,500	1	7,500
101.36; nutrition labeling of dietary supplements	300	40	12,000	4.025	48,300
101.42 and 101.45; nutrition labeling of raw fruits, vegetables, and fish.	1,000	1	1,000	0.5 (30 minutes)	500
101.45(c); databases of nutrient values for raw fruits, vegetables, and fish.	5	4	20	4	80
101.79(c)(2)(i)(D); disclosure requirements for food labels that contain a folate/neural tube defect health claim.	1,000	1	1,000	0.25 (15 minutes)	250
101.79(c)(2)(iv); disclosure of amount of folate for food labels that contain a folate/neural tube defect health claim.	100	1	100	0.25 (15 minutes)	25
101.100(d); disclosure of agreements that form the basis for exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.105 and 101.100(h); disclosure requirements for food not accurately labeled for quantity of contents and for claiming certain labeling exemptions.	25,000	1.03	25,750	0.5 (30 minutes)	12,875
Total					1,029,258

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
101.12(e); recordkeeping to document the basis for density-adjusted RACC.	25	1	25	1	25
101.13(q)(5); recordkeeping to document the basis for nutrient content claims.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); recordkeeping to document nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.22(i)(4); recordkeeping to document supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.100(d)(2); recordkeeping pertaining to agreements that form the basis for an exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.105(t); recordkeeping pertaining to disclosure requirements for food not accurately labeled for quantity of contents.	100	1	100	1	100
Total					676,150

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section/Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
101.9(j)(18) and 101.36(h)(2); procedure for small business nutrition labeling exemption notice using Form FDA 3570	10,000	1	10,000	8	80,000
101.12(h); petitions to establish or amend a RACC	5	1	5	80	400
101.69; petitions for nutrient content claims	3	1	3	25	75
101.70; petitions for health claims	5	1	5	80	400

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

21 CFR section/Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
101.108; written proposal for requesting temporary exemptions from certain regulations for the purpose of conducting food labeling experiments	1	1	1	40	40
Total					80,915

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimated annual third party disclosure, recordkeeping, and reporting burdens are based on our communications with industry and our knowledge of and experience with food labeling and the submission of petitions and requests to us.

We expect that the burden hours for submissions under § 101.108 will be insignificant. Section 101.108 was originally issued to provide a procedure whereby we could grant exemptions from certain food labeling requirements. Exemption petitions have infrequently been submitted in the recent past; none have been submitted since publication on January 6, 1993, of the final regulations implementing section 403(q) and (r) of the FD&C Act. Thus, in order to maintain OMB approval of § 101.108 to accommodate the possibility that a food producer may propose to conduct a labeling experiment on its own initiative, we estimate that we will receive one or fewer submissions under § 101.108 in the next 3 years.

Dated: December 27, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31733 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–0025]

Medical Device Accessories—Describing Accessories and Classification Pathway for New Accessory Types; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Medical Device Accessories—Describing Accessories and Classification Pathways for New Accessory Types.'' This document provides guidance to industry and FDA staff about the regulation of accessories to medical devices. The guidance explains what devices FDA generally considers an ''accessory'' and encourages use of the *de novo* classification process under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to allow manufacturers and other parties to request risk- and regulatory control-based classification of accessories of a new type (*i.e.,* accessories of a type that has not been previously classified under the FD&C Act, cleared for marketing under a 510(k) submission, or approved in an application for premarket approval (PMA)).

DATES: Submit either electronic or written comments on this guidance at any time. General comments on Agency guidance documents are welcome at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2015–D–0025 for ''Medical Device Accessories—Describing Accessories and Classification Pathway for New Accessory Types.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

An electronic copy of the guidance document is available for download from the Internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Medical Device Accessories—Describing Accessories and Classification Pathway for New Accessory Types'' to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Erica Takai, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5456, Silver Spring, MD 20993–0002, 301–796–6353 or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave,. Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA has jurisdiction over accessories because the definition of the term ''device'' provided in section 201(h) of the FD&C Act defines ''device'' to include, among other things, an ''accessory.'' All accessories to articles that meet this definition of ''device'' are regulated under the FD&C Act.

This guidance is intended to provide guidance to industry and FDA staff about the regulation of accessories to medical devices. Accordingly, this guidance describes the types of devices that FDA generally considers as accessories and discusses the risk- and regulatory control-based classification paradigm for these accessories. This information is expected to provide a greater level of transparency with regards to the classification of accessories and will aid FDA staff and industry in assuring that these devices are subject to an appropriate level of regulatory oversight by FDA. In addition, this guidance describes the use of the *de novo* classification process under section 513(f)(2) of the FD&C Act (21 U.S.C. 360c(f)(2)) for manufacturers to request risk- and regulatory control-based classifications of accessories of a new type that are low-moderate risk for which general controls or general and special controls provide a reasonable assurance of safety and effectiveness, but for which there is no legally marketed predicate device.

For the purposes of this guidance document, an ''accessory'' is defined as ''a finished device that is intended to support, supplement, and/or augment the performance of one or more parent devices.'' It is important to note that FDA does not generally consider articles that do not meet the definition of an accessory as accessories simply because they may be used in conjunction with a device.

This guidance clarifies that classification of accessory devices, as for non-accessory devices, should reflect the risks of the device when used as intended and the level of regulatory controls necessary to provide a reasonable assurance of safety and effectiveness. Classifying an accessory in the same class as its parent device is appropriate when the accessory, when used as intended with the parent device, meets the criteria for placement in the class of the parent device. However, some accessories can have a lower risk profile than that of their parent device and, therefore, may warrant being regulated in a lower class.

In the **Federal Register** of January 20, 2015 (80 FR 2710), FDA published a notice of availability for the draft guidance entitled ''Medical Device Accessories: Defining Accessories and Classification Pathway for New Accessory Types.'' FDA revised the guidance as appropriate in response to the comments. We received comments requesting that the scope of the guidance be expanded to apply to existing accessories that were previously classified. FDA is continuing to explore mechanisms for risk- and regulatory control-based reclassification of existing accessories. Therefore, the scope of the guidance has not been expanded and includes the use of the *de novo* classification process to classify accessories of a new type.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the regulation of medical device accessories. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Medical Device Accessories: Describing Accessories and Classification Pathway for New Accessory Types'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1770 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231; the collections of information in 21 CFR part 860, subpart C have been approved under OMB control number 0910–0138; and the collection of information for new medical device accessories devices have been approved under OMB control number 0910–0823.

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31669 Filed 12–29–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Statement of Organization, Functions, and Delegations of Authority

Part N, National Institutes of Health (NIH), of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (40 FR 22859, May 27, 1975, as amended most recently at 77 FR 1941, January 12, 2012, and redesignated from Part HN as Part N at 60 FR 56605, November 9, 1995), is amended as set forth below to establish the *All of Us*SM Research Program Office.

Section N–A, Organization and Functions, is amended as follows: Immediately after the paragraph headed ''Office of the Director''(OD), insert the following:

All Of Us Research Program Office

(HNAK) (1) Oversees the design, development, implementation, and evaluation of the *All of Us* Resesarch Program, creating the largest and most diverse research cohort of its kind, to foster a new era of medicine in which researchers, providers and patients work together to develop individualized care by supporting research into the complex factors promoting health and treatments to cure disease.

Delegations of Authority Statement: All delegations and redelegations of authority to officers and employees of the NIH that were in effect immediately prior to the effective date of this reorganization and are consistent with this reorganization shall continue in effect, pending further redelegation.

Dated: December 23, 2016.

Francis S. Collins,

Director, National Institutes of Health.

[FR Doc. 2016–31687 Filed 12–29–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–53]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov* .

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 12–07, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301)-443–2265 (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 or send an email to *title5@hud.gov* for detailed instructions, or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*e.g.,* acreage, floor plan, condition of property, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following address(es): AGRICULTURE: Ms. Debra Kerr, Department of

Agriculture, OPPM, Property Management Division, Agriculture South Building, 300 7th Street SW., Washington, DC 20024, (202)–720–8873; AIR FORCE: Mr. Robert E. Moriarty, P.E., AFCEC/CI, 2261 Hughes Avenue, Ste. 155, JBSA Lackland TX 78236–9853, (315)–225–7384; COE: Ms. Brenda Johnson-Turner, HQUSACE/CEMP–CR, 441 G Street NW., Washington, DC 20314, (202)–761–7238; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202)–501–0084; INTERIOR: Mr. Michael Wright, Acquisition and Property Management, Department of the Interior, 3960 N. 56th Ave., #104 Hollywood, FL. 33021, (754)–400–7381; NASA: Mr. William Brodt, National Aeronautics AND Space Administration, 300 E Street SW., Room 2P85, Washington, DC 20546, (202)–358–1117; NAVY: Ms. Nikki Hunt, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374, (202)-685–9426; VETERAN AFFAIRS: Ms. Jessica L. Kaplan, Director, Real Property Service, Department of Veterans Affairs, 810 Vermont Avenue NW. (003C1E), Washington, DC 20420, (202)–273–8234; (These are not toll-free numbers).

Dated: December 22, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 12/30/2016

Suitable/Available Properties

Building

Colorado

Denver VA Medical Center
Campus Bldg. 25
1055 Clermont Street
Denver CO 80220
Landholding Agency: VA
Property Number: 97201640001
Status: Underutilized
Comments: 40+ yrs.; 400 sf.; generator shelter; past useful service life; access 7:30–4:00; contact VA for more information.

Building 39
Denver VA Medical Center
Denver CO 80220
Landholding Agency: VA
Property Number: 97201640002
Status: Underutilized
Comments: 32+ yrs. old; 454 sq. ft.; generator shelter, past useful service life; prior approval needed to gain access; contact VA for more information.

Building 25
Denver VA Medical Center Campus
Denver CO 80220
Landholding Agency: VA
Property Number: 97201640003
Status: Underutilized
Comments: 40+ yrs. old; 400 sq. ft.; generator shelter; past useful service life; prior approval needed to gain access; contact VA for more information.

Oregon

4 Buildings
Dale Buildings 007655 00
Dale OR 97869
Landholding Agency: Agriculture
Property Number: 15201640027
Status: Excess
Directions: 2830 (dale Lagoon Pumphouse) 14292010616; 2630 (Dale Old Tree Cooler (Rec. Storage))1640.009091; 2318 (Dale Pressure Reducing Enclosure) 1904.009091; 1847 (dale Utilities Bldg.) 1628.009091
Comments: off-site removal only; relocation extremely difficult due to size & type; 2830–48 sq. ft.; poor conditions; non-friable asbestos; & lead present; contact Agriculture for more details on a property listed above

Unsuitable Properties

Building

Alabama

Selma Fed. Bldg. & Courthouse
908 Alabama Avenue
Selma AL 36701
Landholding Agency: GSA
Property Number: 54201640010
Status: Excess
GSA Number: 4–G–AL–0819–AA
Comments: Polychlorinated biphenyls (PCBs)
Reasons: Contamination

4526 Lox Transfer Control House
Marshall Space Flight Center
Marshall Space Flight AL 35812
Landholding Agency: NASA
Property Number: 71201640016
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4525 Lox Transfer Control House
Marshall Space Flight Center
Marshall Space Flight AL 35812
Landholding Agency: NASA
Property Number: 71201640017
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4524A Test Support Building
Marshall Space Flight Center
Marshall Space Flight AL 35812
Landholding Agency: NASA
Property Number: 71201640018
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4523 Test Support Building
Marshall Space Flight Center
MSFC AL 35812
Landholding Agency: NASA
Property Number: 71201640019
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4522 Test Facility 500
Marshall Space Flight Center
MSFC AL 35812
Landholding Agency: NASA
Property Number: 71201640020
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4572 Propulsion & Structural
Test Facility
Marshall Space Flight Center
MSFC AL 35812
Landholding Agency: NASA
Property Number: 71201640021
Status: Underutilized
Comments: Public access denied and no alternative method to gain access without compromising national security; friable asbestos
Reasons: Contamination; Secured Area

4570 Advanced Propulsion
Research Facility
Marshall Space Flight Center
MSFC AL 35812
Landholding Agency: NASA
Property Number: 71201640022
Status: Unutilized
Comments: Public access denied and no alternative method to gain access without compromising national security; friable asbestos
Reasons: Secured Area; Contamination

Alaska

Building 59182 Control Tower
at Peandneau Range JBER
JBER AK 99505
Landholding Agency: Air Force
Property Number: 18201640046
Status: Excess
Comments: public access denied and no alternative method to gain access without compromising national security
Reasons: Secured Area

Latrine at Malmate Range
Building 59531 JBER
JBER AK 99506
Landholding Agency: Air Force
Property Number: 18201640047
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security
Reasons: Secured Area

California

East Parking Area
Naval Air Station North Island
Coronado CA
Landholding Agency: Navy
Property Number: 77201640012
Status: Underutilized
Directions: 1.5 acres of land
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Guam

Andersen AFB
Andersen AFB Family Housing
Andersen GU
Landholding Agency: Navy
Property Number: 77201640013
Status: Excess
Comments: Friable asbestos
Reasons: Contamination
Andersen AFB Family Housing
Robert's Terrace Housing Area
Andersen GU
Landholding Agency: Navy
Property Number: 77201640014
Status: Excess
Directions: Some Capehart Housing along Ponape Blvd.
Comments: Friable asbestos
Reasons: Contamination

Missouri

Table Rock Lake Project
TRL–45426
Cape Fair Recreation Area Pit Toilet
Cape Fair MO 65624
Landholding Agency: COE
Property Number: 31201640019
Status: Underutilized
Comments: Extensive deterioration; building in disrepair due to cracks in the foundation, walls & sidewalk.
Reasons: Extensive deterioration

01002 LONGBR–29279
Dwelling Frame W/Double Garage & Patio
30174 Visitor Center Road
Macon MO 63552
Landholding Agency: COE
Property Number: 31201640020
Status: Excess
Directions: Long Branch Project
Comments: Unsound foundation; black mold throughout; water damage on ceiling; fireplace collapsing.
Reasons: Extensive deterioration

Montana

3 Buildings
Tiber Dam Camp, N1/2, SW1/4, SE1/4
Chester MT 59522
Landholding Agency: Interior
Property Number: 61201640003
Status: Excess
Directions: R008400200B, R008400400B, R008400300B
Comments: Rodent damaged and extensive deterioration of wood; clear threat to physical safety
Reasons: Extensive deterioration

Nebraska

543800B117 Cattle Poleshed
#73 RPUID:03.55111
844 RD 313
Clay Center NE 68933
Landholding Agency: Agriculture
Property Number: 15201640026
Status: Excess
Directions: 19606 HRUSKA U.S. Meat Animal Research Center
Comments: Not structurally sound.
Reasons: Extensive deterioration

Nevada

FMA HSG 800–804
(&99011 Land Fee Pru)
Tonopah AFS Z164—WZVS
Tonopah NV 89049
Landholding Agency: Air Force
Property Number: 18201530002
Status: Excess
Directions: Fac #80000818213 #2 Victoria St.; 80100818212 #3 Victoria St.; 80300818210 #5 Victoria St.; 80300818209 #6 Victoria St.; 80400818208 #7 Victoria St.
Comments: Documented deficiencies: severely weather damaged; significant rodent infestation; clear threat of physical safety
Reasons: Extensive deterioration

Virgin Islands

Cinnamon Bay Concession Cottage
Cinnamon Bay Campground
on North Shore Road
St. John VI 00830
Landholding Agency: Interior
Property Number: 61201640002
Status: Underutilized
Directions: #1–10
Comments: Property located within floodway which has not been correct or contained; documented deficiencies; foundation is crumbling at the edges causing the stuccoed walls to sink.
Reasons: Floodway; Extensive deterioration

Unsuitable Properties

Land

California

Steam Plant
Naval Air Station North Island
Coronado CA
Landholding Agency: Navy
Property Number: 77201640010
Status: Underutilized
Directions: 2.62 acres of land
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Steam Plant Parking Area
Naval Air Station North Island
Coronado CA
Landholding Agency: Navy
Property Number: 77201640011
Status: Underutilized
Directions: 1.1 acres of land
Comments: Public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

[FR Doc. 2016–31334 Filed 12–29–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2016–N230]; [FXES11140800000–178–FF08ECAR00]

Endangered and Threatened Wildlife and Plants; Incidental Take Permit Application; Proposed Low-Effect Habitat Conservation Plan and Associated Documents; City of Monterey Park, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from Monterey Park Retail Partners, LLC (applicant) for a 5-year incidental take permit for the threatened coastal California gnatcatcher (*Polioptila californica californica*) pursuant to the Endangered Species Act of 1973, as amended (Act). We are requesting comments on the permit application and on the preliminary determination that the proposed Habitat Conservation Plan qualifies as a ''low-effect'' habitat conservation plan, eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended. The basis for this determination is discussed in the environmental action statement (EAS) and the associated low-effect screening form, which are also available for public review.

DATES: Written comments should be received on or before January 30, 2017.

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- *U.S. Mail:* Field Supervisor, Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008.
- *Fax:* Field Supervisor, 760–431–9624.

Obtaining Documents: To request copies of the application, proposed HCP, and EAS, contact the Service, by telephone at 760–431–9440 or by letter to the Carlsbad Fish and Wildlife Office (see **ADDRESSES**). Copies of the proposed HCP and EAS also are available for public inspection during regular business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Ms. Karen Goebel, Assistant Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); telephone: 760–431–9440. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have received an application from Monterey Park Retail Partners, LLC (applicant) for a 5-year incidental take permit for one covered species pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.,* Act). The application addresses the potential ''take'' of the threatened coastal California gnatcatcher (*Polioptila californica californica;* gnatcatcher) in the course of activities associated with the construction, operation, and maintenance of the Monterey Park Market Place project, in the City of Monterey Park, Los Angeles County, California. A conservation program to avoid, minimize, and mitigate for project activities would be implemented as described in the applicant's proposed habitat conservation plan (HCP).

We are requesting comments on the permit application and on the preliminary determination that the proposed HCP qualifies as a ''low-effect'' HCP, eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended. The basis for this determination is discussed in the environmental action statement (EAS) and associated low-effect screening form, which are also available for public review.

Background

Section 9 of the Act and its implementing Federal regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the Act as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct'' (16 U.S.C. 1538). ''Harm'' includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns such as breeding, feeding, or sheltering (50 CFR 17.3). However, under section 10(a) of the Act, the Service may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

Applicant's Proposed Project

The applicant requests a 5-year permit under section 10(a)(1)(B) of the Act. If we approve the permit, the applicant anticipates taking gnatcatcher as a result of permanent impacts to 2.77 acres of habitat the species uses for breeding, feeding, and sheltering. The take would be incidental to the applicant's activities associated with the construction of the Monterey Park Market Place project in the City of Monterey Park, California, and includes restoration and in-perpetuity preservation and management of 12 acres of gnatcatcher habitat.

The Monterey Park Market Place project consists of the construction of a 62-acre commercial retail development in the City of Monterey Park. The project will permanently impact 2.77 acres of gnatcatcher-occupied habitat as a result of clearing and grading activities. Up to three gnatcatcher territories have been documented on the project site.

To minimize take of gnatcatcher by the Monterey Park Market Place project and offset impacts to its habitat, the applicant proposes to mitigate for permanent impacts to 2.77 acres of occupied gnatcatcher habitat through the restoration, conservation, and in-perpetuity management of 12 acres of coastal sage scrub suitable for the gnatcatcher by a Service-approved restoration contractor and the Puente Hills Habitat Authority. The applicant's proposed HCP also contains the following proposed measures to minimize the effects of construction activities on the gnatcatcher:

- Grading limits will be delineated with construction fencing and silt fencing to ensure that impact limits do not extend beyond the allowed limits of development.
- A Service-approved biologist will monitor grading of the site and provide a letter summarizing compliance with the construction limits of the proposed project to the Service within one month of completion of grading.
- Vegetation clearing will take place outside of the bird nesting season (February l5 through August 31) to the fullest extent practicable. Clearing may only occur during this period once a Service-approved biologist has conducted at least three surveys of the impact areas for nesting birds, with each survey taking place one week apart and the last survey conducted within 24 hours prior to clearing. The Service-approved biologist will document compliance with the Migratory Bird Treaty Act (MBTA) and other applicable regulations that protect nesting birds. If an active bird nest is observed, an appropriate buffer (minimum of 300 feet for any active gnatcatcher nest) will be established wherein no project activities will occur until the nest is no longer active.

Proposed Action and Alternatives

The Proposed Action consists of the issuance of an incidental take permit and implementation of the proposed HCP, which includes measures to avoid, minimize, and mitigate impacts to the gnatcatcher. If we approve the permit, take of gnatcatcher would be authorized for the applicant's activities associated with the construction of the Monterey Park Market Place project. In the proposed HCP, the applicant considers alternatives to the taking of gnatcatcher under the proposed action. Alternative development configuration was considered; however, because of the small size and irregular shape of the project site, further avoidance of impacts to gnatcatcher habitat could not be achieved. The applicant also considered the No Action Alternative. Under the No Action Alternative, no incidental take of gnatcatcher habitat would occur, and no long-term protection and management would be afforded to the species.

Our Preliminary Determination

The Service has made a preliminary determination that the approval of the HCP and issuance of an incidental take permit qualify for categorical exclusion under NEPA (42 U.S.C. 4321 *et seq.*), as provided by the Department of the Interior implementing regulations in part 46 of title 43 of the Code of Federal Regulations (43 CFR 46.205, 46.210, and 46.215), and that the HCP qualifies as a ''low-effect'' plan as defined by the *Habitat Conservation Planning Handbook* (December 2016).

We base our determination that an HCP qualifies as a low-effect plan on the following three criteria:

(1) Implementation of the HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats;

(2) Implementation of the HCP would result in minor or negligible effects on other environmental values or resources; and

(3) Impacts of the HCP, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources that would be considered significant.

Based upon this preliminary determination, we do not intend to prepare further NEPA documentation. We will consider public comments in making the final determination on whether to prepare such additional documentation.

Next Steps

We will evaluate the proposed HCP and comments we receive to determine whether the permit application meets the requirements and issuance criteria under section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). We will also evaluate whether issuance of a section 10(a)(1)(B) incidental take permit would comply with section 7 of the Act by conducting an intra-Service 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 a permit. If the requirements and issuance criteria under section 10(a) are met, we will issue the permit to the applicant for incidental take of gnatcatcher.

Public Comments

If you wish to comment on the permit application, proposed HCP, and associated documents, you may submit comments by any of the methods noted in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Karen A. Goebel,

Acting Field Supervisor, Carlsbad Fish and Wildlife Office, Carlsbad, California.

[FR Doc. 2016–31694 Filed 12–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2016–N229; FXES11130300000–178–FF03E00000]

Endangered and Threatened Wildlife and Plants; Permit Applications

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 applications for a permit to conduct activities intended to enhance the survival of endangered or threatened species. Federal law prohibits certain activities with endangered species unless a permit is obtained.

DATES: We must receive any written comments on or before January 30, 2017.

ADDRESSES: Send written comments by U.S. mail to the Regional Director, Attn: Carlita Payne, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458; or by electronic mail to *permitsR3ES@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Carlita Payne, (612) 713–5343.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), prohibits certain activities with endangered and threatened species unless the activities are specifically authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A permit granted by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) of the ESA 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.

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 permit number when you submit comments. Documents and other information the applicants have submitted with the 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 Applications

Proposed activities in the following permit requests are for the recovery and enhancement of survival of the species in the wild.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
TE38793A	Kenneth Mierzwa.	Hine's emerald dragonfly (*Somatochlora hineana*).	Alabama, Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, Wisconsin.	Survey and monitor, habitat assessment.	Capture and release, exuviae collection, adult counts.	Renew.
TE11170C	Ashleigh Cable.	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), northern long-eared bat (*M. septentrionalis*).	Illinois	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, radio-tag, harp trap, release.	New.
TE01311C	Shawn McKinley.	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), northern long-eared bat (*M. septentrionalis*), Virginia big-eared bat (*Plecotus townsendii virginianus*).	Rangewide	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, mist-net, harp trap, radio-tag, band, release.	New.
TE13571C	Jennifer Moore.	Eastern massasauga rattlesnake (*Sistrurus catenatus*).	Michigan	Survey and monitoring, habitat assessment, population connectivity assessment.	Capture, handle, pit-tag, tissue collection, release.	New.
TE14588C	Dane Smith	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), northern long-eared bat (*M. septentrionalis*).	Missouri	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, mist-net, radio-tag, band, tissue collection, release.	New.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
TE15664C	April McKay	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), northern long-eared bat (*M. septentrionalis*).	Rangewide	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, mist-net, harp trap, radio-tag, band, release.	New.
TE106217	The Toledo Zoological Society.	Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*).	Ohio	Propagation and transport	Capture, handle, hold, release.	Amend, renew.
TE85231B	Kalamazoo Nature Center.	Mitchell's satyr butterfly (*N.m. mitchellii*).	Michigan	Propagation and transport	Capture, handle, temporarily hold, release.	Amend.
TE02373A	Environmental Solutions and Innovations.	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), northern long-eared bat (*M. septentrionalis*), Virginia big-eared bat (*Plecotus townsendii virginianus*), Ozark big-eared bat (*P.t.ingens*), American burying beetle (*Nicrophorus americanus*), eastern massasauga rattlesnake (*Sistrurus catenatus*), Karner blue butterfly (*Lycaeides melissa samuelis*), Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*), St. Francis' satyr butterfly (*N.m. francisci),* rusty patched bumble bee (*Bombus affinis*), Guyandotte River crayfish (*Cambarus veteranus*), Big Sandy crayfish (*C. callainus*), 12 fish species, 57 freshwater mussel species.	Rangewide	Conduct presence/absence surveys, habitat assessment, DNA sampling, relocation, transport.	Capture, handle, temporarily hold, release.	Amend, renew.
TE194099	Michael Hoggarth.	30 freshwater mussel species.	Indiana, Michigan, Ohio, Kentucky, New York, Pennsylvania, West Virginia.	Conduct presence/absence surveys, relocations, transport.	Capture, handle, relocate, release.	Renew.
TE14549C	Larissa Herrera.	10 freshwater mussel species.	Illinois, Iowa, Indiana, Michigan, Ohio, Wisconsin.	Conduct presence/absence surveys.	Capture, handle, release	New.
TE181256	Lewis Environmental Consulting, LLC.	62 freshwater mussel species.	Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, Tennessee, West Virginia.	Conduct presence/absence surveys, transport, propagation.	Capture, handle, hold, transport, release.	Amend, renew.

National Environmental Policy Act

The proposed activities in the requested permits qualify as categorical exclusions under the National Environmental Policy Act, as provided by Department of the Interior implementing regulations in part 46 of title 43 of the CFR (43 CFR 46.205, 46.210, and 46.215).

Public Availability of Comments

We seek public review and comments on these permit applications. Please refer to the permit number when you submit comments. Comments and materials we receive in response to this notice are available for public inspection, by appointment, during normal business hours at the address listed above in **ADDRESSES.**

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 ESA (16 U.S.C. 1531 *et seq.*).

Dated: December 23, 2016.

Lori H. Nordstrom,

Assistant Regional Director, Ecological Services, Midwest Region.

[FR Doc. 2016–31700 Filed 12–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2016–N231; FXES11140800000–178–FF08ECAR00]

Endangered and Threatened Wildlife and Plants; Incidental Take Permit Application; Proposed Low-Effect Habitat Conservation Plan and Associated Documents; San Diego Gas and Electric, San Diego, Riverside, and Orange Counties, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from the San Diego Gas and Electric Company (SDG&E) for an incidental take permit for 15 animal species pursuant to the Endangered Species Act of 1973, as amended. SDG&E is also seeking assurances for 22 plant species under the Service's ''No Surprises'' regulation. We are requesting comments on the permit application and on the preliminary determination that the proposed habitat conservation (HCP) qualifies as a ''low-effect'' HCP, eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended. The basis for this determination is discussed in the environmental action statement (EAS) and the associated low-effect screening form, which are also available for public review.

DATES: Written comments should be received on or before January 30, 2017.

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- *U.S. Mail:* Field Supervisor, Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008.
- *Fax:* Field Supervisor, 760–431–9624.

Obtaining Documents: To request copies of the application, proposed HCP, and EAS, contact the Service, by telephone at 760–431–9440 or by letter to the Carlsbad Fish and Wildlife Office (see **ADDRESSES**). Copies of the proposed HCP and EAS also are available for public inspection during regular business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Ms. Karen Goebel, Assistant Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); telephone: 760–431–9440. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have received an application from the San Diego Gas and Electric Company (SDG&E) for a 5-year incidental take permit for 15 animal species pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The application addresses the potential ''take'' of 15 animal species and impacts to 22 plant species associated with routine utility infrastructure operation and maintenance (O&M) activities and minor new construction within SDG&E's service territory, which covers San Diego County and portions of Orange and Riverside Counties, California. A conservation program to avoid, minimize, and mitigate for project activities would be implemented by SDG&E as described in the applicant's proposed habitat conservation plan (HCP).

The HCP is designed to support the continuation of activities covered by Endangered Species Act (ESA) Permit No. PRT–809637, which is a multi-species incidental take permit issued by the Service to SDG&E in December 1995 (1995 ESA permit). The 1995 permit is subject to SDG&E's compliance with its 1995 Subregional Natural Community Conservation Plan/Habitat Conservation Plan (1995 NCCP/HCP) and a 400-acre cap on habitat impacts. Under this new HCP, SDG&E would continue to apply all of the conservation efforts, mitigation measures, and operational protocols implemented under the 1995 NCCP/HCP. The HCP would allow a maximum of 60 acres of impact over a 5-year permit term.

We are requesting comments on the permit application and on the preliminary determination that the proposed HCP qualifies as a ''low-effect'' HCP, eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended. The basis for this determination is discussed in the environmental action statement (EAS) and associated low-effect screening form, which are also available for public review.

Background

Section 9 of the Endangered Species Act and its implementing Federal regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the Act as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct'' (16 U.S.C. 1538). ''Harm'' includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns such as breeding, feeding, or sheltering (50 CFR 17.3). However, under section 10(a) of the Act, the Service may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity.

Take of plant species is not prohibited under the Endangered Species Act and therefore cannot be authorized under an incidental take permit. However, 22 plant species, including 16 federally listed plants, are proposed to be included on the permit in recognition of the conservation benefits provided to them under the HCP.

Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22, respectively. All species included on the incidental take permit, if issued, would receive assurances under the Service's ''No Surprises'' regulation (50 CFR 17.22(b)(5) and 17.32)(b)(5).

SDG&E seeks incidental take authorization for 15 animal species, including 8 federally endangered, 3 federally threatened, and 4 unlisted species, and assurances for 22 plant species, including 11 federally endangered, 5 federally threatened, and 6 unlisted species. Collectively the 37 listed and unlisted species are referred to as ''Covered Species'' in the HCP. The permit would provide take authorization for all 15 animal species and assurances for all 22 plant species identified in the HCP as ''Covered Species'' during the requested permit term of 5 years.

If we approve the permit, incidental take of the 15 animal species and impacts to 22 plant species listed in Table 2 of the HCP would occur as a result of covered species habitat removal at a rate of 5 to 12 acres annually over the course of the 5-year permit term, or up to a 60-acre maximum impact. The 60-acre habitat impact, including take of covered animal species, would be incidental to SDG&E's O&M activities on existing infrastructure and minor new construction within their service territory in San Diego, Orange, and Riverside Counties.

To minimize and mitigate impacts to covered species, including take of animal species, from O&M activities and minor new construction, SDG&E will implement all of the conservation efforts, mitigation measures, and operational protocols identified under their 1995 NCCP/HCP. Specific measures include implementing 61 operational protocols to minimize impacts to covered species and deducting mitigation credits from existing preserved and managed lands conserved by SDG&E to benefit the covered species.

Proposed Action and Alternatives

The Proposed Action consists of the issuance of an incidental take permit and implementation of the proposed HCP, which includes measures to avoid, minimize, and mitigate impacts to 37 covered species. If we approve the permit, take of the 15 animal species and impacts to 22 plant species would be authorized for SDG&E to conduct O&M activities and minor new construction. In the proposed HCP, the applicant considers alternatives to the taking of covered species under the proposed action. A ''No Action'' alternative was considered where SDG&E would continue to conduct its activities in accordance with the applicant's 1995 NCCP/HCP until the 400-acre cap on habitat impacts is reached. Simultaneously, SDG&E would work with the Service and the California Department of Fish and Wildlife to develop and adopt a revised NCCP/HCP. However, if this process is not completed by the time the 400-acre cap is reached, SDG&E would have to suspend its routine O&M activities until the process is complete or seek individual permits for distinct activities. Any suspension would pose significant risks to SDG&E's ability to provide safe and reliable service to its customers and pursuing individual permits for routine activities would impose significant administrative burdens and costs and potential delays on SDG&E.

Our Preliminary Determination

The Service has made a preliminary determination that approval of the proposed HCP qualifies as a categorical exclusion under NEPA (42 U.S.C. 4321 *et seq.*), as provided by the Department of the Interior implementing regulations in part 46 of title 43 of the Code of Federal Regulations (43 CFR 46.205, 46.210, and 46.215), and that the HCP qualifies as a ''low-effect'' plan as defined by the *Habitat Conservation Planning Handbook* (December 2016).

We base our determination that a HCP qualifies as a low-effect plan on the following three criteria:

(1) Implementation of the HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats;

(2) Implementation of the HCP would result in minor or negligible effects on other environmental values or resources; and

(3) Impacts of the HCP, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources that would be considered significant.

Based upon this preliminary determination, we do not intend to prepare further NEPA documentation. We will consider public comments in making the final determination on whether to prepare such additional documentation.

Next Steps

We will evaluate the proposed HCP and comments we receive to determine whether the permit application meets the requirements and issuance criteria under section 10(a) of the Act (16 U.S.C. 1531 *et seq.*). We will also evaluate whether issuance of a section 10(a)(1)(B) incidental take permit would comply with section 7 of the Act by conducting an intra-Service 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 a permit. If the requirements and issuance criteria under section 10(a) are met, we will issue the permit to the applicant for incidental take and assurances, as appropriate, for the 37 covered species.

Public Comments

If you wish to comment on the permit application, proposed HCP, and associated documents, you may submit comments by any of the methods noted in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Karen A. Goebel,

Acting Field Supervisor, Carlsbad Fish and Wildlife Office, Carlsbad, California.

[FR Doc. 2016–31698 Filed 12–29–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[178A2100DD/AAKC001030/ A0A501010.999900 253G]

Guidelines for Implementing the Indian Child Welfare Act

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the Department's new *Guidelines for Implementing the Indian Child Welfare Act.* These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and the Department's regulations. All such parties—including the courts, State child welfare agencies, private adoption agencies, Tribes, and family members—have a stake in ensuring the proper implementation of this important Federal law designed to protect Indian children, their parents, and Indian tribes.

ADDRESSES: The guidelines are available at: *http://bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm.* You can also reach this Web page by going to *www.bia.gov* and clicking the ''Indian Child Welfare Act'' icon on the right-hand side of the page.

FOR FURTHER INFORMATION CONTACT: For information on implementation of these guidelines, please contact Ms. Debra Burton, ICWA Specialist, Bureau of Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS 3642, Washington, DC 20240, (202) 513–7610; *debra.burton@bia.gov.* For information regarding the development of these guidelines, please contact Ms. Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS 3642, Washington, DC 20240, (202) 273–4680; *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION: The ICWA is a statute passed by Congress and codified in the United States Code (U.S.C.) at 25 U.S.C. 1901 *et seq.* The Department promulgated ICWA regulations to implement the statute; the regulations were published in the **Federal Register** at 81 FR 38778 (June 14, 2016) and will be codified in the Code of Federal Regulations (CFR) at 25 CFR part 23.

The Department is now issuing *Guidelines for Implementing the Indian Child Welfare Act* to complement the regulations. While not imposing binding requirements, the guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. The guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. The guidelines replace the 1979 and 2015 versions of the Department's guidelines.

The Department encourages all involved in child custody proceedings who seek to understand and uniformly apply ICWA and the Department's regulations to review the guidelines, which are available at the Web page listed in the **ADDRESSES** section of this notice.

Dated: December 16, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2016–31726 Filed 12–29–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[178A2100DD/AAKC001030/ A0A501010.999900253G]

Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of New Mexico

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Pueblo of Santa Ana and the State of New Mexico entered into a compact governing Class III gaming. This notice announces that the compact is taking effect.

DATES: The effective date of the compact is December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Section 11 of the Indian Gaming Regulatory Act (IGRA) requires the Secretary of the Interior to publish in the **Federal Register** notice of approved Tribal-State compacts that are for the purpose of engaging in Class III gaming activities on Indian lands. *See* Public Law 100–497, 25 U.S.C. 2701 *et seq.* All Tribal-State Class III compacts, including amendments, are subject to review and approval by the Secretary under 25 CFR 293.4. The Secretary took no action on the compact within 45 days of its submission. Therefore, the compact is considered to have been approved, but only to the extent the compact is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Dated: December 22, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2016–31725 Filed 12–29–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[167A2100DD/AAKC001030/ A0A501010.999900]

Notice of Intent To Prepare an Environmental Impact Statement for the Tule River Tribe's Proposed Fee-to-Trust and Eagle Mountain Casino Relocation Project, Tulare County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA), as lead agency, intends to gather information necessary for preparing an environmental impact statement (EIS) in connection with the Tule River Tribe's (Tribe) proposed Eagle Mountain Casino Relocation Project in Tulare County, California. This notice also opens public scoping to identify potential issues, concerns and alternatives to be considered in the EIS.

DATES: To ensure consideration during the development of the EIS, written comments on the scope of the EIS should be sent as soon as possible and no later than January 30, 2017. The date of the public scoping meeting will be announced at least 15 days in advance through a notice to be published in the local newspaper (Porterville Recorder) and online at *http://www.tulerivereis.com.*

ADDRESSES: You may mail or hand-deliver written comments to Ms. Amy Dutschke, Regional Director, Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Sacramento, California 95825. Please include your name, return address, and ''NOI Comments, Tule River Tribe Casino Relocation Project'' on the first page of your written comments. You may also submit comments through email to Mr. John Rydzik, Chief, Division of Environmental, Cultural Resource Management and Safety, Bureau of Indian Affairs, at *john.rydzik@bia.gov.* If emailing comments, please use ''NOI Comments, Tule River Tribe Casino Relocation Project'' as the subject of your email.

The location of the public scoping meeting will be announced at least 15 days in advance through a notice to be published in the local newspaper (Porterville Recorder) and online at *http://www.tulerivereis.com.*

FOR FURTHER INFORMATION CONTACT: Mr. John Rydzik, Chief, Division of Environmental, Cultural Resource Management and Safety, Bureau of Indian Affairs, Pacific Regional Office, 2800 Cottage Way, Room W–2820, Sacramento, California 95825; telephone: (916) 978–6051; email: *john.rydzik@bia.gov.* Information is also available online at *http://www.tulerivereis.com.*

SUPPLEMENTARY INFORMATION: The Tribe submitted an application to the Bureau of Indian Affairs (BIA) requesting the placement of approximately 40 acres of fee land in trust by the United States upon which the Tribe would construct a casino resort. The facility would include an approximately 105,000 square foot casino, an approximately 250-room hotel, approximately 36,000 square feet of food and beverage facilities, administrative space, a multi-purpose events center, a conference center, and associated parking and infrastructure. The new facility would replace the Tribe's existing casino, and the existing casino buildings would be converted to tribal government or service uses. Accordingly, the proposed action for the Department is the acquisition requested by the Tribe. The proposed fee-to-trust property is located within the boundaries of the City of Porterville, in Tulare County, California, adjacent to the Porterville Airport and approximately 15 miles west of the Tule River Tribe Reservation. The proposed trust property includes 17 parcels, bound by West Street on the west, an off-highway vehicle park (OHV) owned by the City of Porterville to the north and east, and a photovoltaic power station (solar farm) to the south. The Assessor's parcel numbers (APNs) for the property are 302–400–001 through 302–400–017. The purpose of the proposed action is to improve the economic status of the tribal government so it can better provide housing, health care, education, cultural programs, and other services to its members.

The proposed action encompasses the various Federal approvals which may be required to implement the Tribe's proposed project, including approval of the Tribe's fee-to-trust application and a secretarial determination pursuant to Section 2719(b)(1)(A) of the Indian Gaming Regulatory Act. The EIS will identify and evaluate issues related to these approvals, and will also evaluate a range of reasonable alternatives. Possible alternatives currently under consideration include: (1) An expanded site alternative that involves acquiring additional adjacent fee-land into trust for the development of ancillary infrastructure and overflow parking; (2) a reduced-intensity casino alternative; (3) an alternate-use (non-casino) alternative; and (4) an alternative involving expansion of the Tribe's existing casino. The range of issues and alternatives may be expanded based on comments received during the scoping process.

Areas of environmental concern identified for analysis in the EIS include land resources; water resources; air quality; noise; biological resources; cultural/historical/archaeological resources; resource use patterns; traffic and transportation; public health and safety; hazardous materials and hazardous wastes; public services and utilities; socioeconomics; environmental justice; visual resources/aesthetics; and cumulative, indirect, and growth-inducing effects. The range of issues and alternatives to be addressed in the EIS may be expanded or reduced based on comments received in response to this notice and at the public scoping meeting. Additional information, including a map of the proposed trust property, is available by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Public Comment Availability: Comments, including names and addresses of respondents, will be available for public review at the BIA address shown in the **ADDRESSES** section, during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, telephone 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 in your comment that your personal identifying information be withheld from public review, the BIA cannot guarantee that this will occur.

Authority: This notice is published in accordance with sections 1503.1 and 1506.6 of the Council on Environmental Quality Regulations (40 CFR parts 1500 through 1508) implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4345 *et seq.*), and the Department of the Interior National Environmental Policy Act Implementation Policy (43 CFR part 46), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: December 22, 2016.

Lawrence S. Roberts,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2016–31724 Filed 12–29–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO350000.16X.L11100000.PI0000 LXSISGMW0000]

Notice of Amended Proposed Withdrawal, Release of Draft Environmental Impact Statement, and Notice of Public Meetings; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice announces the amendment of the September 24, 2015, application by the Assistant Secretary of the Interior for Land and Minerals Management to withdraw approximately 10 million acres of public and National Forest System lands from location and entry under the United States mining laws to protect the Greater Sage-Grouse and its habitat. The amendment adds 387,981.42 acres in the State of Nevada and refines the proposed withdrawal boundaries in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming. In addition, this notice announces the release of the draft Environmental Impact Statement (EIS) for public review, which analyzes and discloses the impacts of the proposed withdrawal.

DATES: Comments must be received by March 28, 2017. Meetings will be held to provide the public with an opportunity to review and comment on the proposed withdrawal amendment and the draft EIS. Please see the **SUPPLEMENTARY INFORMATION** section for the locations, dates, and times of the scheduled public meetings.

ADDRESSES: Written comments should be sent to Mark Mackiewicz, Bureau of Land Management (BLM) WO, C/O Price Field Office, 125 South 600 West, Price, UT 84501 or submitted electronically to *sagebrush_withdrawals@blm.gov.* Please see the **SUPPLEMENTARY INFORMATION** section for an electronic link and office locations where specific legal descriptions and maps of the lands may be reviewed.

FOR FURTHER INFORMATION CONTACT: Mark A. Mackiewicz, BLM, by telephone at 435–636–3616, or by email at *mmackiew@blm.gov.* Persons using a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 800–877–8339. FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On September 24, 2015, a Notice of Proposed Withdrawal was published in the **Federal Register** (80 FR 57635), as corrected (80 FR 63583), which provided notice of the proposal to withdraw the identified lands from location and entry under the United States mining laws for 20 years, subject to valid existing rights. As a result of a request submitted by the State of Nevada, the BLM (applicant) petitioned the Assistant Secretary of the Interior for Land and Minerals Management to amend the original proposal through the addition of 387,981.42 acres of lands in that state. These lands represent a proposal by the State of Nevada to substitute for withdrawal 487,756 acres of high mineral development potential areas in Sagebrush Focal Areas (SFAs) for areas adjacent to SFAs that contain high value habitat and identified Greater Sage-Grouse populations. This petition also amends the original withdrawal proposal by adjusting the boundary of lands located in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming as a result of legal land description refinements that defined the proposed withdrawal boundaries utilizing the public land survey system standards. The boundary adjustments resulted in a slight decrease in overall acres proposed for withdrawal, though refinements vary section-by-section.

The Assistant Secretary of the Interior for Land and Minerals Management has approved the BLM's petition. This action therefore, constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

Exhibit ''A'' of the application amendment describes the proposed additional public lands in Nevada being considered for withdrawal.

Exhibit ''B'' describes all of the lands in both the original withdrawal application and the proposed withdrawal amendment under consideration by the BLM and the U.S. Forest Service (USFS). The withdrawal amendment includes 387,981.42 acres in the State of Nevada and the boundary adjustment of lands located in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming that were identified as a result of legal land description refinements.

The written legal land descriptions and the maps depicting the proposed withdrawal for both Exhibit ''A'' and Exhibit ''B'' may be found on the BLM internet Web site link: *https://www.blm.gov/node/3282*.

The maps, legal land descriptions, and records relating to the amendment application may be examined at the following BLM State Offices or USFS Regional Offices or by contacting Mark Mackiewicz at 435–636–3616.

Idaho State Office, 1387 S. Vinnell Way, Boise, ID 83709.

Montana State Office, 5001 Southgate Drive, Billings, MT 59101–4669.

Nevada State Office, 1340 Financial Boulevard, Reno, NV 89502.

Oregon State Office, 1220 SW 3rd Avenue, Portland OR 97204.

Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, UT 84101.

Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

U.S. Forest Service, Region 1, 200 E Broadway St, Missoula, MT 59802.

U.S. Forest Service, Region 4, Federal Building, 324 25th Street, Ogden, UT 84401.

U.S. Forest Service, Region 6, 1220 SW 3rd Avenue, Portland OR 97204.

The withdrawal proposal (including the amendment) will be processed in accordance with the regulations set forth in 43 CFR part 2300.

The purpose of the proposed withdrawal is to protect the Greater Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining.

Publication of this notice segregates the lands described in the amended withdrawal application from location or entry under the United States mining laws, subject to valid existing rights, until September 24, 2017, unless the withdrawal application is denied or cancelled or the withdrawal is approved prior to that date. All of the lands (unless otherwise subject to an existing withdrawal) will remain open to the public land laws, leasing under the mineral and geothermal leasing laws, and disposal under the mineral material sales laws.

Non-Federal mineral lands located within the boundaries of the proposed withdrawal areas will not be affected.

Licenses, permits, cooperative agreements, or discretionary land use authorizations may be allowed during the temporary segregative period, but only with the approval of the authorized officer of the BLM or the USFS.

The use of a right-of-way, interagency or cooperative agreement, or surface management by the BLM under 43 CFR 3715 or 43 CFR 3809 regulations will not adequately constrain nondiscretionary uses, which could result in loss of critical Greater Sage-Grouse habitat.

There are no suitable alternative sites for the withdrawal.

No water rights would be needed to fulfill the purpose of the requested withdrawal.

The proposed action analyzed in the draft EIS considers a withdrawal of approximately 10 million acres of Federal lands from location and entry under the United States mining laws for a maximum period of 20 years, subject to valid existing rights. The lands included in the proposed action are National System of Public Lands and National Forest System lands administered by the BLM and the USFS. Public scoping for this project began on September 24, 2015, and closed on January 15, 2016, with the publication in the **Federal Register** of the Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an EIS. During public scoping there were 5,078 unique letters submitted. The issues identified include, but are not limited to:

- Development of Federal mineral resources is authorized by law on BLM and National Forest System Lands; restrictions or closures may decrease the ability to provide mineral resources;
- The proposed action could affect the social and economic conditions within the analysis area, particularly in smaller communities;
- The proposed action could reduce the potential for disturbance to vegetation communities and habitat alteration and fragmentation that otherwise might have occurred from mining activity; and
- Mineral exploration and development has the potential to impact wildlife, including special status species and associated habitat within and adjacent to the proposed withdrawal area.

An interdisciplinary approach was used to develop the draft EIS to consider a variety of resource issues and concerns. Based on internal and external scoping, the issues analyzed in detail in the draft EIS include:

- Geology and mineral resources;
- Vegetation, including special status plant species;
- Wildlife and special status animal species, including Greater Sage-Grouse; and
- Socioeconomic conditions, including environmental justice and human health and safety.

In addition to the proposed action, the draft EIS analyzes and discloses the potential effects of the No Action alternative, State of Nevada alternative, High Mineral Potential alternative, and State of Idaho alternative.

Under the No Action alternative, the proposed withdrawal area would remain open to location and entry under the United States mining laws. New mining claims could be located and the BLM and USFS would continue to oversee and regulate locatable mineral exploration and development in accordance with existing programs, polices, and regulations.

Under the State of Nevada alternative, 487,756 acres of lands in Nevada, that are part of the proposed action would not be withdrawn and 387,981.42 acres of priority Greater Sage-Grouse habitat located contiguous to but outside the SFAs in the State would be included in the withdrawal. Nevada suggested that this alternative be considered to reduce the anticipated economic effect of the proposed withdrawal to the State of Nevada while still meeting the purpose and need for the proposed action.

Under the High Mineral Potential alternative, all areas within the SFAs that contain lands with high mineral potential, as defined by the Sagebrush Mineral-Resource Assessment prepared by the U.S. Geological Survey, would not be withdrawn. Under this alternative, 558,918 acres of high mineral potential lands in the six states that are part of the proposed action would not be withdrawn.

Under the State of Idaho alternative, 538,742 acres of economically developable lands in the State of Idaho that are part of the proposed action would be excluded from the proposed withdrawal and left open to location and entry under the United States mining laws. The State of Idaho identified these areas as economically developable. No additional lands are being proposed for inclusion in the withdrawal under this alternative.

Thirty-one agencies and two American Indian Tribes have entered into Cooperating Agency agreements with the BLM for this EIS effort. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal (40 CFR 1508.5). Cooperating agencies participate in the preparation of the NEPA analysis and documentation. Cooperating agency status does not imply the agency supports the proposed action.

The BLM also contacted 53 American Indian governments via letter or face-to-face meetings during scoping and prior to the release of the draft EIS. The governments were provided a project update, an offer to provide more information, and an offer for government-to-government consultation.

In accordance with 36 CFR 800.3(a)(1), the BLM determined that the proposed SFA withdrawal is an undertaking that has no potential to affect historic properties, assuming such historic properties were present, and therefore the agency official has no further obligation under the National Historic Preservation Act. The BLM informed 53 American Indian governments; the Idaho, Montana, Nevada, Oregon, Utah, and Wyoming State Historic Preservation Offices; and the Advisory Council on Historic Preservation of this determination of effect.

The draft EIS is available at the following libraries and offices online at: *https://www.blm.gov/node/3282*.

IDAHO

BLM Offices

- Boise District Office, 3948 Development Ave., Boise, ID 83705
- Owyhee Field Office, 20 First Avenue West, Marsing, ID 83639
- Idaho Falls District Office, 1405 Hollipark Dr., Idaho Falls, ID 83401
- Pocatello Field Office, 4350 South Cliffs Drive, Pocatello, ID 83204
- Twin Falls District Office, 2878 Addison Ave. E, Twin Falls, ID 83301
- Shoshone Field Office, 400 West ''F'' Street, Shoshone, ID 83352
- Salmon Field Office, 1206 South Challis Street, Salmon, ID 83467
- Burley Field Office, 15 East 200 South, Burley, ID 83318
- Challis Field Office, 1151 Blue Mountain Road, Challis, ID 83226

U.S. Forest Service Offices

- Caribou-Targhee National Forest, 1405 Hollipark Drive, Idaho Falls, ID 83401
- Salmon-Challis National Forest, 1206 S. Challis Street, Salmon, ID 83467
- Sawtooth National Forest, 2647 Kimberly Road East, Twin Falls, ID 83301

Libraries

- Mountain Home Public Library, 790 N 10th E Street, Mountain Home, ID 83647
- Boise Public Library, 715 S Capitol Boulevard, Boise, ID 83702
- Twin Falls Public Library, 201 Fourth Avenue East, Twin Falls, ID 83301
- Idaho Falls Public Library, 457 W Broadway Street, Idaho Falls, ID 83402

MONTANA

BLM Offices

- HiLine District Office, 1101 15th Street North, Great Falls, MT 59401
- Glasgow Field Office, 5 Lasar Drive, Glasgow, MT 59230
- Malta Field Office, 501 S. 2nd Street East, Malta, MT 59538
- Central Montana District Office, 920 Northeast Main, Lewistown, MT 59457
- Lewistown Field Office, 920 Northeast Main, Lewistown, MT 59457

Libraries

- Lewistown Public Library, 701 West Main Street, Lewistown, MT 59457
- Phillips County Library, P.O. Box 840, Malta, MT 59538
- Glasgow City-County Library, 408 3rd Avenue South, Glasgow, MT 59230

NEVADA

BLM Offices

- BLM Nevada State Office, 1340 Financial Blvd., Reno NV 89502
- Elko District Office, 3900 Idaho St., Elko, NV 89801
- Winnemucca District Office, 5100 E. Winnemucca Blvd., Winnemucca, NV 89445
- BLM Battle Mountain District Office, 50 Bastian Road, Battle Mountain, NV 89820

U.S. Forest Service Offices

- Humboldt-Toiyabe National Forest, 1200 Franklin Way, Sparks, NV 89431

Libraries

- Humboldt County Library, US Highway 95, McDermitt, NV 89421
- Humboldt County Library, 85 East 5th Street, Winnemucca, NV 89445
- Elko County Library, 720 Court Street, Elko, NV 89801
- Battle Mountain Branch Library, PO Box 141, NV 89820
- Jackpot Branch Library, 2301 Progressive Road, Jackpot, NV 89825
- Washoe County Library, PO Box 2151, Reno, NV 89801

OREGON

BLM Offices

- Burns District Office, 28910 Hwy 20 West, Hines, OR 97738
- Lakeview Field Office, 1301 South G. Street, Lakeview, OR 97630
- Vale District Office, 100 Oregon St, Vale, OR 97918

U.S. Forest Service Offices

- Fremont-Winema National Forest, 1301 South G Street, Lakeview, OR 97630

Libraries

- Harney County Library, 80 West D Street, Burns OR 97720
- Malheur County Library, 388 SW 2nd Avenue, Ontario, OR 97914
- Lake County Library, County Courthouse, Lakeview, OR 97630

UTAH

BLM Offices

- West Desert District Office, 2370 S. Decker Lake Blvd., West Valley City, UT 84119
- BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101

U.S. Forest Service Offices

- Uinta-Wasatch-Cache National Forest, 857 West South Jordan Parkway, South Jordan, UT 84095

Libraries

- Box Elder County Bookmobile Library, 80 W 50 S, Willard, UT 84340–0595
- Cache County Library at Providence, 15 North Main, Providence, UT 84332
- Rich County Library and Bookmobile, 20 N Main, Randolph, UT 84064
- Salt Lake City Public Library, 210 E 400 S, Salt Lake City, UT 84111

WYOMING

BLM Offices

- High Desert District Office, 280 Highway 191 North, Rock Springs, WY 82901
- Kemmerer Field Office, 430 North Highway 189, Kemmerer, WY 83101
- Wind River/Bighorn Basin District Office, 101 South 23rd, Worland, WY 82401
- Lander Field Office, 1335 Main Street, Lander, WY 82520
- Pinedale Field Office, 1625 West Pine Street, Pinedale, WY 82941

Libraries

- Fremont County Library, 244 Amoretti Street, Lander, WY 82520
- Rock Springs Library, 400 C Street, Rock Springs, WY 82901
- Lincoln County Library, 519 Emerald Street, Kemmerer, WY 83101
- Sublette County Library, 155 S Tyler Street, Pinedale, WY 82941

Specific comments or concerns about the proposed withdrawal will be most helpful to the BLM. Your comments should identify specific concerns with the potential environmental effects, reasonable alternatives, and measures to avoid or lessen the proposed withdrawal's environmental impacts. The more specific your comments, the more useful they will be. To ensure consideration of your comments on the proposal in the final EIS, it is important that the BLM receive your comments before March 28, 2017.

After the comments are reviewed, any significant new issues will be investigated, modifications will be made to the draft EIS, and a final EIS will be published and distributed. The final EIS will contain the agency's responses to timely comments received on the draft EIS.

In accordance with the requirements of 43 CFR 2310.3–1(b)(2)(iv) and 40 CFR 1506.6(b), for a period until March 28, 2017, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal amendment as it relates to the lands in the six states and/or the draft EIS may present their views in writing to Mark Mackiewicz, BLM WO, C/O Price Field Office, 125 South 600 West, Price, Utah 84501, or by email to: *sagebrush_withdrawals@blm.gov* or by attending one of the public meetings on the dates and times as noted below.

Notice is also hereby given that public meetings in connection with the proposed withdrawal and the release of the draft EIS will be held on the following dates, times, and locations:

Monday, February 13, 2017, from 2 p.m. to 4 p.m.—Great Northern Hotel, 2 South 1st Street, Malta, MT 59538
Tuesday, February 14, 2017, from 5 p.m. to 7 p.m.—BLM West Desert District Office, 2370 S. Decker Lake Dr., West Valley City, UT 84119
Wednesday, February 15, 2017, from 5 p.m. to 7 p.m.—Rock Springs BLM Office, 280 Hwy 191 N, Rock Springs, WY 82901
Thursday, February 16, 2017, from 5p.m. to 7 p.m.—Shiloh Suites Conference Hotel, 780 Lindsay Blvd., Idaho Falls, ID 83402
Tuesday, February 21, 2017, from 5 p.m. to 7 p.m.—The Nugget, 1100 Nugget Avenue, Sparks, NV 89431
Wednesday, February 22, 2017, from 5 p.m. to 7 p.m.—Lakeview BLM District Office, 1301 South G Street, Lakeview, OR 97720
Thursday, February 23, 2017, from 5 p.m. to 7 p.m.—Elko Conference Center, 724 Moren Way, Elko, NV 89801
Friday, February 24, 2017, from 5 p.m. to 7 p.m.—Best Western Vista Inn, 2645 Airport Way, Boise, ID 83709

The public will have an opportunity to provide oral and written comments at the meetings. All comments received will be considered before any recommendation concerning the proposed withdrawal is submitted to the Assistant Secretary of the Interior for Land and Minerals Management for final action.

Comments including names and street addresses of respondents will be available for public review at the BLM Washington Office at the address noted above, during regular business hours, Monday through Friday, except Federal holidays. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Jenna Whitlock,

Acting Deputy Director, Operations, Bureau of Land Management.

[FR Doc. 2016–31629 Filed 12–29–16; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000.L14400000.ET0000 FUND. 17XL1109AF. WAOR068905 HAG17–0040]

Notice of Application for Withdrawal and Opportunity for Public Meeting; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture, Forest Service (USFS) has filed an application with the Bureau of Land Management (BLM) requesting that the Secretary of the Interior withdraw, for a period of 20 years, approximately 340,079 acres of National Forest System lands located in the Methow Valley, Okanagan National Forest. The purpose of the withdrawal is to protect the area while Congress considers legislation to permanently withdraw the lands, and to protect the value of ecological and recreational resources of the Methow Valley. Publication of this notice segregates the lands, subject to valid existing rights, for up to 2 years from settlement, sale, location, and entry under the public land laws, location and entry under the United States mining laws, and operation of the mineral and geothermal leasing laws. This notice also gives the public an opportunity to comment on the application for withdrawal.

DATES: Comments must be received by March 30, 2017. The date(s) and location(s) of meetings related to the application for withdrawal will be announced at least 30 days in advance of the meetings through local media, newspapers and the **Federal Register**.

ADDRESSES: Comments should be sent to the BLM Oregon/Washington State Director, P.O. Box 2965, Portland, OR 97208–2965.

FOR FURTHER INFORMATION CONTACT: Jacob Childers, BLM Oregon/Washington State Office, P.O. Box 2965, Portland, OR 97208–2965 or by phone at 503–808–6225. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual. The service is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The applicant is the USFS. The application requests the Secretary of the Interior withdraw for a period of 20 years, subject to valid existing rights, the following described National Forest System lands from settlement, sale, location, and entry under the public land laws, location and entry under the United States mining laws, and operation of the mineral and geothermal leasing laws to protect the value of ecological and recreational resources of the Methow Valley and to protect the area while legislation to permanently withdraw the lands is being considered. Recreation accounts for a substantial share of the Methow Valley community's economy while the watershed provides habitat for several threatened and endangered species. Legislation is currently pending in the 114th Congress as S.2991 and identified as the ''Methow Headwaters Protection Act of 2016.''

Okanogan National Forest

Willamette Meridian

T. 34 N., R. 20 E.,
Sec. 10, except that portion within the Lake Chelan-Sawtooth Wilderness and south of the ridge dividing Little Bridge Creek and Wolf Creek;
Sec. 11;
Secs. 14 and 15, those portions lying northerly of the ridge dividing Little Bridge Creek and Wolf Creek;
Tract 37;
Protraction block 37;
Protraction blocks 38 and 39, except those portions lying within the Lake Chelan-Sawtooth Wilderness;
Protraction block 43, that portion lying westerly of the ridge beginning in the SW¼ and termination in the NE¼ dividing Wolf Creek and Rader Creek;

Protraction block 44, that portion lying westerly of the ridge in the NW¼.
T. 34 N., R. 21 E.,
Sec. 6, W½, that portion lying north of the ridge in the SW¼, except lots 4, 7, 8, and HES 218A.
T. 35 N., R. 18 E.,
Secs. 10 thru 12, those portions lying southerly of ridge dividing Cedar Creek from Silver Star, Varden, and Early Winters Creeks;
Secs. 13 and 14;
Secs. 15, 16, and 21, those portions lying southerly and easterly of ridge dividing Cedar Creek from Early Winters Creek;
Secs. 22 thru 24;
Secs. 25 thru 27, except those portions within the Lake Chelan-Sawtooth Wilderness;
Sec. 28, except that portion within the Lake Chelan-Sawtooth Wilderness and including that portion lying easterly of ridge dividing Cedar Creek and Early Winters Creek;
Secs. 33, 34, and 36, except those portions within the Lake Chelan-Sawtooth Wilderness.
T. 35 N., R. 19 E.,
Secs. 2 and 3;
Sec. 4, that portion lying easterly of Cedar Creek and southwesterly of ridge in SW¼;
Secs. 5, 6 and 7, those portions lying southerly of ridge dividing Cedar Creek from Pekin and Varden Creeks;
Secs. 8 thru 11;
Sec. 14, except that portion within the Lake Chelan-Sawtooth Wilderness;
Secs. 15 thru 21;
Secs. 22 and 23 and 26 thru 31, except those portions within the Lake Chelan-Sawtooth Wilderness;
Protraction blocks 37 and 38;
Protraction blocks 39 and 40, except those portions within the Lake Chelan-Sawtooth Wilderness.
T. 35 N., R. 20 E.,
Secs. 1 and 2;
Sec. 3, lots 1 through 4, SE¼NW¼, S½NE¼, SE¼;
Sec. 4, N½NW¼, NW¼NE¼;
Sec. 6, except HES 202;
Sec. 7 and 8;
Sec. 9, W½, except N½NW¼ and HES 182; Sec. 10, lot 1, S½NE¼, E½SE¼;
Secs. 11 and 12;
Sec. 13, N½;
Sec. 14, N½, except HES 180;
Sec. 16, lots 3 thru 11, NW¼NW¼ and S½NW¼;
Sec. 17, except Mineral Survey No. 1005, Tip Top Lode;
Sec. 18;
Sec. 19 and 20, except those portions within the Lake Chelan-Sawtooth Wilderness;
Sec. 21 and 22;
Sec. 23, SW¼;
Secs. 26 thru 29 and 35, except those portions within the Lake Chelan-Sawtooth Wilderness.
T. 35 N., R. 22 E.,
Secs. 1 thru 5;
Secs. 8 thru 12;
Secs. 13 and 14, those portions lying northerly of ridge dividing Perarrygin Creek from Bear and Blue Buck Creek;
Secs. 15 thru 17;
Secs. 21 and 22, those portions lying northerly of ridge dividing Perarrygin Creek from Bear Creek; protraction block 37;
Protraction blocks 38 and 39, except HES 211;
Protraction block 40;
Protraction blocks 41 and 43, those portions lying northerly of ridge dividing Perarrygin Creek from Bear Creek.
T. 35 N., R. 23 E.,
Sec. 4, that portion lying northwesterly of the ridge that divides North Fork Boulder Creek and Granite Creek;
Secs. 5 and 6;
Secs. 7 thru 9;
Sec. 18, those portions lying northerly of the ridge that divides Boulder Creek and Blue Buck Creek.
T. 36 N., R. 17 E.,
Secs. 1 thru 3;
Secs. 4, 5, 7 and 8, those portions lying in Okanogan County;
Secs. 9 thru 17;
Secs. 18 and 19, those portions lying in Okanogan County;
Secs. 20 thru 24;
Sec. 25, that portion lying northerly of ridge that divides Cataract Creek and Pine Creek;
Sec. 26, that portion lying in Okanogan County and northerly of ridge that divides Cataract Creek and Pine Creek;
Sec. 27, that portion lying in Okanogan County; Sec. 28;
Sec. 29, 32 thru 34, that portion lying in Okanogan County.
T. 36 N., R. 18 E.,
Secs. 1 thru 12;
Secs. 13 thru 16, those portions lying northerly of ridge dividing Methow River and Early Winters Creek;
Secs. 17 and 18;
Secs. 19 thru 21 and 29 and 30, those portions lying northerly of ridge dividing Methow River and Early Winters Creek.
T. 36 N., R. 19 E.,
Secs. 1 thru 3;
Secs. 7, 11 and 12;
Secs. 17, 18, 20 and 21, those portions lying northerly of ridge dividing Methow River and Early Winters Creek;
Sec. 28, that portion of the E½, lying easterly of ridge and Cedar Creek;
Sec. 33, that portion lying easterly of Cedar Creek;
Secs. 34 and 35;
HES 84, that portion purchased from Robert Wise, Jan. 1973, Forest Service case number OKA68, bk. 243 pg. 129;
HES 89, that portion purchased from R.D. Merrill Company, Sept. 1994, Forest Service case number OKA060806, bk. 125 pg. 2403;
HES 237;
Purchase-Marco Inc., Dec. 1994, bk. 128 pg. 1334;
HES 198, that portion purchased from Trust for Public Land, Aug. 2003, Forest Service case number OKA75TPL, AFN 3065255;
Tracts 37, 39, 40, 42 and 43;
Protraction blocks 37 thru 58.
T. 36 N., R. 20 E.,
Secs. 5 thru 8, Secs. 10 thru 14, Secs. 17 thru 28;
Sec. 29, except HES199 and Mineral Survey 618;
Sec. 30, except E½SW¼, S½SE¼, lot 5, HES 82, 113, 114 and 229 and Mineral Survey 618;
Sec. 31, except N½NW¼NE¼, HES 81, HES 82, HES 199, HES 200, HES 202, HES 203;
Sec. 32, except HES 199, HES 201, HES 203;
Secs. 33 thru 36.
T. 36 N., R. 21 E.,
Secs. 1 thru 11;
Sec. 12, except HES 74;
Sec. 13, except HES 74 and 75;
Sec. 14, except HES 75;
Secs. 15 thru 22;
Secs. 23 and 24, except HES 75;
Secs. 25 and 26, except HES 77
Sec. 27;
Secs. 28 and 29, except HES 80;
Secs. 30 and 31;
Sec. 32, except lots 9 thru 11 and HES 79, HES 80 and HES 210;
Sec. 33, except HES 78, HES 79 and HES 210;
Sec. 34, except N½NE¼, lots 2 and 3;
Sec. 35, except HES 76 and HES 77;
Sec. 36.
T. 36 N., R. 22 E.,
All.
T. 36 N., R. 23 E.,
Secs. 7 thru 10;
Secs. 11 and 14, those portions lying westerly of ridge dividing Boulder Creek from Clark, Pelican and McCay Creeks;
Secs. 15 thru 21;
Secs. 22 and 23, those portions lying westerly of ridge dividing Boulder Creek from McCay and Wilder Creeks;
Secs. 27 and 28, those portions lying westerly of ridge dividing Boulder Creek from Wilder and Jim Creeks;
Secs. 29 thru 32;
Sec. 33, that portion lying westerly of ridge dividing Boulder Creek from Jim and West Fork Salmon Creeks;
Protraction block 38, that portion lying westerly of ridge dividing Boulder Creek from Peak and Clark Creeks, except Mineral Survey 1242;
Protraction block 39, except Mineral Survey 1242;
Protraction blocks 40 thru 42.
T. 37 N., R. 17 E.,
Secs. 12, 13, Secs. 22 thru 24, those portions lying in Okanogan County;
Secs. 25 and 26;
Sec. 27, 33 and 34 those portions lying in Okanogan County;
Secs. 35 and 36.
T. 37 N., R. 18 E.,
Sec. 7, that portion lying in Okanogan County and except that portion within the Lake Chelan-Sawtooth Wilderness;
Sec. 8 and 17, except those portions within the Pasayten Wilderness;
Secs. 18 thru 20;
Secs. 21, 25 thru 28, except those portions within the Pasayten Wilderness;
Secs. 29 thru 36.
T. 37 N., R. 19 E.,
Secs. 19 thru 24, except those portions within the Pasayten Wilderness;
Secs. 25 thru 29;
Secs. 30, except that portion within the Pasayten Wilderness;

Sec. 31, 33 thru 36;
Protraction block 37.
T. 37 N., R. 20 E.,
Secs. 1 thru 3;
Secs. 4, 5, and 8, except those portions within the Pasayten Wilderness;
Secs. 9 thru 16;
Secs. 17 thru 19, except those portions within the Pasayten Wilderness;
Secs. 20 thru 35;
Protraction block 37.
T. 37 N., R. 21 E.,
All.
T. 37 N., R. 22 E.,
All.
T. 37 N., R. 23 E.,
Secs. 2, that portion lying westerly of ridge that divides Twenty Mile Creek from Sinlahekin Creek;
Secs. 3 thru 10;
Sec. 11, that portion lying westerly of ridge that divides Twenty Mile Creek from Sinlahekin Creek;
Sec. 14, that portion lying westerly of ridge that divides Twenty Mile Creek from Lone Frank Creek;
Secs. 15 thru 22;
Secs. 23, 26, and 27, those portions lying westerly of ridge that divides Twenty Mile Creek from Lone Frank and Salmon Creeks;
Secs. 28 thru 33;
Secs. 34 and 35, those portions lying westerly of ridge that divides Boulder Creek from Salmon and Peak Creeks.
T. 38 N., R. 20 E.,
Secs. 9 thru 14, except those portions within the Pasayten Wilderness;
Sec. 15;
Secs. 16 and 21, except those portions within the Pasayten Wilderness;
Secs. 22 thru 27;
Secs. 28 and 33, except those portions within the Pasayten Wilderness;
Secs. 34 thru 36.
T. 38 N., R. 21 E.,
Secs. 7, 13, and Secs. 18 thru 24, except those portions within the Pasayten Wilderness;
Secs. 25 thru 36.
T. 38 N., R. 22 E.,
Secs. 9 thru 11, except those portions within the Pasayten Wilderness;
Secs. 14 and 15;
Secs. 16 thru 18, except those portions within the Pasayten Wilderness;
Secs. 19 thru 23, and Secs. 26 thru 35;
Protraction block 37, except that portion within the Pasayten Wilderness; protraction block 38;
Protraction block 39, except that portion within the Pasayten Wilderness; protraction blocks 40 thru 43.
T. 38 N., R. 23 E.,
Secs. 3, that portion lying westerly of ridge dividing Wildhorse and Dog Creeks from Hilltop Creek;
Secs. 4 thru 9;
Secs. 10, 14 and 15, those portions lying westerly of ridge dividing Do and Thirty Mile Creeks from Hilltop and Crosby Creeks;
Secs. 16 thru 21;
Secs. 22, 23, and 26, those portions lying westerly of ridge dividing Twenty Mile Creek from Crosby and Toasts Coulee Creeks;
Secs. 27 thru 33;
Secs. 34 and 35, those portions lying westerly of ridge dividing Twenty Mile Creek from Toasts Coulee Creek.
T. 39 N., R. 22 E.,
Sec. 35, except that portion within the Pasayten Wilderness;
Protraction block 42, except that portion within the Pasayten Wilderness.
T. 39 N., R. 23 E.,
Secs. 8 and 9, except those portions within the Pasayten Wilderness;
Sec. 15, that portion lying westerly of ridge dividing Queer Creek and Middle Fork Toats Coulee Creek and except that portion within the Pasayten Wilderness;
Secs. 16 thru19, except those portions within the Pasayten Wilderness;
Secs. 20 and 21;
Sec. 22 and 27, that portion lying westerly of ridge dividing Queer Creek and Middle Fork Toats Coulee Creek;
Secs. 28 and 29;
Sec. 30, except that portion within the Pasayten Wilderness;
Secs. 31 thru 33;
Sec. 34, that portion lying westerly of ridge dividing Wildhorse Creek from Hilltop and Middle Fork Toats Coulee Creeks.

The areas described aggregate 340,079 acres of National Forest System lands in Okanogan County, Washington.

Non-Federal mineral lands located within the boundaries of the proposed withdrawal areas will not be affected.

Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature that will not significantly impact the values to be protected by the withdrawal may be allowed with the approval of the authorized FS officer during the temporary segregation period. FS surface occupancy regulations will not adequately constrain land uses allowed under the General Mining Law (as amended) and the Mineral Leasing Act of 1920 (as amended).

There are no suitable alternative sites for the withdrawal.

No water rights would be needed to fulfill the purpose of the requested withdrawal.

Records related to the application may be examined by contacting Jacob Childers, BLM Oregon/Washington State Office at the address or phone number listed above.

For a period until March 30, 2017, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the BLM Oregon/Washington State Office, State Director at the address indicated above. Information regarding the withdrawal application will be available for public review at the BLM Oregon State Office, 1220 SW 3rd Avenue, Portland, OR 97204 and at the Okanogan-Wenatchee National Forest, 215 Melody Lane, Wenatchee, WA 98801 during regular business hours, 8:45 a.m. to 4:30 p.m. Monday through Friday, except Federal holidays. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. Individuals who submit written comments may request confidentiality by asking us in your comment to withhold your personal identifying information from public review; however, we cannot guarantee that we will be able to do so.

Notice is hereby given that a minimum of at least one public meeting will be held in conjunction with the withdrawal application. A notice of the time and place will be published in the **Federal Register** and a local newspaper at least 30 days before the scheduled date of any meetings.

For a period until December 31, 2018, subject to valid existing rights, the lands described in this notice will be segregated from settlement, sale, location, and entry under the public land laws, location and entry under the United States mining laws, and operation of the mineral and geothermal leasing laws, unless the application is denied or canceled or the withdrawal is approved prior to that date.

This application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

Lenore Heppler,
Branch Chief, Land, Mineral and Energy Resources.

[FR Doc. 2016–31746 Filed 12–29–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV912000. L13400000.PQ0000 LXSS006F0000 261A; 14–1109; MO#4500102930]

Notice of Public Meetings: Sierra Front-Northwestern Great Basin Resource Advisory Council, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Sierra Front-

Northwestern Great Basin Resource Advisory Council (RAC), will hold one meeting in Nevada, in January 2017. The meeting is open to the public.

DATES AND TIME: January 26, 2017, at the Carson City BLM Office (5665 Morgan Mill Road) in Carson City, Nevada. A field trip will be held the same day in the afternoon within the Carson City BLM District. Approximate meeting time is 8 a.m. to 1 p.m. with a field tour in the afternoon. However, the meeting and field tour could end earlier if discussions and presentations conclude before 4 p.m. The meeting will include a public comment period at approximately 8:15 a.m. and approximately 12:15 p.m.

FOR FURTHER INFORMATION CONTACT: Lisa Ross, Public Affairs Specialist, Carson City District Office, 5665 Morgan Mill Road, Carson City, NV 89701, telephone: (775) 885–6107, email: *lross@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 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 Nevada. Topics for discussion at the meeting will include, but are not limited to:

- January 26—Review of last year's goals and assess achievements, spring/riparian management discussion and recommendations, RAC subcommittee report, and District managers' updates.

The Council may raise other topics at the meetings.

Final agendas will be posted on-line at the BLM Sierra Front-Northwestern Great Basin RAC Web site at *https://www.blm.gov/node/6214* and will be published in local and regional media sources at least 14 days before each meeting.

Individuals who need special assistance such as sign language interpretation or other reasonable accommodations, or who wish to receive a copy of each agenda, may contact Lisa Ross no later than 10 days prior to each meeting.

Stephen D. Clutter,

Chief, Office of Communications.

[FR Doc. 2016–31696 Filed 12–29–16; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[16X L1109AF LLUTY0100000 L16100000.DQ0000.LXSS030J0000 24 1A]

Notice of Availability of the Record of Decision for the Moab Master Leasing Plan/Approved Resource Management Plan Amendments for the Moab and Monticello Field Offices, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Moab Master Leasing Plan (MLP)/Approved Resource Management Plan Amendments for the Moab and Monticello Field Offices (Approved Plan). On December 15, 2016, the Utah State Director signed the ROD, which constitutes the final decision of the BLM and makes the Approved Plan effective immediately.

ADDRESSES: Copies of the ROD and Approved Plan are available upon request, and available for public inspection at the following locations:

- Bureau of Land Management, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah.
- Bureau of Land Management, Moab Field Office, 82 East Dogwood, Moab, Utah.
- Bureau of Land Management, Monticello Field Office, 365 North Main, Monticello, Utah.

The ROD and Approved Plan, together with accompanying background documents, are available online at: *http://go.usa.gov/xksyS.*

FOR FURTHER INFORMATION CONTACT: Brent Northrup, Project Manager, BLM Moab Field Office, 82 East Dogwood, Moab, UT 84532, telephone 435–259–2151 or email *bnorthup@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual. The Service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Approved Plan is the culmination of a significant effort by the BLM and interested members of the public, community stakeholders, and other local, State, and Federal partners, to provide for responsible mineral development in balance with healthy wildlife habitat, clean air and water, and a vital recreation economy.

The Approved Plan addresses mineral leasing and development on 785,567 acres of BLM-administered land within the Moab and Monticello Field Offices. The Approved Plan amends mineral leasing decisions in portions of the existing Moab and Monticello Resource Management Plans that were completed in 2008.

The Proposed Plan was selected as the Approved Plan because it is the alternative that best balances competing considerations between outdoor recreation, iconic scenery, and development of oil/gas and potash deposits. The Approved Plan allows recreation and mineral extraction to occur in specified areas in order to minimize conflicts with resources.

The Preferred Alternative in the MLP Draft Amendment/Draft Environmental Impact Statement (EIS), with adjustments and clarifications, was carried forward as the Proposed Plan in the MLP/Final EIS released to the public on July 21, 2016. Five protest letters were received during the 30-day protest period on the Proposed Plan, which ended on August 22, 2016. The letters were addressed by the BLM Washington Office. During the Governor's Consistency Review Process, the Governor sent correspondence to the BLM on September 22, 2016, identifying alleged inconsistencies between the Proposed Plan and the State's San Juan County Energy Zone. After reviewing the information submitted, the BLM determined that the Proposed Plan is consistent with the Zone to the maximum extent practical based on the identified resource values. No modifications or corrections were made to the Approved Plan in response to the protest process and the Governor's Consistency Review. The Governor did not appeal the BLM Utah State Director's determination to the BLM Director.

The ROD does not include any implementation actions. The mineral leasing decisions in the Approved Plan are planning-level decisions and therefore are not appealable. Future implementation actions must be in conformance with the management direction in the Approved Plan; any such actions will result from future decisionmaking process(es), including appropriate environmental review.

Authority: 40 CFR 1506.6.

Edwin L. Roberson,

State Director.

[FR Doc. 2016–31743 Filed 12–29–16; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR02800000, 17XR0687ND, RX185279142060200]

Notice of Availability of the Final Environmental Impact Report/Final Environmental Impact Statement, Bay Delta Conservation Plan/California WaterFix

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation (Reclamation), in coordination with the California Department of Water Resources (DWR), has prepared a Final Environmental Impact Report/Final Environmental Impact Statement (Final EIR/EIS) for the Bay Delta Conservation Plan/California WaterFix pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The DWR proposes to implement a strategy to help restore ecological functions of the Delta and improve water supply reliability in the state of California. The Final EIR/EIS describes and analyzes potential environmental impacts of alternatives and identifies mitigation measures to help avoid or minimize impacts. The initial approach focused on a Habitat Conservation Plan, referred to as the Bay Delta Conservation Plan (BDCP), which included modifications to the State Water Project (SWP) and associated Conservation Measures. A new alternative strategy emerged after public input on the Draft EIR/EIS and was further refined in a Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS). This new strategy, the California Waterfix, focuses on a new water conveyance facility, habitat restoration measures necessary to minimize or avoid project effects, and a revised set of Conservation Measures. Endangered Species Act compliance would be achieved through Section 7 consultation.

DATES: No Federal or State decision on the proposed action will be made until at least 30 days after the U.S. Environmental Protection Agency (EPA) publishes a notice of availability of the Final EIR/EIS. After the 30-day period, the U.S. Department of the Interior will sign a Record of Decision and DWR will complete a Notice of Decision. The Record of Decision will state the actions that will be implemented by Reclamation and will discuss factors leading to the decisions.

ADDRESSES: Send requests for the Final EIR/EIS to Brook White, Bureau of Reclamation, Mid-Pacific Region, Bay-Delta Office, 801 I Street, Suite 140, Sacramento, CA 95814–2536, by calling (916) 414–2402, or emailing *bwhite@usbr.gov.*

To view or download the Final EIR/EIS, or for a list of locations to view hard-bound copies, go to *www.baydeltaconservationplan.com.*

FOR FURTHER INFORMATION CONTACT: Brook White, Bureau of Reclamation, (916) 414–2402, or by email at *bwhite@usbr.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 24, 2008, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) issued a Notice of Intent (NOI) to prepare an EIS on the BDCP (73 FR 4178). The NOI was reissued on April 15, 2008, to include Reclamation as a co-lead Federal agency, update the status of the planning process, and provide revised information related to scoping meetings (73 FR 20326). The NOI dated April 15, 2008 identified scoping meeting locations and stated that written comments would be accepted until May 30, 2008. Additional information was later developed to describe the proposed BDCP, and subsequent scoping activities were initiated on February 13, 2009, with the publication of a revised NOI (74 FR 7257). The NOI identified scoping meeting locations and stated that written comments would be accepted until May 14, 2009.

In December 2010, the California Natural Resources Agency provided to the public a summary of the BDCP, its status, and a list of outstanding issues. In 2011 and 2012, public meetings continued in Sacramento, California, to update stakeholders and the public on elements of the Draft BDCP and EIR/EIS that were being developed.

On December 13, 2013, the Draft BDCP and associated Draft EIR/EIS were released to the public and a 120-day public comment period was opened through notification in the **Federal Register** (78 FR 75939). This notice described the proposed action and a reasonable range of alternatives. Twelve more public meetings were held in California in early 2014. In response to requests from the public, the comment period was extended for an additional 60 days and closed on June 13, 2014 (79 FR 17135). A Draft Implementing Agreement for the BDCP was also made available to the public on May 30, 2014, for a 60-day review and comment period, which closed on July 29, 2014. The comment period for the Draft EIR/EIS was also extended to the later date. All draft documents are available at *www.BayDeltaConservationPlan.com.*

As a result of considering comments on the Draft BDCP, Draft EIR/EIS, and Draft Implementing Agreement, Reclamation and DWR proposed three additional conveyance alternatives for analysis in a RDEIR/SDEIS released on July 10, 2015 (80 FR 39797). These new alternatives, 2D, 4A, and 5A, each contain fewer Conservation Measures than the alternatives circulated in the Draft EIS/EIR. Each of the new alternatives is not structured as a Habitat Conservation Plan/Natural Communities Conservation Plan but is structured to achieve compliance with the Endangered Species Act through consultation under Section 7 and with the California Endangered Species Act through the incidental take permit process under Section 2081(b) of the California Fish & Game Code. On July 10, 2015, the RDEIR/SDEIS was released to the public. Comments were due on August 31, 2015.

The RDEIR/SDEIS described and analyzed project modifications and refinement of the resource area analyses, alternatives, and actions. Reclamation became the Federal lead agency and NMFS, USFWS, and the U.S. Army Corps of Engineers, by virtue of their regulatory review requirements, became cooperating agencies for the RDEIR/SDEIS. All other entities identified as Cooperating Agencies through prior agreements retained their status for the RDEIR/SDEIS.

DWR identified Alternative 4A (known as the California WaterFix) as their proposed project and Reclamation has selected Alternative 4A as the National Environmental Policy Act preferred alternative. This alternative consists of a water conveyance facility with three intakes, habitat restoration measures necessary to minimize or avoid project effects, and modified versions of a subset of Conservation Measures from the BDCP. Alternative 4A is proposed to make physical and operational improvements to the SWP in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and CVP south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations. For further background information, see the December 13, 2013 **Federal Register** notice for the draft EIR/EIS (78 FR 75939).

The Final EIR/EIS contains responses to all substantive comments received on the Draft EIR/EIS and RDEIR/SDEIS, and reflects comments and any additional information received during the review period.

DWR's certification of the EIR and final decision-making under the CEQA will not occur until at least 30 days after EPA publishes a notice of availability of the Final EIR/EIS. This distribution of the Final EIR/EIS, including the written proposed responses to comments submitted by public agencies, is intended to satisfy the requirement to provide these responses to commenting public agencies at least 10 days prior to certification, consistent with CEQA Guidelines Section 15088(b). In addition, the end of the **Federal Register** notice period is intended by DWR to close the period by which any person may submit to DWR any grounds for noncompliance with CEQA, CA Public Resources Code Section 21177(a).

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence—including your personal identifying information—may be made publicly available at any time. While you may ask us in your correspondence to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 27, 2016.

Camille Touton,

Acting Principal Deputy Assistant Secretary—Water and Science.

[FR Doc. 2016–31735 Filed 12–29–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. AMC Entertainment Holdings, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *AMC Entertainment Holdings, Inc., et al.,* Civil Action No. 1:16–cv–2475. On December 20, 2016, the United States filed a Complaint alleging that the proposed acquisition by AMC Entertainment Holdings, Inc. of Carmike Cinemas, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires AMC to divest certain theatre assets, reduce its equity holdings and relinquish its governance rights in National CineMedia, LLC, and complete screen transfers to the cinema advertising network of Screenvision, LLC.

Copies of the Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**.Comments should be directed to Owen M. Kendler, Acting Chief, Litigation III Section, Antitrust Division, Department of Justice, 450 Fifth Street N.W., Suite 4000, Washington, DC 20530 (telephone: 202–305–8376).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, Antitrust Division, 450 Fifth Street NW., Suite 4000, Washington, DC 20530, Plaintiff, v. *AMC Entertainment Holdings, Inc., One AMC Way, 11500 Ash Street, Leawood, KS 64105,* and, *Carmike Cinemas, Inc., 1301 First Avenue, Columbus, GA 31901,* Defendants.

Case No.: 1:16–cv–02475.
Judge: Randolph D. Moss.
Filed: 12/20/2016.

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to prevent the proposed acquisition by Defendant AMC Entertainment Holdings, Inc. (''AMC'') of all of the outstanding voting securities of Defendant Carmike Cinemas, Inc. (''Carmike'').

I. Nature of Action

1. AMC is a significant competitor to Carmike in the exhibition of first-run commercial movies in multiple areas around the United States, including the areas in and around Montgomery, Alabama; Destin and Miramar Beach, Florida; Orange Park and Fleming Island, Florida; Cumming, Georgia; Lithonia and Conyers, Georgia; Crestwood and Lansing, Illinois; Normal and Bloomington, Illinois; Pekin, Peoria, and Washington, Illinois; Inver Grove Heights and Oakdale, Minnesota; Coon Rapids and Mounds View, Minnesota; Rockaway and Sparta, New Jersey; Westfield and Cranford, New Jersey; Lawton, Oklahoma; Allentown and Center Valley, Pennsylvania; and Madison and Fitchburg, Wisconsin (collectively, the ''Local Markets''). If AMC acquires Carmike, AMC would obtain direct control of one of its most significant competitors in the Local Markets, likely resulting in higher ticket prices and/or a lower quality viewing experience for moviegoers in these areas.

2. AMC is also a founding member of National CineMedia, LLC (''NCM'')—the nation's largest provider of preshow services to exhibitors—and remains one of NCM's largest investors and exhibitors. Carmike is the largest exhibitor in the network of NCM's main competitor, Screenvision Exhibitions, Inc. (''Screenvision''), and is one of Screenvision's largest investors. NCM and Screenvision are the country's two leading preshow cinema advertising networks and together cover over 80% of movie theatre screens in the United States. If AMC's proposed acquisition of Carmike were to proceed, it would likely weaken competition between NCM and Screenvision because they would have a significant common owner. In addition, the proposed merger would undermine Screenvision's ability to compete for advertisers and exhibitors because, as explained below, Screenvision will no longer be able to rely on Carmike's growth to expand its network. The loss of competition in the markets for preshow services and cinema advertising will likely result in lower preshow services revenues to exhibitors, higher prices to cinema advertisers, and lower quality preshow services and advertising.

3. Accordingly, AMC's proposed acquisition of Carmike likely would substantially lessen competition in each of the Local Markets for the exhibition of first-run, commercial movies and in the markets for the sale of preshow services to exhibitors and the sale of cinema advertising to advertisers in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. Jurisdiction and Venue

4. This action is filed by the United States pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to obtain equitable relief and to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

5. The distribution and theatrical exhibition of first-run, commercial films, the provision of preshow services to thousands of theatres across the United States, and the sale of cinema advertising to advertisers throughout the United States are commercial activities that substantially affect, and are in the flow of, interstate trade and commerce. Defendants' activities in purchasing preshow advertising and other content, equipment, services, and supplies, as well as licensing films for exhibition, substantially affect interstate commerce.

6. The Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. 25 and 28 U.S.C. 1331, 1337(a), and 1345.

7. Defendants consent to personal jurisdiction and venue in this district, and AMC operates theatres in this district. This Court has personal jurisdiction over each Defendant, and venue is proper under 15 U.S.C. 22, and 28 U.S.C. 1391(b) and (c).

III. Defendants and the Proposed Acquisition

8. Defendant AMC is a Delaware corporation with its headquarters in Leawood, Kansas. As of September 30, 2016, AMC operated approximately 388 theatres with a total of 5,295 screens located across 31 states and the District of Columbia. AMC reported approximately $1.89 billion in U.S. box office revenues in 2015 and approximately $1.46 billion in U.S. box office revenues for the first nine months of 2016. Measured by number of theatres, screens, and box office revenue, AMC is the second-largest theatre circuit in the United States.

9. Defendant Carmike is a Delaware corporation with its headquarters in Columbus, Georgia. As of September 30, 2016, Carmike operated approximately 271 movie theatres with a total of 2,917 screens located across 41 states. Carmike reported approximately $490.0 million in U.S. box office revenues in 2015, and approximately $370.8 million in U.S. box office revenue for the first nine months of 2016. Measured by number of theatres, screens, and box office revenue, Carmike is the fourth-largest theatre circuit in the United States.

10. On March 3, 2016, AMC and Carmike executed an Agreement and Plan of Merger, under which AMC would acquire all outstanding voting securities of Carmike for approximately $1.2 billion. If the parties consummate the merger, AMC will be the nation's largest theatre exhibitor.

IV. Background

A. Movie Theatres

11. Viewing movies in a theatre is a popular pastime. Over 1.3 billion movie tickets were sold in the United States and Canada in 2015, with total box office revenues reaching approximately $11.1 billion.

12. Companies that operate movie theatres are called ''exhibitors.'' Some exhibitors own a single theatre, whereas others own a circuit of theatres within one or more regions of the United States. AMC and Carmike are two of the largest exhibitors in the United States.

13. Exhibitors set ticket prices for a theatre based on a number of factors, including the age and condition of the theatre, the number and type of amenities the theatre offers (such as the range of snacks, food and beverages offered, the size of its screens and quality of its sound systems, and whether it provides stadium and/or reserved seating), competitive pressures facing the theatre (such as the price of tickets at nearby theatres, the age and condition of those theatres, and the number and types of amenities they offer), and the population demographics and density surrounding the theatre.

B. Preshow Services and Cinema Advertising

14. On almost all movie screens, before the previews and feature film begin, the audience is presented with a preshow—a video program consisting of national, regional, and local advertisements; special content segments (*e.g.,* a ''behind the scenes'' look at a new TV show); and theatre announcements. The preshow is typically twenty to thirty minutes long and is designed to engage moviegoers as they wait for the feature film to start.

15. Cinema advertising networks act as intermediaries between exhibitors and advertisers. For advertisers, the preshow is a unique opportunity to reach an attentive audience using a large screen with the benefit of high-quality video and sound. For exhibitors, the preshow provides a lucrative way to supplement revenue earned through ticket sales and concessions at a time when its movie screens screens are otherwise unused.

16. To obtain preshow services, exhibitors typically enter into long-term, exclusive contracts with the cinema advertising networks. The contracts for the largest few exhibitors, including AMC and Carmike, tend to be longest—approximately 30 years—whereas the contracts for the smaller exhibitors tend to last five to ten years. Under the contracts, the networks commit to marketing the preshow screen time to advertisers and packaging the advertisements and other content into an entertaining video program. Exhibitors agree to display the preshow on their movie screens. The cinema advertising networks retain a negotiated portion of the advertising proceeds for the services they provide, and the exhibitors retain the remaining portion of the advertising proceeds.

17. Cinema advertising networks sell advertising time in preshows to advertisers seeking to market their products on a local, regional, or national basis. Generally, national advertisers seek to purchase cinema advertising from firms that can provide access to a nationwide network of movie screens. Thus, the cinema advertising networks work hard to enter into contracts with exhibitors throughout the country and compete vigorously to woo exhibitors away from each other.

18. NCM and Screenvision are the dominant cinema advertising networks in the United States. They compete head-to-head to win exclusive contracts with exhibitors and to offer advertisers access to their exhibitors' movie audiences. Together, NCM and Screenvision serve over 80% of all movie screens in the country.

19. NCM has a national cinema advertising network that covers about 20,500 of the approximately 40,500 movie screens in the United States. In 2015, NCM earned approximately $447 million in gross advertising revenue.

20. National CineMedia, Inc. is the managing member and owner of 43.6% of NCM. The remaining 56.4% is owned by the three largest exhibitors in the United States: AMC (17.4%), Regal Entertainment Group (''Regal'') (19.8%), and Cinemark Holdings, Inc. (''Cinemark'') (19.2%). Under NCM's governing documents, post-merger, AMC ownership would increase to approximately 26.5%.

21. Regal, Cinemark, and AMC (the so-called ''Founding Members'') exercise a significant degree of control and influence over NCM and account for approximately 83% of its screens. In addition to holding a majority of NCM's equity, they have representatives on NCM's Board of Directors and enjoy substantial governance rights, including approval rights over certain NCM contracts with competing exhibitors. NCM management routinely consults with executives of the Founding

Members in making business decisions. AMC can fill two seats on the NCM board.

22. Screenvision has a national cinema advertising network that covers 14,300 screens in more than 2,300 theatres. Carmike is by far the largest exhibitor in Screenvision's network, and, as of September 30, 2016, owned approximately 19% of Screenvision through SV Holdco, LLC, a holding company that owns and operates Screenvision. Carmike also holds a seat on Screenvision's board of directors and possesses certain governance rights. No other major theatre exhibitor holds significant equity interests in Screenvision. Following the merger, AMC plans to divest or convert Carmike's Screenvision shares such that AMC will hold no more than 10% of Screenvision's voting stock.

V. Relevant Markets

A. The Exhibition of First-Run, Commercial Movies in the Local Markets

23. The exhibition of first-run, commercial movies in the Local Markets are relevant markets under Section 7 of the Clayton Act, 15 U.S.C. 18.

The Exhibition of First-Run, Commercial Movies Product Market

24. Movies are a unique form of entertainment. The experience of viewing a movie in a theatre is an inherently different experience from live entertainment (*e.g.,* a stage production or attending a sporting event) or viewing a movie in the home (*e.g.,* through streaming video, on a DVD, or via pay-per-view).

25. Reflecting the significant differences of viewing a movie in a theatre, ticket prices for movies generally differ from prices for other forms of entertainment. For example, typically, tickets for live entertainment are significantly more expensive than a movie ticket, whereas the costs of home viewing through streaming video, a DVD rental, or pay-per-view is usually significantly less expensive than viewing a movie in a theatre.

26. Viewing a movie at home differs from viewing a movie in a theatre in many ways. For example, the size of the screens differ, the sophistication of the sound systems differ, and, unlike at home, in the theatre, one has the social experience of viewing a movie with other patrons.

27. In addition, the most popular newly released or ''first-run'' movies are not available for home viewing at the time they are released in theatres. Movies are considered to be in their ''first-run'' during the four to five weeks following initial release in a given locality. If successful, a movie may be exhibited at other theatres after the first-run as part of a second or subsequent run (often called a ''sub-run'' or ''second-run'').

28. Moviegoers generally do not regard sub-run movies as an adequate substitute for first-run movies. Reflecting the significant difference between viewing a newly released, first-run movie and an older sub-run movie, tickets at theatres exhibiting first-run movies usually cost significantly more than tickets at sub-run theatres.

29. Art movies and foreign-language movies are also not reasonable substitutes for commercial, first-run movies. Art movies, which include documentaries, are sometimes referred to as independent films. Although art and foreign-language movies appeal to some viewers of commercial movies, art and foreign-language movies tend to have more narrow appeal and typically attract an older audience than commercial movies. Exhibitors consider the operation of theatres that predominantly exhibit art and foreign-language movies to be distinct from the operation of theatres that predominantly exhibit commercial movies.

30. A hypothetical monopolist controlling the exhibition of all first-run, commercial movies in a relevant geographic market would profitably impose at least a small but significant and non-transitory increase (SSNIP) in ticket prices. Thus, the exhibition of first-run, commercial movies is a relevant product market and line of commerce under Section 7 of the Clayton Act in which to assess the competitive effects of this acquisition.

Relevant Geographic Markets for the Exhibition of First-Run, Commercial Movies

31. Moviegoers typically are not willing to travel very far from their home to attend a movie. As a result, geographic markets for the exhibition of first-run, commercial movies are relatively local. Each of the following areas is a relevant geographic market and section of the country for purposes of Section 7 of the Clayton Act.

Area In and Around Montgomery, Alabama

32. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Montgomery, Alabama. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Chantilly 13 BigD, the Carmike Promenade 12, and the AMC Festival Plaza 16. No other predominately first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

33. Moviegoers who reside in and around Montgomery, Alabama are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Montgomery, Alabama constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Destin and Miramar Beach, Florida

34. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Destin and Miramar Beach, Florida. The only theatres that predominantly show first-run commercial movies in this area are the AMC Destin Commons 14 and the Carmike Boulevard 10 BigD. No other predominantly first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

35. Moviegoers who reside in and around Destin and Miramar Beach, Florida are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Destin and Miramar Beach, Florida constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Orange Park and Fleming Island, Florida

36. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Orange Park and Fleming Island, Florida. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Fleming Island 12, the AMC Orange Park 24, and the EPIC Theater at Oakleaf. Other than the EPIC Theater, no other first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

37. Moviegoers who reside in and around Orange Park and Fleming Island, Florida are unlikely to travel significant

distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Orange Park and Fleming Island, Florida constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Cumming, Georgia

38. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Cumming, Georgia. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Movies 400 12, the AMC Avenue Forsyth 12, and the Regal Avalon 12. Other than the Regal Avalon 12, no other predominantly first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

39. Moviegoers who reside in and around Cumming, Georgia are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Cumming, Georgia constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Lithonia and Conyers, Georgia

40. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Lithonia and Conyers, Georgia. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Conyers Crossing 16 and the AMC Stonecrest Mall 16. No other predominately first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

41. Moviegoers who reside in and around Lithonia and Conyers, Georgia are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Lithonia and Conyers, Georgia constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Crestwood and Lansing, Illinois

42. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Crestwood and Lansing, Illinois. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Digiplex Lansing 8, the AMC Crestwood 18, the AMC Schererville 12, the AMC Schererville 16, the Marcus Country Club Hills Cinema, the Marcus Chicago Heights Cinema, the Studio Movie Grill Chatham, and the Hoosier Theater. Other than the Marcus Country Club Hills Cinema, the Marcus Chicago Heights Cinema, the Studio Movie Grill Chatham, and the Hoosier Theater, no other predominantly first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

43. Moviegoers who reside in and around Crestwood and Lansing, Illinois are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Crestwood and Lansing, Illinois constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Normal and Bloomington, Illinois

44. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Normal and Bloomington, Illinois. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Ovation 10, the AMC Normal 14, and the Wehrenberg Bloomington Galaxy 14 Cinema. Other than the Wehrenberg Bloomington Galaxy 14 Cinema, no other predominantly first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

45. Moviegoers who reside in and around Normal and Bloomington, Illinois are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Normal and Bloomington, Illinois constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Pekin, Peoria, and Washington, Illinois

46. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Pekin, Peoria, and Washington, Illinois. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Sunnyland 10, the Carmike Grand Prairie 18, the AMC Pekin 14, the Goodrich Willow Knolls 14, the Morton Cinema, and the Landmark Cinemas. Other than the Goodrich Willow Knolls, the Morton Cinema, and the Landmark Cinemas, no predominantly first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

47. Moviegoers who reside in and around Pekin, Peoria, and Washington, Illinois are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Pekin, Peoria, and Washington, Illinois constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Inver Grove Heights and Oakdale, Minnesota

48. AMC and Carmike account for nearly a majority of the first-run, commercial movie box office revenue in and around Inver Grove Heights and Oakdale, Minnesota. The only theatres that predominantly show first-run commercial movies in this area are the AMC Inver Grove 16, the Carmike Oakdale 20, the Woodbury 10, and the Marcus Oakdale 17. Other than the Woodbury 10 and the Marcus Oakdale 17, no other predominantly first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

49. Moviegoers who reside in and around Inver Grove Heights and Oakdale, Minnesota are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial

movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Inver Grove Heights and Oakdale, Minnesota constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Coon Rapids and Mounds View, Minnesota

50. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Coon Rapids and Mounds View, Minnesota. The only theatres that predominantly show first-run commercial movies in this area are the AMC Coon Rapids 16, the AMC Arbor Lakes, the Carmike Wynnsong 15, the Andover 10, the Regal Brooklyn Center 20, and the Mann Champlin. Other than the Andover 10, the Regal Brooklyn Center 20, and the Mann Champlin, no other predominantly first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

51. Moviegoers who reside in and around Coon Rapids and Mounds View, Minnesota are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Coon Rapids and Mounds View, Minnesota constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Rockaway and Sparta, New Jersey

52. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Rockaway and Sparta, New Jersey. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Digiplex Sparta 3 and the AMC Rockaway 16. No other predominantly first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

53. Moviegoers who reside in and around Rockaway and Sparta, New Jersey are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Rockaway and Sparta, New Jersey constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Westfield and Cranford, New Jersey

54. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Westfield and Cranford, New Jersey. Carmike operates two first-run, commercial movie theatres in the area: the Digiplex Rialto Westfield and the Digiplex Cranford 5. AMC operates five theaters in the area: the Mountainside 10, the Aviation 12, the Jersey Gardens 20, the Menlo Park 12, and the Essex Green 9. While there are several other first-run, commercial movie theatres operating in the vicinity of the AMC and Carmike theatres in the area, AMC and Carmike are first and fourth, respectively, in term of the number of screens and box office revenue.

55. Moviegoers who reside in and around Westfield and Cranford, New Jersey are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Westfield and Cranford, New Jersey constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Lawton, Oklahoma

56. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Lawton, Oklahoma. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Patriot 13 and the AMC Lawton 12. No other predominately first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

57. Moviegoers who reside in and around Lawton, Oklahoma are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Lawton, Oklahoma constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Allentown and Center Valley, Pennsylvania

58. AMC and Carmike account for all of the first-run, commercial movie box office revenue in and around Allentown and Center Valley, Pennsylvania. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Promenade 16 IMAX, the Carmike Promenade 16, and the AMC Tilghman Square 8. No other predominately first-run, commercial movie theatre is in the vicinity of the Carmike and AMC theatres.

59. Moviegoers who reside in and around Allentown and Center Valley, Pennsylvania are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Allentown and Center Valley, Pennsylvania constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

Area In and Around Madison and Fitchburg, Wisconsin

60. AMC and Carmike account for the majority of the first-run, commercial movie box office revenue in and around Madison and Fitchburg, Wisconsin. The only theatres that predominantly show first-run commercial movies in this area are the Carmike Sundance Madison 6, the AMC Fitchburg 18, and the Marcus Point Cinema 15. Other than the Marcus Point Cinema 15, no predominately first-run, commercial movie theatre is in the vicinity of the AMC and Carmike theatres.

61. Moviegoers who reside in and around Madison and Fitchburg, Wisconsin are unlikely to travel significant distances out of that area to attend a first-run, commercial movie. A small but significant increase in the price of tickets by a hypothetical monopolist of first-run, commercial movie theatres in this area would likely not cause a sufficient number of moviegoers to travel out of that area to make the increase unprofitable. The area in and around Madison and Fitchburg, Wisconsin constitutes a relevant geographic market in which to assess the competitive effects of this acquisition.

B. Preshow Services and Cinema Advertising in the United States

62. Preshow services sold to exhibitors and cinema advertising sold to advertisers in the United States are relevant markets under Section 7 of the Clayton Act, 15 U.S.C. § 18.

Preshow Services and Cinema Advertising Product Markets

i. Preshow Services

63. Preshow services consist of the packaging of advertisements and content into a preshow delivered to exhibitors, enabling them to earn revenue from the use of their screens before the feature film. The price charged to exhibitors for preshow services is the portion of advertising revenue retained by the network.

64. The sale of preshow services to exhibitors constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act. There are no reasonable substitutes for preshow services. Exhibitors cannot easily replace the preshow services that they buy from cinema advertising networks because individual exhibitors generally lack sufficient screens and geographic reach to secure national advertising. Nor can exhibitors sufficiently replace national advertising in preshows with local and regional advertising because local and regional advertising generates far less revenue than national advertising. Because there are no reasonable substitutes for preshow services, a hypothetical monopolist of all such services could profitably impose a SSNIP. Thus, the market for preshow services is a relevant product market in which to assess the competitive effects of this acquisition.

ii. Cinema Advertising

65. Cinema advertising is the on-screen advertising incorporated in the preshow. The sale of cinema advertising to advertisers is a relevant product market and line of commerce under Section 7 of the Clayton Act. Cinema advertising has important attributes that differentiate it from other forms of video advertising. For example, the preshow is projected on a large screen with high-quality video and sound in a darkened auditorium. In contrast to TV and other video advertising platforms, the audience cannot avoid the advertisements by fast forwarding through them, clicking past them, or changing a channel. The preshow also allows for long-form advertisements typically not available on TV, and it reaches a weekend audience and light TV viewers who are otherwise difficult to reach.

66. Many advertisers value the combination of attributes afforded by cinema advertising, and few would switch to other forms of video advertising in response to a SSNIP of cinema advertising. A hypothetical monopolist over all cinema advertising would profitably impose a SSNIP and, thus, the market for cinema advertising is a relevant product market in which to assess the competitive effects of this acquisition.

Relevant Geographic Market for Preshow Services and Cinema Advertising

67. NCM and Screenvision compete with each other throughout the United States. Exhibitors and advertisers in the United States would not switch to cinema advertising networks located outside of the United States in the event of a SSNIP in the United States. Accordingly, the United States is a relevant geographic market for preshow services sold to exhibitors and for cinema advertising sold to advertisers within the meaning of Section 7 of the Clayton Act.

VI. COMPETITIVE EFFECTS

A. Exhibition of First-Run, Commercial Movies in the Local Markets

68. Exhibitors compete to attract moviegoers to their theatres over the theatres of their rivals. They do that by competing on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, students, or children) moviegoers will begin to frequent their rivals' theatres. Exhibitors also compete by seeking to license the first-run movies that are likely to attract the largest numbers of moviegoers. In addition, exhibitors compete over the quality of the viewing experience by offering moviegoers the most sophisticated sound systems, largest screens, best picture clarity, best seating (including stadium, reserved, and recliner seating), and the broadest variety and highest quality snacks, food, and drinks at concession stands or cafés in the lobby or served to moviegoers at their seats.

69. AMC and Carmike currently compete for moviegoers in the Local Markets. These markets are highly concentrated, and in each market, AMC and Carmike are significant competitors, given their close proximity. Their rivalry spurs each to improve the quality of its theatres and keeps ticket prices in check.

70. In each of the Local Markets, AMC's acquisition of Carmike will lead to significant increases in concentration and eliminate existing competition between AMC and Carmike.

71. Market concentration is often a useful indicator of the level of competitive vigor in a market and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase that concentration, the more likely it is that the transaction would result in reduced competition, harming consumers. Market concentration commonly is measured by the Herfindahl-Hirschman Index (''HHI''), as discussed in Appendix A. Markets in which the HHI exceeds 2,500 points are considered highly concentrated, and transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power.

72. All of the Local Markets are highly concentrated and will experience significant HHI increases as a result of the transaction. In each of the Local Markets, the proposed acquisition would give AMC control of at least half, and sometimes all, of the first-run, commercial movie theatre screens and between 48% and 100% of the annual box office revenues. In each of the Local Markets, the acquisition would yield post-acquisition HHIs of between 3,800 and 10,000, representing increases in the range of 600 to 5,000 points.

73. Today, were one of Defendants' theatres to increase unilaterally ticket prices in each of Local Markets, the exhibitor that increased price would likely suffer financially as a substantial number of its customers would patronize the other exhibitor. The acquisition would eliminate this pricing constraint. Thus, the acquisition is likely to lead to higher ticket prices for moviegoers, which could take the form of a higher adult evening ticket price or reduced discounting for matinees, children, seniors, or students.

74. The proposed acquisition likely would also reduce competition between AMC and Carmike over the quality of the viewing experience at the theatres in the Local Markets. If no longer motivated to compete, AMC and Carmike would have reduced incentives to maintain, upgrade, and renovate their theatres, to improve the theatres' amenities and services, or to license the most popular movies, thus reducing the quality of the viewing experience for moviegoers in the Local Markets.

75. For all of these reasons, AMC's acquisition of Carmike likely will result in a substantial lessening of competition in each of the Local Markets.

B. Preshow Services and Cinema Advertising in the United States

76. The proposed transaction also would likely substantially lessen competition in the markets for the sale of preshow services to exhibitors and the sale of cinema advertising to advertisers in the United States.

AMC's Simultaneous Ownership of Equity Interests in NCM and Screenvision Will Likely Substantially Lessen Competition

77. As a significant owner of equity interests in both NCM and Screenvision post-merger, AMC would have an incentive to reduce the head-to-head competition between NCM and Screenvision. AMC will not benefit from strong competition between NCM and Screenvision post-merger because the competition will lower the profits AMC earns from NCM and Screenvision through its ownership interest.

78. In light of this incentive, AMC will likely use its influence and governance rights in both companies to ensure that NCM and Screenvision compete less aggressively to sign contracts with exhibitors and advertisers at the expense of the other network. AMC will also have the ability to use its access to confidential, nonpublic, and trade secret information from NCM and Screenvision to facilitate collusion by passing that competitively sensitive information between NCM and Screenvision.

79. The lessening of competition between NCM and Screenvision will likely result in lower payments to exhibitors and/or lower quality preshows for exhibitors. Given that NCM and Screenvision control over 80% of screens in the United States, it would be difficult for exhibitors to substitute to other, smaller networks.

80. Additionally, as a result of this lessening of competition, advertisers will no longer benefit from the lower prices that have resulted from the competition between NCM and Screenvision. Advertisers do not have choices other than these two networks to reach a broad number of viewers of their cinema advertising.

The Merger Will Likely Substantially Lessen Competition in Both Markets Because It Will Likely Weaken Screenvision's Ability to Compete

81. The loss of an independent Carmike also likely would weaken Screenvision's ability to remain a robust, competitive check on NCM, the only other significant competitor in the preshow services and cinema advertising markets. Scale is an important element of competition for advertisers and, in turn, for exhibitors. Carmike is Screenvision's largest exhibitor, and Screenvision touts the Carmike theatre network's current, broad scale when competing to execute deals with advertisers and exhibitors.

82. Screenvision also relies on Carmike's expansion plans to maintain and possibly expand the scale of its network of screens. Under Carmike's contract with Screenvision, all newly-acquired or -built Carmike theatres that have a preshow are automatically assigned to the Screenvision network. As a result, Carmike has fueled much of Screenvision's growth in recent years through its acquisitions of existing theatres and new theatre builds. This growth is important to maintaining scale since exhibitors, including Carmike, periodically close theaters that are no longer economically viable. Additionally, Screenvision's scale is at risk as the industry consolidates and more of the exhibitors with which it had previously contracted migrate to the contracts between NCM and its Founding Members: AMC, Regal, and Cinemark.

83. NCM's Founding Members and Carmike are the only exhibitors that have made significant acquisitions as the exhibitor industry has been consolidating. These exhibitors have long-term exclusive contracts with either NCM or Screenvision. If AMC acquires Carmike, the AMC/NCM exclusive arrangement will be expanded to Carmike and all of the merged firm's future theatre acquisitions and new builds will affiliate with NCM. Screenvision will lose access to its only substantial source of theatre acquisitions and the number of independent exhibitors unencumbered by long-term exclusive dealing arrangements for which Screenvision can compete will shrink even more as industry consolidation continues. Screenvision will only be able to rely on the other, smaller exhibitors for theatre acquisitions or new builds to maintain its network scale. These exhibitors will be unable to replace the growth that Carmike would have likely provided in the absence of the merger.

84. Competition will be lessened in the preshow services and cinema advertising markets because the merger will weaken one of the only two competitors. In the preshow services market, because NCM and Screenvision closely monitor each other and battle for market share, the competition between them provides tangible benefits for exhibitors with respect to price and quality of preshows. The proposed merger would likely substantially lessen the competition between NCM and Screenvision that has yielded these benefits, potentially forcing exhibitors to raise prices to consumers or forgo theatre improvements to offset the resulting reduction in revenue that they earn from preshows.

85. In the cinema advertising market, the resulting lessening of competition from the proposed acquisition would negatively impact advertisers, who pay NCM and Screenvision to place their ads in the movie preshows. Currently, advertisers benefit from competition between NCM and Screenvision for the placement of their ads. The proposed merger would likely substantially lessen the competition between NCM and Screenvision that has yielded these benefits, likely forcing advertisers to pay higher prices or accept lower quality placement of their advertising in the movie pre-shows.

VII. ENTRY

86. Sufficient, timely entry that would deter or counteract the anticompetitive effects in the relevant markets alleged above is unlikely. Exhibitors are reluctant to locate new, first-run, commercial theatres near existing, first-run, commercial theatres unless the population density, demographics, or the quality of existing theatres makes new entry viable. Timely entry of new, first-run, commercial movie theatres in the areas in and around the Local Markets would be unlikely to defeat a price increase by the merged firm.

87. Additionally, the entry barriers associated with developing a cinema advertising network are high, and thus new entry or expansion by existing competitors is unlikely to prevent or remedy the proposed merger's likely anticompetitive effects in the preshow services and cinema advertising markets. Barriers to entry and expansion include the time and cost of developing a network of screens to achieve sufficient scale. NCM's and Screenvision's lock-up of almost all of the exhibitors in the United States through staggered long-term contracts makes entry a long process. This adds to the already high cost of building the infrastructure necessary to develop and attract national advertisers. It also increases the length of time an entrant must sustain losses before its scale is large enough to sell advertising at long-term profitable rates.

88. Exhibitors generally cannot supply preshow services themselves to replace the likely substantial lessening of competition in the preshow services market. Individual exhibitors or groups of small exhibitors whose contracts with NCM or Screenvision are expiring are unlikely to be able to establish cost-effective sales forces, attract national advertisers, or otherwise develop a

sufficient infrastructure to reasonably replace lost competition.

VIII. VIOLATION ALLEGED

89. Plaintiff hereby reincorporates paragraphs 1 through 88.

90. The likely effect of AMC's proposed acquisition of Carmike would be to substantially lessen competition in each of the relevant markets identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

91. Unless enjoined, the proposed transaction would likely have the following effects, among others:

(a) the prices of tickets at first-run, commercial movie theatres in the areas in and around the Local Markets would likely increase above levels that would prevail absent the acquisition;

(b) the quality of first-run, commercial theatres and the viewing experience at those theatres in the Local Markets would likely decrease below levels that would prevail absent the acquisition;

(c) the quality of and revenues from preshow services provided to exhibitors would likely decrease below levels that would prevail absent the acquisition; and

(d) the cost to place ads in theatre preshows to advertisers will likely increase to levels above, and the quality of advertising will decrease to levels below, those that would prevail absent the acquisition.

IX. REQUESTED RELIEF

92. Plaintiff requests that:

(a) AMC's proposed acquisition of Carmike be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) Defendants be permanently enjoined from and restrained from carrying out the proposed acquisition or any other transaction that would combine the two companies;

(c) Plaintiff be awarded its costs of this action; and

(d) Plaintiff be awarded such other reliefs as the Court may deem just and proper.

Dated: 12/20/2016.

For Plaintiff United States of America

/s/ ________________

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Acting Assistant Attorney General.

/s/ ________________

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APPENDIX A

Herfindahl-Hirschman Index

The term ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the relevant market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3 (2010) (''Guidelines''). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the Guidelines. *Id.*

United States District Court for the District of Columbia

United States of America Plaintiff, v. *AMC Entertainment Holdings, Inc., and Carmike Cinemas, Inc.,* Defendants.

Case No.: 1:16–cv–02475
Judge: Randolph D. Moss
Filed: 12/20/2016

COMPETITIVE IMPACT STATEMENT

Plaintiff, United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF PROCEEDING

On March 3, 2016, Defendant AMC Entertainment Holdings, Inc. (''AMC'') agreed to acquire all of the outstanding voting securities of Defendant Carmike Cinemas, Inc. (''Carmike''). AMC and Carmike are the second-largest and fourth-largest movie theatre circuits, respectively, in the United States.

AMC owns significant equity in National CineMedia, LLC (''NCM'') and Carmike owns significant equity in SV Holdco, LLC, a holding company that owns and operates Screenvision Exhibition, Inc. (collectively ''Screenvision''). NCM and Screenvision are the country's two main, preshow cinema advertising networks, covering over 80% of movie theatre screens in the United States.

The United States filed a civil antitrust complaint on December 20, 2016, seeking to enjoin the proposed acquisition and to obtain equitable relief. The Complaint alleges that the acquisition, if permitted to proceed, would give AMC direct control of one of its most significant movie theatre competitors, and in some cases, its only competitor, in 15 local markets (identified as the ''Local Markets'' in the Complaint) [1] in nine states. Moviegoers would likely experience higher ticket and concession prices and lower quality services in these local markets as a consequence.

The Complaint further alleges that because AMC will hold sizable interests in both NCM and Screenvision post-transaction, and Screenvision will lose Carmike as a source of future growth of its network, the acquisition would substantially lessen competition in the markets for preshow services and cinema advertising. This loss of competition likely would result in increased prices and reduced services for advertisers and theatre exhibitors seeking preshow services.

The likely effect of AMC's acquisition of Carmike will be to substantially lessen competition in the exhibition of first-run, commercial movies in the 15 Local Markets, and in the sale of preshow services and cinema advertising on a nationwide basis, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold

[1] As alleged in the Complaint, the 15 Local Markets are Montgomery, Alabama; Destin and Miramar Beach, Florida; Orange Park and Fleming Island, Florida; Cumming, Georgia; Lithonia and Conyers, Georgia; Crestwood and Lansing, Illinois; Normal and Bloomington, Illinois; Pekin, Peoria, and Washington, Illinois; Inver Grove Heights and Oakdale, Minnesota; Coon Rapids and Mounds View, Minnesota; Rockaway and Sparta, New Jersey; Westfield and Cranford, New Jersey; Lawton, Oklahoma; Allentown and Center Valley, Pennsylvania; and Madison and Fitchburg, Wisconsin.

Separate'') and a proposed Final Judgment. Under the terms of the proposed Final Judgment, which is explained more fully below, AMC is required to take certain actions that are designed to eliminate the anticompetitive effects that are likely to result from AMC's acquisition of Carmike. Specifically, the Defendants are required to: (1) Divest movie theatres in the 15 Local Markets where it and Carmike are direct competitors; (2) sell down its equity interest in NCM such that it owns no more than 4.99%; (3) relinquish its seats on NCM's Board of Directors and all other governance rights it holds in NCM, (4) transfer 24 theaters with a total of 384 screens to the Screenvision cinema advertising network and divest any of those theatres it does not successfully transfer; and (5) implement and maintain ''firewalls'' to further ensure that it does not obtain NCM's, Screenvision's, or other exhibitors' competitively sensitive information or become a conduit for the flow of such information between NCM and Screenvision.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

Defendant AMC is a Delaware corporation with its headquarters in Leawood, Kansas. As of September 30, 2016, AMC operated approximately 388 theatres with a total of 5,295 screens located across 31 states and the District of Columbia. AMC reported approximately $1.89 billion in U.S. box office revenues in 2015 and approximately $1.46 billion in U.S. box office revenues for the first nine months of 2016. Measured by number of theatres, screens, and box office revenue, AMC is the second-largest theatre circuit in the United States.

AMC is one of the three founders of the NCM cinema advertising network, owns 17.4% of NCM, controls two seats on NCM's Board of Directors, and has certain governance rights over NCM. AMC's ownership interest in NCM will increase to 26.5% after it acquires Carmike.

Defendant Carmike is a Delaware corporation with its headquarters in Columbus, Georgia. As of September 30, 2016, Carmike operated approximately 271 movie theatres with a total of 2,917 screens located across 41 states. Carmike reported approximately $490.0 million in U.S. box office revenues in 2015, and approximately $370.8 million in U.S. box office revenue for the first nine months of 2016. Measured by number of theatres, screens, and box office revenue, Carmike is the fourth-largest theatre circuit in the United States.

Carmike is the largest theatre circuit in the Screenvision cinema advertising network. It also owns approximately 19% of Screenvision, controls a seat on Screenvision's Board of Directors, and has certain governance rights over Screenvision.

B. The Competitive Effects of the Transaction on the Exhibition of First-Run, Commercial Movies

1. The Relevant Markets

As alleged in the Complaint, movies are a unique form of entertainment. The experience of viewing a movie in a theatre is an inherently different experience from live entertainment (*e.g.,* a stage production or attending a sporting event) or viewing a movie in the home (*e.g.,* through streaming video, on a DVD, or via pay-per-view).

Reflecting the significant differences of viewing a movie in a theatre, ticket prices for movies generally differ from prices for other forms of entertainment. For example, typically, tickets for live entertainment are significantly more expensive than a movie ticket, whereas the costs of home viewing through streaming video, a DVD rental, or pay-per-view is usually significantly less expensive than viewing a movie in a theatre.

Viewing a movie at home differs from viewing a movie in a theatre in many ways. For example, the size of the screens and sophistication of the sound systems differ, and, unlike at home, in the theatre, one has the social experience of viewing a movie with other patrons.

In addition, the most popular newly released or ''first-run'' movies are not available for home viewing at the time they are released in theatres. Movies are considered to be in their ''first-run'' during the four to five weeks following initial release in a given locality. If successful, a movie may be exhibited at other theatres after the first-run as part of a second or subsequent run (often called a ''sub-run'' or ''second-run'').

Moviegoers generally do not regard sub-run movies as an adequate substitute for first-run movies. Reflecting the significant difference between viewing a newly released, first-run movie and an older sub-run movie, tickets at theatres exhibiting first-run movies usually cost significantly more than tickets at sub-run theatres.

Art movies and foreign-language movies are also not reasonable substitutes for commercial, first-run movies. Art movies, which include documentaries, are sometimes referred to as independent films. Although art and foreign-language movies appeal to some viewers of commercial movies, art and foreign-language movies tend to have more narrow appeal and typically attract an older audience than commercial movies. Exhibitors consider the operation of theatres that predominantly exhibit art and foreign-language movies to be distinct from the operation of theatres that predominantly exhibit commercial movies.

For all of these reasons, the Complaint alleges that a hypothetical monopolist controlling the exhibition of all first-run, commercial movies in a relevant geographic market would profitably impose at least a small but significant and non-transitory increase (''SSNIP'') in ticket prices. Thus, the exhibition of first-run, commercial movies is a relevant product market and line of commerce under Section 7 of the Clayton Act in which to assess the competitive effects of this acquisition.

Moviegoers typically are not willing to travel very far from their home to attend a movie. As a result, geographic markets for the exhibition of first-run, commercial movies are relatively local. As detailed in the Complaint, there are 15 Local Markets in which AMC and Carmike compete today and each is a relevant geographic market in a section of the country for purposes of Section 7 of the Clayton Act.

2. Competitive Effects

Exhibitors compete to attract moviegoers to their theatres over the theatres of their rivals. They do that by competing on price, knowing that if they charge too much (or do not offer sufficient discounted tickets for matinees, seniors, students, or children) moviegoers will begin to frequent their rivals. Exhibitors also compete by seeking to license the first-run movies that are likely to attract the largest numbers of moviegoers. In addition, exhibitors compete over the quality of the viewing experience by offering moviegoers the most sophisticated sound systems, largest screens, best picture clarity, best seating (including stadium, reserved, and recliner seating), and the broadest variety and highest quality of snacks, food, and drinks at concession stands or cafés in the lobby or served to moviegoers at their seats.

AMC and Carmike currently compete for moviegoers in the Local Markets. As detailed in the Complaint, all 15 Local Markets are highly concentrated, and will experience significant additional increases in concentration as a result of the transaction. In each of the Local Markets, the proposed acquisition would give AMC control of a majority, or all, of the first-run, commercial movie theatres and between 48% and 100% of the annual box office revenues. The transaction will also eliminate substantial head-to-head competition between AMC and Carmike that has provided consumers with lower prices and a higher quality movie-going experience.

3. Entry and Expansion

Sufficient, timely entry that would deter or counteract the anticompetitive effects in the Local Markets is unlikely. Exhibitors are reluctant to locate new, first-run, commercial theatres near existing, first-run, commercial theatres unless the population density, demographics, or quality of existing theatres makes new entry viable. Timely entry of new, first-run, commercial movie theatres in the areas in and around the Local Markets would be unlikely to defeat a price increase by the merged firm.

C. The Competitive Effects of the Transaction on the Preshow Services and Cinema Advertising Markets

1. Relevant Markets

As alleged in the Complaint, both preshow services sold to exhibitors and cinema advertising sold to advertisers in the United States are relevant markets under Section 7 of the Clayton Act, 15 U.S.C. § 18.

Preshow services consist of the packaging of advertisements and content into a preshow delivered to exhibitors, enabling them to earn revenue from the use of their screens before the feature film. The price charged to exhibitors for preshow services is the portion of advertising revenue retained by the network.

The sale of preshow services to exhibitors constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act. There are no reasonable substitutes for preshow services. Exhibitors cannot easily replace the preshow services that they buy from cinema advertising networks because individual exhibitors generally lack sufficient screens and geographic reach to secure national advertising. Nor can exhibitors sufficiently replace national advertising in preshows with local and regional advertising because local and regional advertising generates far less revenue than national advertising. Because there are no reasonable substitutes for preshow services, a hypothetical monopolist of all such services could profitably impose a SSNIP. Thus, the Complaint alleges that the market for preshow services is a relevant product market in which to assess the competitive effects of the acquisition.

Cinema advertising is the on-screen advertising incorporated in the preshow. The Complaint alleges that the sale of cinema advertising to advertisers is a relevant product market and line of commerce under Section 7 of the Clayton Act. Cinema advertising has important attributes that differentiate it from other forms of video advertising. For example, the preshow is projected on a large screen with high-quality video and sound in a darkened auditorium. In contrast to TV and other video advertising platforms, the audience cannot avoid the advertisements by fast forwarding through them, clicking past them, or changing a channel. The preshow also allows for long-form advertisements typically not available on TV, and it reaches a weekend audience and light TV viewers who are otherwise difficult to reach.

NCM and Screenvision compete with each other throughout the United States. Exhibitors and advertisers in the United States would not switch to cinema advertising networks located outside of the United States in the event of a SSNIP in the United States. Accordingly, the Complaint alleges that United States is a relevant geographic market and section of the country for preshow services sold to exhibitors and for cinema advertising sold to advertisers within the meaning of Section 7 of the Clayton Act.

2. Competitive Effects

As a significant owner of equity interests in both NCM and Screenvision post-merger, AMC would have an incentive to reduce the head-to-head competition between NCM and Screenvision. AMC will likely use its influence and governance rights in both companies to ensure that NCM and Screenvision compete less aggressively to sign contracts with exhibitors and advertisers at the expense of the other network. AMC will also have the ability to use its access to confidential, nonpublic, and trade secret information of NCM and Screenvision to reduce competition by passing that competitively sensitive information between the companies.

The lessening of competition between NCM and Screenvision will likely result in lower payments and/or lower quality preshows for exhibitors. Additionally, advertisers will no longer benefit from the lower prices that have resulted from the competition between NCM and Screenvision. Advertisers do not have choices other than these two networks to reach a broad number of viewers of their cinema advertising.

As further alleged in the Complaint, the loss of an independent Carmike also likely would weaken Screenvision's ability to remain a robust competitive check on NCM, the only other significant competitor in the preshow services and cinema advertising markets. In 2014, the United States filed a civil antitrust lawsuit to block NCM's acquisition of Screenvision and preserve the intense competition between the companies. NCM and Screenvision subsequently abandoned their merger in early 2015. As was the case in 2014, Carmike remains Screenvision's largest exhibitor, and Screenvision touts the Carmike theatre network's current, broad scale when competing to execute deals with advertisers and exhibitors. The merger, however, will extend AMC's exclusive contract with NCM to include any new theatres that Carmike would have opened or acquired. This shift from Screenvision to NCM will likely weaken Screenvision's ability to compete because: (1) It will be unable to rely on Carmike's growth to increase its network's scale; and (2) the number of independent theatre exhibitors unencumbered by an exclusive preshow agreement with NCM will shrink as exhibitor consolidation continues. For all of these reasons, the Complaint alleges that the merger is likely to substantially lessen competition in the preshow services and cinema advertising markets.

3. Entry and Expansion

According to the Complaint, the entry barriers associated with developing a cinema advertising network are high, and thus new entry or expansion by existing competitors is unlikely to prevent or remedy the proposed merger's likely anticompetitive effects in the preshow services and cinema advertising markets. Barriers to entry and expansion include the time and cost of developing a network of screens to achieve sufficient scale. NCM's and Screenvision's lock-up of almost all of the exhibitors in the United States through staggered long-term contracts makes entry a long process. This adds to the already high cost of building the infrastructure necessary to develop and attract national advertisers. It also increases the length of time an entrant must sustain losses before its scale is large enough to sell advertising at long-term profitable rates.

Exhibitors generally cannot supply preshow services themselves to replace the substantial lessening of competition in the preshow services market. Individual exhibitors or groups of small exhibitors whose contracts with NCM or Screenvision are expiring are unlikely to be able to establish cost-effective sales forces, attract national advertisers, or otherwise develop a sufficient infrastructure to reasonably replace lost competition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The movie theatre divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of AMC's acquisition of Carmike in each of the 15 Local Markets for the exhibition of first-run, commercial movies by establishing new, independent, and economically-viable competitors. The other requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition on the preshow services and cinema advertising markets by requiring AMC to divest most of its ownership interest in NCM, relinquish its NCM Board seats and all governance rights, transfer 24 AMC theatres with a total of 384 screens to the Screenvision network, and implement firewalls to prevent the misuse of competitively sensitive information.

A. Theatre Exhibition of First-Run, Commercial Movies

Section IV.A of the proposed Final Judgment requires Defendants within sixty calendar days after the filing of the Complaint, or five calendar days after the Court's entry of Final Judgment, whichever is later, to divest as viable, ongoing businesses the theatres identified on the ''Initial Theatre Divestiture Assets'' list in Appendix A to the proposed Final Judgment to one or more acquirers acceptable to the United States in its sole discretion. This will require Defendants to divest a minimum of 15 theatres covering each of the Local Markets.

The theatres must be divested in such a way as to satisfy the United States that they can and will be operated by the purchaser as viable, ongoing businesses that can compete effectively as first-run, commercial theatres. To that end, the proposed Final Judgment provides the acquirer(s) of the theatres with an option to enter into a transitional agreement with Defendants of up to 120 days in length, with the possibility of one or more extensions not to exceed six months in total, for the supply of any goods, services, support, including software service and support, and reasonable use of the name AMC, the name Carmike, and any registered service marks of AMC or Carmike, for use in operating those theatres during the period of transition. The availability of a transitional agreement will ensure that the acquirer(s) of the theatres can operate without interruption while long-term supply agreements are arranged and the theatres rebranded.

In the event that Defendants do not accomplish the theatre divestitures within the periods prescribed in the proposed Final Judgment, Section VI of the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States to effectuate the theatre divestitures required by the Final Judgment.

If Defendants are unable to effectuate any of the divestitures due to their inability to obtain the consent of the landlord from whom a theatre is leased, Section IV.K of the proposed Final Judgment requires them to divest alternative theatre assets that compete effectively with the theatres for which the landlord consent was not obtained. This provision will ensure that any failure by Defendants to obtain landlord consent does not thwart the relief obtained in the proposed Final Judgment.

The theatre divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of AMC's acquisition of Carmike in the exhibition of first-run, commercial movies in the Local Markets.

In addition to the proposed Final Judgment's provisions, the Hold Separate provides that, until the divestitures take place, AMC and Carmike must maintain the sales and marketing of the theatres, and maintain the theatres in operable condition at current capacity configurations. In addition, AMC and Carmike must not transfer or reassign to other areas within the company their employees with primary responsibility for the operation of the theatres, except for transfer bids initiated by employees pursuant to Defendants' regular, established job-posting policies.

B. Preshow Services and Cinema Advertising

The proposed Final Judgment will remedy the anticompetitive effects of the proposed transaction in the markets for preshow services and cinema advertising in two principal ways.

First, the proposed Final Judgment will significantly reduce AMC's incentive and ability to weaken head-to-head competition between NCM and Screenvision following the merger. In the absence of relief, AMC's significant equity holdings in both NCM and Screenvision would give AMC the incentive post-merger to use its governance rights to soften each company's competitive actions towards the other and use its access to each company's competitively sensitive information to help the companies coordinate their actions. The proposed Final Judgment significantly reduces AMC's incentives to lessen competition or favor NCM over Screenvision by requiring AMC to sell down its NCM equity holdings to a level of no more than 4.99%. Pursuant to NCM's governing documents, AMC would lose its right to seats on NCM's board of directors. Because the divestiture will leave AMC with a relatively small stake in NCM—both in terms of its proportion of the whole and total value—it would no longer earn significant profits from a lessening of competition between NCM and Screenvision. Moreover, the NCM profits to be earned from any action AMC were to take to lessen such competition would largely accrue to its theatre exhibitor rivals Regal and Cinemark, an unappealing outcome to AMC.

To further reduce AMC's ability to lessen head-to-head competition between NCM and Screenvision, Section X.A of the proposed Final Judgment prohibits AMC from holding NCM board seats or otherwise exercising any governance rights in NCM. In addition, Section X.B of the proposed Final Judgment prohibits AMC from, among other activities, attending NCM board meetings, receiving nonpublic information from NCM, or proposing NCM make future acquisitions. These provisions, along with the loss of AMC's rights to participate in NCM's business as a result of the sell down of AMC's equity interest below 5%, will render AMC unable to direct or influence NCM to soften its competitive actions towards Screenvision.

In order to further ensure that AMC cannot use its position as an owner and major customer of NCM and Screenvision to obtain competitively sensitive information that could be used to facilitate improper coordination or otherwise cause competitive harm, Section XII of the proposed Final Judgment requires AMC to institute firewalls to prevent AMC from obtaining competitively sensitive information from either NCM or Screenvision, passing competitively sensitive information between NCM and Screenvision, or obtaining from NCM or Screenvision competitively sensitive information about any of NCM or Screenvision's other exhibitor customers.

Second, the proposed Final Judgment seeks to ensure that Screenvision will remain a strong competitor to NCM in the preshow services and cinema advertising markets. As alleged in the Complaint, Screenvision is NCM's only significant competitor in these markets, and Carmike is Screenvision's largest theatre exhibitor. While Carmike's legacy theatres will remain in Screenvision's network for the remainder of the Carmike/Screenvision contract, the merger will deprive Screenvision of Carmike's expected growth through future acquisitions and new theatre builds. To offset this loss of future Carmike growth, Section XI.A of the proposed Final Judgment requires the Defendants to transfer the 24 theatres identified in Appendix B to the proposed Final Judgment, comprising a total of 384 screens, to Screenvision for the term of the Final Judgment and to stop utilizing NCM preshow and theatre advertising services at these theatres. If the Defendants fail to effectuate the Screenvision transfer at any of the 24 theatres within the time period set forth in Section XI.A, Section XI.B requires AMC to divest such theatres pursuant to the procedures set forth in Section IV.B of the proposed Final Judgment. In addition to the screen transfer, Screenvision will also benefit from AMC's plans to remodel a significant number of Carmike theatres, which will likely increase audience attendance at those theatres. Taken together, Screenvision will obtain through the screen transfers and theatre remodeling the credibility and additional scale—both in terms of geographic coverage and increased audiences—to compete effectively for advertisers and exhibitors against NCM.

In addition, the proposed Final Judgment requires AMC to designate a Compliance Officer who will supervise the AMC's compliance with the Final Judgment, distributing the Final Judgment to the company's personnel, and reporting decree violations, including violations of the firewall provisions, to the United States.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: Owen M. Kendler, Acting Chief, Litigation III, Antitrust Division, United States Department of Justice, 450 5th Street NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. Plaintiff could have continued the litigation and sought preliminary and permanent injunctions against AMC's acquisition of Carmike. Plaintiff is satisfied, however, that the divestiture of assets and other relief described in the proposed Final Judgment will preserve competition for the exhibition of first-run, commercial movies in the Local Markets, as well as preserve competition in preshow services and cinema advertising. Thus, the proposed Final Judgment would achieve all or substantially all of the relief that the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment is ''in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Id. at § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *US*

Airways Group, Inc., 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's ''inquiry is limited'' because the government has ''broad discretion'' to determine the adequacy of the relief secured through a settlement); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court conducting inquiry under the APPA may consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also US Airways,* 8 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also US Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461)); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also US Airways,* 38 F. Supp 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (concluding that ''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also US Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language codified what Congress intended when it enacted the Tunney Act in 1974, as the author of this legislation, Senator Tunney explained: ''The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.''

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[3] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

SBC Commc'ns, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways,* 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 20, 2016

Respectfully submitted,

/s/

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Attorney for the United States.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *AMC Entertainment Holdings, Inc., and Carmike Cinemas, Inc.,* Defendants.

Case No.: 1:16–cv–02475
Judge: Randolph D. Moss
Filed: 12/20/2016

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on December 20, 2016 the United States and Defendants, AMC Entertainment Holdings, Inc. (''AMC'') and Carmike Cinemas, Inc. (''Carmike''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, Plaintiff requires Defendants to make certain divestitures, undertake certain actions, and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to Plaintiff that the divestitures required below can and will be made and the actions and conduct restrictions can and will be undertaken, and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture and other remedy provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II. DEFINITIONS

As used in this Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities to which Defendants divest the Theatre Divestiture Assets.

B. ''AMC'' means AMC Entertainment Holdings, Inc., a Delaware corporation with its headquarters in Leawood, Kansas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Carmike'' means Carmike Cinemas, Inc., a Delaware corporation with its headquarters in Columbus, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''NCM Divestiture Assets'' means that portion of Defendants' NCM Holdings required to be divested under this Final Judgment.

E. ''Initial Theatre Divestiture Assets'' means the theatre assets listed in Appendix A. The term ''Initial Theatre Divestiture Assets'' includes:

1. All tangible assets that comprise the business of operating theatres that exhibit movies, including, but not limited to, real property and improvements, research and development activities, all equipment, fixed assets, and fixtures, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used in connection with the Initial Theatre Divestiture Assets; all licenses, permits, and authorizations issued by any governmental organization relating to the Initial Theatre Divestiture Assets; all contracts (including management contracts), teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Initial Theatre Divestiture Assets, including supply agreements (provided however, that supply agreements that apply to all of each Defendant's theatres may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)); all customer lists (including rewards and loyalty club data at the option of the Acquirer(s), copies of which may be retained by Defendants at their option), contracts, accounts, and credit records relating to the Initial Theatre Divestiture Assets; all repair and performance records and all other records relating to the Initial Theatre Divestiture Assets; and

2. All intangible assets relating to the operation of the Initial Theatre Divestiture Assets, including, but not limited, to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, (provided, however, that the names Carmike, AMC, and any registered service marks of Carmike or AMC may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), technical information, computer software and related documentation (provided, however, that Defendants' proprietary software may be excluded from the Initial Theatre Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), know-how and trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Carmike or AMC provide to their own employees, customers,

[4] *See also United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

suppliers, agents, or licensees (except for the employee manuals that Carmike or AMC provide to all its employees), and all research data concerning historic and current research and development.

F. ''Screen Transfer Theatres'' means the theatres listed in Appendix B.

G. ''Screen Transfer Divestiture Assets'' means any Screen Transfer Theatres that Defendants must divest pursuant to Section XI(B) of this Final Judgment due to Defendants' failure to fully effect the screen transfers required by Section XI(A). The term ''Screen Transfer Divestiture Assets'' also includes for any such Screen Transfer Theatre:

1. All tangible assets that comprise the business of operating theatres that exhibit movies, including, but not limited to, real property and improvements, research and development activities, all equipment, fixed assets, and fixtures, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used in connection with the Screen Transfer Divestiture Assets; all licenses, permits, and authorizations issued by any governmental organization relating to the Screen Transfer Divestiture Assets; all contracts (including management contracts), teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Screen Transfer Divestiture Assets, including supply agreements (provided, however, that supply agreements that apply to all of each Defendant's theatres may be excluded from the Screen Transfer Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)); all customer lists (including rewards and loyalty club data at the option of the Acquirer(s), copies of which may be retained by Defendants at their option), contracts, accounts, and credit records relating to the Screen Transfer Divestiture Assets; all repair and performance records and all other records relating to the Screen Transfer Divestiture Assets; and

2. All intangible assets relating to the operation of the Screen Transfer Divestiture Assets, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, (provided, however, that the names Carmike and AMC, and any registered service marks of Carmike and AMC may be excluded from the Screen Transfer Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), technical information, computer software and related documentation (provided, however, that Defendants' proprietary software may be excluded from the Screen Transfer Divestiture Assets, subject to the transitional agreement provisions specified in Section IV(F)), know-how and trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Carmike or AMC provide to their own employees, customers, suppliers, agents, or licensees (except for the employee manuals that Carmike or AMC provide to all its employees), and all research data concerning historic and current research and development.

H. ''Theatre Divestiture Assets'' means the Initial Theatre Divestiture Assets and the Screen Transfer Divestiture Assets.

I. ''Landlord Consent'' means any contractual approval or consent that the landlord or owner of one or more of the Theatre Divestiture Assets, or of the property on which one or more of the Theatre Divestiture Assets is situated, must grant prior to the transfer of one of the Theatre Divestiture Assets to an Acquirer.

J. ''NCM'' means National CineMedia, LLC, a Delaware limited liability company together with National CineMedia, Inc., headquartered in Centennial, Colorado, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

K. ''NCM Holdings'' means any equity interest of NCM that AMC owns or controls, directly or indirectly, of NCM, whether voting or nonvoting.

L. ''Competitively Sensitive Information'' means all non-public information, provided, disclosed, or otherwise made available to the Defendants by NCM or Screenvision, including but not limited to, information related to: (i) Current or future business plans; (ii) technological tests or initiatives; (iii) investments, finances or budgets; (iv) pricing; (v) information related to other movie theatre exhibitors; (vi) terms and conditions (including but not limited to fees or prices) of any actual or prospective contract, agreement, understanding, or relationship concerning the exhibition of first-run commercial movies or preshow and cinema advertising services, to specific or identifiable customers or classes of groups of customers; or (vii) the existence of any such prospective contract, agreement, understanding, or relationship, as well as any proprietary customer information.

M. ''Person'' means any natural person, corporation, association, firm, partnership, or other business or legal entity.

N. ''Screenvision'' means, SV Holdco, LLC, a Delaware limited liability company, headquartered in New York, New York, and the subsidiary it owns and operates, Screenvision Exhibition, Inc., its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

III. APPLICABILITY

A. This Final Judgment applies to AMC and Carmike, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV, VI, VII or XI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Theatre Divestiture Assets or NCM Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURES OF THEATRES

A. Defendants are ordered and directed, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of entry of this Final Judgment by the Court, whichever is later, to divest the Initial Theatre Divestiture Assets in a manner consistent with this Final Judgment to one or more Acquirer(s) acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Initial Theatre Divestiture Assets as expeditiously as possible.

B. If Defendants fail to accomplish the screen transfer required by Section XI(A) below for any Screen Transfer Theatre, Defendants are ordered and directed, within sixty (60) calendar days after the expiration of the transfer period provided for in Section XI(A), and any extensions to that period granted by the United States, to divest the Screen Transfer Divestiture Assets in a manner consistent with this Final Judgment to one or more Acquirer(s) acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed ninety (90) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Screen Transfer Divestiture Assets as expeditiously as possible. Defendants shall not divest the Screen Transfer Divestiture Assets to any Acquirer that contracts with NCM to provide pre-show and cinema advertising services. Such Screen Transfer Theatres must be divested free and clear of any contracts with NCM to provide pre-show and cinema advertising services.

C. In accomplishing the divestitures ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Theatre Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Theatre Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Theatre Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the applicable Theatre Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer(s) to employ or contract with any employee of any Defendant whose primary responsibility relates to the operation or management of the applicable Theatre Divestiture Assets being sold to the Acquirer(s).

E. Defendants shall permit prospective Acquirer(s) of the Theatre Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Theatre Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. In connection with the divestiture of the Theatre Divestiture Assets, at the option of the Acquirer(s), Defendants shall enter into a transitional supply, service, support, and use agreement (''transitional agreement''), of up to 120 days in length, for the supply of any goods, services, support, including software service and support, and reasonable use of the names AMC and Carmike, and any registered service marks of AMC or Carmike, that the Acquirer(s) request for the operation of the Theatre Divestiture Assets, during the period covered by the transitional agreement. At the request of the Acquirer(s), the United States in its sole discretion may agree to one or more extensions of this time period not to exceed six (6) months in total. The terms and conditions of the transitional agreement must be acceptable to the United States in its sole discretion. The transitional agreement shall be deemed incorporated into this Final Judgment and a failure by Defendants to comply with any of the terms or conditions of the transitional agreement shall constitute a failure to comply with this Final Judgment.

G. Defendants shall warrant to the Acquirer(s) of the Theatre Divestiture Assets that each asset will be operational on the date of sale.

H. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Theatre Divestiture Assets.

I. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Theatre Divestiture Assets. Following the sale of the Theatre Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Theatre Divestiture Assets.

J. Unless the United States otherwise consents in writing, the divestitures made pursuant to Section IV(A) and IV(B), or by a Divestiture Trustee appointed pursuant to Section VI of this Final Judgment, shall include the entire Theatre Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion that the Theatre Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business of operating theatres that exhibit primarily first-run, commercial movies. Divestiture of the Theatre Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Theatre Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV (A), IV (B), or VI of this Final Judgment,

(1) shall be made to Acquirers that, in the United States' sole judgment have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of theatres exhibiting primarily first-run, commercial movies; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between Acquirers and Defendants gives Defendants the ability unreasonably to raise the Acquirers' costs, to lower the Acquirers' efficiency, or otherwise to interfere in the ability of any Acquirer to compete effectively.

K. If Defendants are unable to effect any of the divestitures required herein due to the inability to obtain the Landlord Consent for any of the Theatre Divestiture Assets, Defendants shall divest alternative theatre assets that compete effectively with the theatre or theatres for which the Landlord Consent was not obtained. The United States shall, in its sole discretion, determine whether such theatre assets compete effectively with the theatres for which Landlord Consent was not obtained.

L. Within five (5) business days following a determination that Landlord Consent cannot be obtained for any of the Theatre Divestiture Assets, Defendants shall notify the United States, and Defendants shall propose an alternative divestiture pursuant to Section IV(K). The United States shall have then ten (10) business days in which to determine whether such theatre assets are a suitable alternative pursuant to Section IV(K). If Defendants' selection is deemed not to be a suitable alternative, the United States shall in its sole discretion select alternative theatre assets to be divested from among those theatre(s) that the United States has determined, in its sole discretion, compete effectively with the theatre(s) for which Landlord Consent was not obtained.

M. If a Divestiture Trustee is responsible for effecting divestiture of the Theatre Divestiture Assets, it shall notify the United States and Defendants within five (5) business days following a determination that Landlord Consent cannot be obtained for one or more of the Theatre Divestiture Assets. Defendants shall thereafter have five (5) business days to propose an alternative divestiture pursuant to Section IV(K). The United States shall then have ten (10) business days to determine whether the proposed theatre assets are a suitable competitive alternative pursuant to Section IV(K). If Defendants' selection is deemed not to be a suitable competitive alternative, the United States shall in its sole discretion select alternative theatre assets to be divested from among those theatre(s) that the United States has determined, in its sole discretion, compete effectively with the theatre(s) for which Landlord Consent was not obtained.

V. NOTICE OF PROPOSED THEATRE DIVESTITURES

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whoever is then responsible for effecting the divestitures required herein, shall notify the United States of any proposed divestitures required by Sections IV(A), IV(B), and VI of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Theatre Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), and any other potential Acquirer(s). Defendants and the Divestiture Trustee shall furnish any additional information requested to the United States within fifteen (15) calendar days of receipt of the request, unless the parties otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants, and the Divestiture Trustee, if there is one, stating whether it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures may be consummated, subject only to the Defendants' limited right to object to the sale under Section VI(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV(A), IV(B), or VI shall not be consummated. Upon objection by Defendants under Section VI(C), a divestiture proposed under Section VI shall not be consummated unless approved by the Court.

VI. APPOINTMENT OF TRUSTEE FOR THEATRE DIVESTITURES

A. If Defendants have not divested the Theatre Divestiture Assets within the time period specified in Section IV(A) and IV(B), respectively, Defendants shall notify the United States of that fact in writing, specifically identifying the Theatre Divestiture Assets that have not been divested. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the applicable Theatre Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the applicable Theatre Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestitures to Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, VI VIII, IX, and XIV, of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section VI (D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee and reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture(s). Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section V.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the applicable Theatre Divestiture Assets, and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Theatre Divestiture Assets subject to sale by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestitures. The Divestiture Trustee and any consultants, accountants, attorneys, and other persons retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the assets and business to be divested, and Defendants shall develop financial and other information relevant to such assets and business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestitures.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the parties and the Court setting forth the Divestiture Trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Theatre Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Theatre Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestitures, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestitures have not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VII. DIVESTITURE OF NCM HOLDINGS

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, on or before June 20, 2019, to divest that portion of the NCM Holdings sufficient to cause Defendants to own no more than 4.99 percent of the outstanding shares of NCM on a fully converted basis (the ''NCM Divestiture Assets''). Defendants must divest the NCM Divestiture Assets on the following schedule: (i) On or before twelve (12) months from the date of the filing of the Complaint in this matter that portion of the NCM Holdings sufficient to cause Defendants to own no more than 15 percent of all outstanding shares of NCM on a fully converted basis, (ii) on or before twenty-four (24) months from the date of the filing of the Complaint in this matter that portion of the NCM Holdings sufficient to cause Defendants to own no more than 7.5 percent of all outstanding shares of NCM on a fully converted basis; and (iii) on or before June 20, 2019 that portion of the NCM Holdings sufficient to cause Defendants to own no more than 4.99 percent of all outstanding shares of NCM on a fully converted basis. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances.

B. Defendants are enjoined and restrained from the date of the filing of the Complaint in this matter from acquiring, directly or indirectly, any additional NCM Holdings except to the extent an NCM annual audience attendance adjustment or an acquisition of a movie theatre or movie theatre chain results in Defendants' NCM Holdings exceeding the thresholds set forth in Section VII (A). To the extent an NCM annual audience attendance adjustment or an acquisition of a movie theatre or movie theatre chain results in Defendants' NCM Holdings' exceeding the thresholds set forth in Section VII (A), then Defendants shall have 90 days from the date their NCM Holdings exceed the applicable threshold in Section VII (A) to sell down their NCM Holdings so that their NCM Holdings comply with the applicable threshold. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed 60 calendar days in total, and shall notify the Court in such circumstances.

C. The divestitures required by Section VII(A) may be made by open market sale, public offering, private sale, repurchase by NCM, or a combination thereof. Such divestitures shall not be made by private sale or placement to any person who provides pre-show and cinema advertising services other than NCM unless the United States, in its sole discretion, shall otherwise agree in writing.

VIII. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Sections IV or VII of this Final Judgment.

IX. HOLD SEPARATE

Until the divestitures of the Theatre Divestiture Assets required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

X. NCM PROHIBITED CONDUCT

A. From the date of the filing of the Complaint in this matter, Defendants are enjoined and restrained, directly or indirectly, from holding any governance rights in NCM, including any seats on NCM's Board of Directors and from exercising any voting rights in NCM.

B. From the date of the filing the Complaint in this matter, Defendants are enjoined and restrained, directly or indirectly, from:

1. Suggesting, individually or as part of a group, any candidate for election to NCM's Board of Directors, or having any officer, director, manager, employee, or agent serve as an officer, director, manager, employee, or in a comparable position with or for NCM;

2. Using or attempting to use any ownership interest in NCM to exert any influence over NCM in the conduct of NCM's business, including but not limited to, NCM's strategies regarding the pricing of NCM's services;

3. Using or attempting to use any rights or duties under any advertising agreement or relationship between Defendants and NCM (including any rights or duties Defendants may have as a customer of NCM), to influence NCM in the conduct of NCM's business with respect to any Person other than AMC;

4. Participating in, being present at, or receiving any notes, minutes, or agendas of, information from, or any documents distributed in connection with, any nonpublic meeting of NCM's Board of Directors or any committee thereof, or any other governing body of NCM. For purposes of this provision, the term ''meeting'' includes any action taken by consent of the relevant directors in lieu of a meeting;

5. Voting or permitting to be voted any NCM shares that Defendants own unless the United States, in its sole discretion, otherwise consents in writing;

6. Communicating to or receiving from any officer, director, manager, employee, or agent of NCM any nonpublic information regarding any aspect of Defendants' or NCM's business, including any plans or proposals with respect thereto; and

7. Proposing to any officer, director, manager, employee, or agent of NCM that NCM merge with, acquire, or sell itself to another Person.

C. Nothing in this Section, however, is intended to prevent: (i) Defendants from procuring preshow and cinema advertising services from NCM, including receiving necessary non-public information from NCM in the context of the Defendants' customer relationship regarding the same, or to prevent NCM from providing pre-show and cinema advertising services to Defendants, including providing necessary non-public information to Defendants in the context of NCM's vendor relationship regarding the same; (ii) joint promotions between NCM and Defendants and communications regarding the provision or procurement of pre-show and cinema advertising services from NCM or Defendants, respectively; (iii) Defendants from hiring NCM personnel or NCM from hiring Defendants personnel (provided that such personnel are not simultaneously employed or otherwise affiliated with NCM or Defendants, respectively); and (iv) nonpublic communications regarding industry-wide issues or possible potential business transactions between the two companies provided that such communications do not violate the antitrust laws or any other applicable law or regulation.

XI. TRANSFER OF NCM–ALIGNED THEATRE SCREENS

A. Defendants are hereby ordered and directed, within sixty (60) calendar days of the filing of the Complaint in this matter, to (i) implement, use, and continuously display Screenvision pre-show services and cinema advertising at the Screen Transfer Theatres for the term of this Final Judgment; and (ii) discontinue and permanently remove NCM pre-show services and cinema advertising at the Screen Transfer Theatres for the term of this Final Judgment. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed sixty (60) days in total, and shall notify the Court in such circumstances.

B. If Defendants do not effectuate the implementation of Screenvision pre-show services and cinema advertising at any Screen Transfer Theatre and the termination, if applicable, of any NCM pre-show services and cinema advertising at that Screen Transfer Theatre during the time period set forth in Section XI(A) (including any extensions to that time period granted pursuant to that Section), then Defendants are ordered and directed to divest that Screen Transfer Theatre pursuant to the terms of Section IV(B) of this Final Judgment. For the avoidance of doubt, the Screen Transfer Theatres that Defendants must divest pursuant to this paragraph are referred to herein as the ''Screen Transfer Divestiture Assets.''

XII. FIREWALLS

A. Defendants shall implement and maintain reasonable procedures to prevent (i) the sharing of Competitively Sensitive Information between Defendants and NCM except as necessary to administer an exhibitor services agreement or exhibition agreement between NCM and Defendants to supply preshow and cinema advertising services; (ii) the sharing of Competitively Sensitive Information between Defendants and Screenvision except as necessary to administer an exhibitor services agreement or exhibition agreement between Screenvision and Defendants to supply preshow and cinema advertising services; (iii) the sharing of Competitively Sensitive Information or otherwise serving as a conduit to share Competitively Sensitive Information between NCM and Screenvision; and (iv) Defendants from obtaining through their ownership or governance position at Screenvision or NCM any Competitively Sensitive Information of or about the business of any movie theatre exhibitor other than Defendants.

B. Defendants shall, within thirty (30) calendar days of the Court's entry of the Hold Separate Stipulation and Order, submit to the United States a document setting forth in detail the procedures implemented to effect compliance with this Section. The United States shall notify Defendants within ten (10) business days whether it approves of or rejects Defendants' compliance plan, in its sole discretion.

C. In the event Defendants' compliance plan is rejected, the reasons for the rejection shall be provided to Defendants and Defendants shall be given the opportunity to submit, within ten (10) business days of receiving the notice of rejection, a revised compliance plan. If the parties cannot agree on a compliance plan, the United States shall have the right to request that the Court rule on whether Defendants' proposed compliance plan is reasonable.

D. Defendants may at any time submit to the United States evidence relating to the actual operation of any firewall in support of a request to modify any firewall set forth in this Section. In determining whether it would be appropriate for the United States to consent to modify the firewall, the United States, in its sole discretion, shall consider the need to protect NCM, Screenvision, or movie theatre exhibitor Competitively Sensitive Information and the impact the firewall has had on Defendants' ability to efficiently support the theatrical exhibition of movies.

XIII. COMPLIANCE PROGRAM

A. Defendants shall maintain a compliance program that shall include designating, within thirty (30) days of the entry of this Final Judgment, a Compliance Officer with responsibility for achieving compliance with this Final Judgment. The Compliance Officer shall, on a continuing basis, supervise the review of current and proposed activities to ensure compliance with this Final Judgment. The Compliance Officer shall be responsible for accomplishing the following activities:

(1) Distributing, within thirty (30) days of the entry of this Final Judgment, a copy of this Final Judgment to all of Defendants' officers, directors, or any company employee or manager with management responsibility or oversight of theatrical exhibition and preshowcinema advertising services;

(2) Distributing, within thirty (30) days of succession, a copy of this Final Judgment to any Person who succeeds to a position described in Section XIII(A)(1); and

(3) Obtaining within sixty (60) days from the entry of this Final Judgment, and once within each calendar year after the year in which this Final Judgment is entered, and retaining for the term of this Final Judgment, a written certification from each Person designated in Sections XIII(A)(1) and XIII(A)(2) that he or she: (a) Has received, read, understands, and agrees to abide by the terms of this Final Judgment; (b) understands that failure to comply with this Final Judgment may result in conviction for criminal contempt of court; and (c) is not aware of any violation of the Final Judgment. Copies of such written certifications are to be promptly provided to the U.S. Department of Justice, Antitrust Division.

B. Within sixty (60) days of the entry of this Final Judgment, Defendants shall certify to the United States that they have (1) designated a Compliance Officer, specifying his or her name, business address and telephone number; and (2) distributed the Final Judgment in accordance with Section XIII(A)(1).

C. If any of Defendants' directors or officers or the Compliance Officer learns of any violation of this Final Judgment, Defendants shall within ten (10) business days provide to the U.S. Department of Justice, Antitrust Division a written detailed description of the nature of the violation with the names, titles, and company affiliation of each person involved.

XIV. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestitures and screen transfers have been completed under Sections IV(A), IV(B), VI, VII, and XI. Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Sections IV (A), IV (B), VI, VII, and XI of this Final Judgment. Each such affidavit pertaining to Sections IV (A), IV (B), and VI shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Theatre Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit pertaining to Sections IV(A), IV(B), and VI shall also include a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Theatre Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Each such affidavit shall also describe the fact and manner of Defendants' compliance with Section XI (A) and the arrangements Defendants have made to complete the required screen transfers in a timely fashion. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitations on information, shall be made within fourteen (14) calendar days of receipt of each such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions taken and all steps implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in their earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall notify the United States no less than sixty (60) calendar days prior to the expiration of each of the deadlines for divesting the NCM Divestiture Assets identified in Section VII (A) of the arrangements Defendants have made to complete such divestitures in a timely fashion. Defendants shall no later than five (5) calendar days after each of the deadlines identified in Section VII(A) deliver to the United States an affidavit as to the fact and manner of its compliance with Section VII(A).

D. For the term of this Final Judgment, on or before each annual anniversary of the date of the filing of the Complaint in this matter, Defendants shall file with the United States a statement as to the fact and manner of its compliance with the provisions of Sections VII (B), X, and XII, including a statement of the percentage of all outstanding shares of NCM owned by Defendants and a description of any violations of Sections VII (B), X, and XII.

E. Defendants shall keep all records of all efforts made to preserve and divest the Theatre Divestiture Assets and the NCM Divestiture Assets until one year after such divestitures have been completed.

XV. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of any related orders such as the Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XVI. NO REACQUISITION

Defendants may not reacquire any part of the Theatre Divestiture Assets or the NCM Divestiture Assets during the term of this Final Judgment.

XVII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XVIII. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XIX. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ______, 201__

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

____

United States District Judge

APPENDIX A

	Theatre(s)	Address
1	AMC Festival Plaza 16 **OR** Carmike Chantilly 13 Big D	7925 Vaughn Rd., Montgomery, AL 36116. 10477 Chantilly Pkwy, Montgomery, AL 36117.
2	AMC Destin Commons 14 **OR** Carmike Boulevard 10 Big D	Destin Commons, 4000 Legendary Dr., Destin, FL 32541. 465 Grand Blvd., Miramar Beach, FL 32550.
3	AMC Orange Park 24 **OR** Carmike Fleming Island 12	Orange Park Mall, 1910 Wells Rd., Orange Park, FL 32073. 1820 Town Center Blvd., Fleming Island, FL 32003.
4	AMC Avenue Forsyth 12 **OR** Carmike Movies 400 12	The Collection at Forsyth, 350 Peachtree Pkwy, Cumming, GA 30041. 415 Atlanta Rd., Cumming, GA 30040.
5	AMC Stonecrest Mall 16 **OR** Carmike Conyers Crossroads 16	Ashley Stewart, 8060 Mall Pkwy, Lithonia, GA 30038. 1536 Dogwood Dr. SE., Conyers, GA 30013.
6	AMC Crestwood 18 **OR** Carmike Digiplex Lansing 8	13221 Rivercrest Dr., Crestwood, IL 60445. 16621 Torrence Ave., Lansing, IL 60438.
7	AMC Normal 14 **OR** Carmike Ovation Cinema 10	201 McKnight St., Normal, IL 61761. 415 Detroit Dr., Bloomington, IL 61704.
8	(AMC Pekin 14) **OR** (Carmike Sunnyland 10 and Carmike Grand Prairie 18).	1124 Edgewater Dr., Pekin, IL 61554. Washington Plaza, 40 Sunnyland Plaza, Washington, IL 61571. 5311 West American Prairie Dr., Peoria, IL 61615.
9	AMC Inver Grove **OR** Carmike Oakdale 20	5567 Bishop Ave., Inver Grove Heights, MN 55076. 1188 Helmo Ave. N, Oakdale, MN 55128.
10	(AMC Coon Rapids and AMC Arbor Lakes 16) **OR** (Carmike Wynnsong 15).	10051 Woodcrest Dr. NW., Coon Rapids, MN 55433. 12575 Elm Creek Blvd. N, Maple Grove, MN 55311. 2430 County Hwy 10, Mounds View, MN 55112.
11	AMC Rockaway 16 **OR** Carmike Digiplex Sparta 3	363 Mt Hope Ave., Rockaway, NJ 07866. 25 Centre St., Sparta Township, NJ 07871.
12	(AMC Mountainside 10) **OR** (Carmike Digiplex Rialto Westfield 6 and Carmike Digiplex Cranford 5).	1021 Route 22, Mountainside, NJ 07092. 250 East Broad St., Westfield, NJ 07090. 25 North Ave. W., Cranford NJ 07016.
13	AMC Lawton 12 **OR** Carmike Patriot 13	200 SW., C Ave., Lawton, OK 73501. 2803 NW., 67th St., Lawton, OK 73505.
14	(AMC Tilghman Square 8) **OR** (Carmike Promenade 16 + IMAX and Carmike 16).	Tilghman Square, 4608 Broadway, Allentown, PA 18104. 2805 Center Valley Pkwy, Center Valley, PA 18034. 1700 Catasauqua Rd., Allentown, PA 18109.
15	AMC Fitchburg 18 **OR** Sundance Carmike Madison	6091 McKee Rd., Fitchburg, WI 53719. 430 North Midvale Blvd., Madison, WI 53705.

APPENDIX B

	Theatres	Address
1	AMC Barrett Commons 24	2600 Cobb Pl. Ln. NW., Kennesaw, GA 30144.
2	AMC Colonial 18	Lawrenceville Market Shopping Center, 825 Lawrenceville-Suwanee Rd., Lawrenceville, GA 30043.
3	AMC Crossroads Mall 16	1211 E Interstate 240 Service Rd., Oklahoma City, OK 73149.
4	AMC Dublin Village 18	Dublin Village Center, 6700 Village Pkwy, Dublin, OH 43017.
5	AMC Dutch Square 14	Dutch Square Mall, 421 Bush River Rd. #80, Columbia, SC 29210.
6	AMC Showplace Naperville 16	2815 Show Place Dr., Naperville, IL 60564.
7	AMC Newport On the Levee 20	Newport on the Levee, Levy, 1 Levee Way #4100, Newport, KY 41071.
8	AMC Starplex Rio Grande 10	4586 E. US Hwy 83, Rio Grande City, TX 78582.
9	AMC Southpoint 17	The Streets at Southpoint, 8030 Renaissance Pkwy, Durham, NC 27713.
10	AMC Loews Waterfront 22	300 W. Waterfront Dr., West Homestead, PA 15120.
11	Sundance Kabuki	1881 Post St., San Francisco, CA 94115.
12	Sundance Cinemas Houston	Bayou Place, 510 Texas Ave., Houston, TX 77002.
13	Sundance Cinemas Seattle	4500 9th Ave. NE., Seattle, WA 98105.
14	Sundance Sunset Cinema	8000 Sunset, 8000 Sunset Blvd., Los Angeles, CA 90046.
15	Sundance Carmike Madison *	430 North Midvale Blvd., Madison, WI 53705.
16	AMC Dine-in Theatres Buckhead 6	Georgia Atlanta Tower Place, Tower Place, 3340 Peachtree Rd NE., Atlanta, GA 30326.
17	AMC Easton Town Center 30 with Dine-in Theatres & IMAX	Easton Town Center, 275 Easton Station, Columbus, OH 43219.
18	AMC Dine-in Theatres Esplanade 14	2515 E Camelback Rd., Phoenix, AZ 85016.
19	AMC Grapevine Mills 30 with Dine-in Theatres	Grapevine Mills, 3150 Grapevine Mills Pkwy, Grapevine, TX 76051.
20	AMC Mesquite 30 with Dine-in Theatres	19919 Lyndon B Johnson Fwy, Mesquite, TX 75149.
21	AMC Dine-in Theatres Southlands 16 Featuring Red Kitchen	23955 E Plaza Ave., Aurora, CO 80016.
22	AMC Dine-in Theatres West Olive 16	12657 Olive Blvd., Creve Couer, MO 63141.
23	AMC Lawton 12 *	200 SW C Ave., Lawton, OK 73501.

APPENDIX B—Continued

	Theatres	Address
24	AMC Dine-in Theatres Yorktown 18	Yorktown Center, 80 Yorktown Shopping Center, Lombard, IL 60148.

* Transferred to the Screenvision network only to the extent AMC retains these theatres.

[FR Doc. 2016–31652 Filed 12–29–16; 8:45 am]
BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Clear Channel Outdoor Holdings, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Asset Preservation Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Clear Channel Outdoor Holdings, Inc.,* Civil Action No. 1:16–cv–02497. On December 22, 2016, the United States filed a Complaint alleging that a proposed transaction between Clear Channel Outdoor Holdings, Inc. and Fairway Media Group, LLC would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, resolves the case by requiring Clear Channel and Fairway to divest certain billboards in Atlanta, Georgia, and Indianapolis, Indiana.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Owen M. Kendler, Acting Chief, Litigation III Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 4000, Washington, DC 20530 (telephone: 202–305–8376).

Patricia A. Brink,
Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 450 Fifth Street NW., Suite 7000, Washington, DC 20530, Plaintiff, v. *Clear Channel Outdoor Holdings, Inc., 200 East Basse Road, Suite 100, San Antonio, TX 78209,* and *Fairway Media Group, LLC, 3801 Capital City Blvd., Lansing, MI 48906,* Defendants.

Case No.: 1:16–cv–02497
Judge: Randolph D. Moss
Filed: 12/22/2016

COMPLAINT

The United States of America (''Plaintiff''), acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the transaction between Defendants Clear Channel Outdoor Holdings, Inc. (''Clear Channel'') and Fairway Media Group, LLC (''Fairway'') and to obtain other equitable relief.

I. NATURE OF THE ACTION

1. Clear Channel and Fairway sell outdoor advertising on billboards to local and national customers in numerous metropolitan areas throughout the United States. Among other metropolitan areas, they compete head-to-head to sell advertising on billboards that are located in Indianapolis, Indiana and Atlanta, Georgia (collectively, the ''Metropolitan Markets''). Within each of the Metropolitan Markets, Clear Channel and Fairway own and operate billboards that are located in close proximity to each other and therefore constitute attractive competitive alternatives for advertisers that seek to advertise on billboards in those specific areas.

2. On March 3, 2016, Clear Channel and Fairway entered into an asset exchange pursuant to which Clear Channel would acquire certain Fairway billboards located in Atlanta and Fairway would acquire certain Clear Channel billboards located in Indianapolis, along with billboards in other metropolitan areas.

3. If consummated, the proposed transaction would eliminate the substantial head-to-head competition between Clear Channel and Fairway within each of the Metropolitan Markets. Head-to-head competition between Clear Channel and Fairway billboards that are located in close proximity to each other in each of the Metropolitan Markets has benefitted advertisers through lower prices and better services. The proposed transaction threatens to end that competition in these areas in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. JURISDICTION, VENUE, AND COMMERCE

4. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

5. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

6. Defendants are engaged in interstate commerce and in activities substantially affecting interstate commerce. They each own and operate billboards in various locations throughout the United States and sell outdoor advertising in the geographic areas where their billboards are located. Their sale of advertising on billboards has had a substantial effect upon interstate commerce.

7. Defendants have consented to venue and personal jurisdiction in this district. Venue is also proper in this district under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

III. THE DEFENDANTS AND THE TRANSACTION

8. Clear Channel is a Delaware corporation, with its corporate headquarters in San Antonio, Texas. Clear Channel is one of the largest outdoor advertising companies in the United States. Clear Channel reported consolidated revenues of over $2.8 billion in 2015. As of December 31, 2015, Clear Channel owned or operated more than 650,000 outdoor advertising displays worldwide. It owns and operates billboards in each of the Metropolitan Markets.

9. Fairway is a Delaware limited liability company with its headquarters in Duncan, South Carolina. Fairway owns or operates outdoor advertising displays in fifteen states. Fairway had revenues of approximately $110 million in 2015. Fairway also owns and operates billboards in each of the Metropolitan Markets.

10. Pursuant to an Asset Purchase and Exchange Agreement dated March 3, 2016, Clear Channel and Fairway agreed to exchange billboards in a transaction valued at $150 million. Specifically, the parties agreed that Clear Channel would acquire certain Fairway billboards located in Atlanta and Fairway would acquire certain Clear Channel billboards located in Indianapolis and Sherman/Denison, Texas. Although the Asset Purchase and Exchange Agreement originally provided that Fairway would acquire certain Clear Channel billboards in Rochester, Minnesota, and that Clear Channel would acquire additional Fairway billboards in Atlanta, the parties subsequently amended their agreement to remove the Rochester assets and the additional Atlanta assets from the transaction.

IV. THE RELEVANT MARKETS

11. The relevant markets for purposes of Section 7 of the Clayton Act are the sale of outdoor advertising on billboards to advertisers targeting consumers located in areas no larger than the Metropolitan Markets, and likely smaller areas within each of the Metropolitan Markets where the parties own and operate billboards in close proximity to each other.

12. Clear Channel and Fairway generate revenue from the sale of outdoor advertising to local and national businesses that want to promote their products and services. Outdoor advertising is available in a variety of sizes and forms for advertising campaigns of differing styles and duration. Outdoor advertising sales include selling space on billboards and posters, public transportation, such as subways and buses, and other public spaces, such as bus stops, kiosks, and benches.

13. Outdoor advertising has prices and characteristics that are distinct from other advertising media platforms like radio, television, the Internet, newspapers, and magazines. Outdoor advertising is suitable for highly visual, limited-information advertising, because consumers are exposed to an outdoor advertisement for only a brief period of time as they travel through specific geographic areas. Outdoor advertisements typically are less expensive and more cost-efficient when compared to other media at reaching an advertiser's target audience. Many advertisers use outdoor advertisements when they want a large number of exposures to consumers at a low cost per exposure. Such advertisers do not view other advertising mediums or platforms as close substitutes.

14. Advertisers often choose a particular form of outdoor advertising over other outdoor advertising forms based upon the purpose of an advertising campaign, the target demographic group, and the geographic area where that campaign is to occur. For this reason, some outdoor advertising forms compete more closely with each other when compared to other outdoor advertising forms. And certain outdoor advertising forms compete more closely with each other depending upon their specific geographic locations.

15. With respect to outdoor advertising forms, billboards compete most closely with other billboards located in the same geographic area. Advertisers select billboards over other outdoor advertising forms based upon a number of factors. These include the size and demographic of the target audience (individuals most likely to purchase the advertiser's products or services), the traffic and commuting patterns of the audience, and other audience characteristics. Additionally, in certain geographic areas, other forms of outdoor advertising are not present.

16. The precise geographic location of a particular billboard is also important to advertisers. Many advertisers need to reach consumers in a particular city, part of a city, metropolitan area, or part of a metropolitan area. They also seek to reach certain demographic categories of consumers within a city or metropolitan area. Consequently, many advertisers select billboards that are located on highways, roads and streets where the vehicle and pedestrian traffic of that target audience is high, or where that traffic is close to the advertiser's commercial locations. By selecting billboards in these locations, advertisers can ensure that their target audience will frequently view billboards that contain their advertisements. If different firms own billboards that are located in close proximity to each other that would efficiently reach an advertiser's target audience, the advertiser would benefit from the competition among those billboard firms to offer better prices and services.

17. At a minimum, billboard companies could profitably impose a small but significant and non-transitory increase in price (''SSNIP'') to those advertisers who view billboards in certain geographic locations either as their sole method of advertising or as a necessary advertising complement to other media, including other outdoor advertising forms. Consequently, for many advertisers who want to advertise on billboards in each of the Metropolitan Markets or in certain smaller areas within each of the Metropolitan Markets, the imposition of a SSNIP would not cause these advertisers to switch some of their advertising to other media, other outdoor advertising forms, or to billboards located outside each area.

18. For all of the above reasons, for purposes of analyzing the competitive effects of the proposed transaction, the relevant product market is outdoor advertising on billboards and the relevant geographic markets are no larger than each of the Metropolitan Markets, and may consist of considerably smaller areas within each of those Metropolitan Markets where the parties own and operate billboards in close proximity to each other.

V. LIKELY ANTICOMPETITIVE EFFECTS

19. Market concentration is often one useful indicator of the likely competitive effects of a transaction. Concentration in each of the Metropolitan Markets and in certain smaller areas within each of the Metropolitan Markets would increase significantly as a result of the proposed transaction.

20. As articulated in the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission, the Herfindahl-Hirschman Index (''HHI'') is a standard measure of market concentration (defined and explained in Appendix A). The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition harming consumers. Mergers resulting in highly concentrated markets (with an HHI in excess of 2,500) that involve an increase in the HHI of more than 200 points are presumed to be likely to enhance market power under the *Horizontal Merger Guidelines.*

21. In each of the Metropolitan Markets, and in certain smaller areas within each of the Metropolitan Markets, the market for outdoor advertising on billboards is highly concentrated. The proposed transaction between Clear Channel and Fairway would result in HHIs in excess of 2,500 in each of the Metropolitan Markets and in certain areas within each Metropolitan Market. These post-transaction HHIs, which reflect

increases of more than 200 points in each Metropolitan Market and in certain areas within each Metropolitan Market, are well above the 2,500 threshold at which a transaction is presumed likely to enhance market power.

22. In addition to increasing concentration, the proposed transaction will eliminate head-to-head competition between Clear Channel and Fairway by bringing under the control of one firm billboards that are close substitutes, based on their geographic locations, in areas with limited alternatives. In some of the areas within each of the Metropolitan Markets, there are no other competing billboards that would be attractive competitive alternatives to Clear Channel's and Fairway's billboards. In other areas within each of the Metropolitan Markets, there are other competitors present, but the number of billboards or their quality is insufficient to preclude the exercise of market power by Clear Channel or Fairway post-transaction.

23. In each of the Metropolitan Markets, there are significant barriers to entry, including governmental regulations that limit new billboard construction. Therefore, it is unlikely that any new entry or repositioning from existing firms would be sufficient or timely to defeat Clear Channel or Fairway from profitably imposing a SSNIP on their billboards in the Metropolitan Markets and in certain smaller areas within the Metropolitan Markets.

VI. VIOLATION ALLEGED

24. The United States hereby repeats and realleges the allegations of paragraphs 1 through 23 as if fully set forth herein.

25. Clear Channel's proposed transaction with Fairway likely would substantially lessen competition in interstate trade and commerce in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Unless enjoined, the proposed transaction likely would have the following anticompetitive effects, among others:

a) competition in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would be substantially lessened;

b) actual and potential competition between Clear Channel and Fairway in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would be eliminated; and

c) prices for outdoor advertising on billboards in each of the Metropolitan Market and in certain areas within each of the Metropolitan Markets would likely increase, and the quality of services would likely decline.

VII. REQUEST FOR RELIEF

26. The United States requests:

a) that the Court adjudge the proposed transaction to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

b) that the Court permanently enjoin and restrain Defendants from carrying out the proposed transaction, or entering into any other agreement, understanding, or plan by which Clear Channel and Fairway would exchange billboards in each of the Metropolitan Markets;

c) that the Court award the United States the costs of this action; and

d) that the Court award such other relief to the United States as the Court may deem just and proper.

Dated: December 22, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

/s/ __________________________________

Renata B. Hesse (D.C. Bar #466107),

Acting Assistant Attorney General.

/s/ __________________________________

Jonathan B. Sallet,

Deputy Assistant Attorney General.

/s/ __________________________________

Patricia A. Brink,

Director of Civil Enforcement.

/s/ __________________________________

Owen M. Kendler,

Acting Chief, Litigation III Section.

/s/ __________________________________

Mark A. Merva * (D.C. Bar #451743),

Trial Attorney, United States Department of Justice, Antitrust Division, Litigation III Section, 450 Fifth Street NW., Suite 4000, Washington, DC 20530, Phone: 202–616–1398, Facsimile: 202–514–7308, Email: Mark.Merva@usdoj.gov.

* Attorney of Record

APPENDIX A

The term ''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Clear Channel Outdoor Holdings, Inc., and Fairway Media Group, LLC, Defendants.*

Case No.: 1:16–cv–02497

Judge: Randolph D. Moss

Filed: 12/22/2016

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), Plaintiff United States of America (''United States'') files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On March 3, 2016, Defendants Clear Channel Outdoor Holdings, Inc. (''Clear Channel'') and Fairway Media Group, LLC (''Fairway'') entered into an asset exchange pursuant to which Clear Channel would acquire certain Fairway billboards located in Atlanta, Georgia, and Fairway would acquire certain Clear Channel billboards located in Indianapolis, Indiana (collectively Atlanta and Indianapolis are the ''Metropolitan Markets''), along with billboards in other metropolitan areas.

The United States filed a civil antitrust Complaint on December 22, 2016, seeking to enjoin the proposed transaction. The Complaint alleges that the proposed transaction likely would eliminate the substantial head-to-head competition between Clear Channel and Fairway within each of the Metropolitan Markets. Head-to-head competition between Clear Channel and Fairway billboards that are located in close proximity to each other in each of the Metropolitan Markets has benefitted advertisers through lower prices and better services. These likely competitive effects would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States also filed an Asset Preservation Stipulation and Order (''Asset Preservation Order'') and proposed Final Judgment, which are designed to eliminate the likely anticompetitive effects of the transaction. The proposed Final Judgment, which is explained more fully below, requires Defendants to divest their interests in 57 identified outdoor billboard assets in the Metropolitan Markets to acquirers approved by the United States in a manner that preserves competition in each of those markets.

The Asset Preservation Order requires Defendants to take certain steps to ensure that each of the divested assets continues to be operated as a competitive, economically viable, and ongoing outdoor advertising asset, uninfluenced by the consummation of the transaction so that competition is maintained until the required divestitures occur.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Transaction

Clear Channel is a Delaware corporation with its headquarters in San Antonio, Texas. Clear Channel is one of the largest outdoor advertising companies in the United States.

Fairway is a Delaware limited liability company with its headquarters in Duncan, South Carolina. Fairway owns and operates outdoor advertising displays in fifteen states.

Pursuant to an Asset Purchase and Exchange Agreement dated March 3, 2016, Clear Channel and Fairway agreed to exchange billboards in a transaction valued at $150 million. Specifically, the parties agreed that Clear Channel would acquire certain Fairway billboards located in Atlanta and Fairway would acquire certain Clear Channel billboards located in Indianapolis and Sherman/Denison, Texas. Although the Asset Purchase and Exchange Agreement originally provided that Fairway would acquire certain Clear Channel billboards in Rochester, Minnesota, and that Clear Channel would acquire additional Fairway billboards in Atlanta, the parties subsequently amended their agreement to remove the Rochester assets and additional Atlanta assets from the transaction.

The proposed transaction, as agreed to by Defendants, likely would lessen competition substantially within each of the Metropolitan Markets. This transaction is the subject of the Complaint and proposed Final Judgment filed today by the United States.

B. The Transaction's Likely Anticompetitive Effects

1. The Relevant Markets

The Complaint alleges that the sale of outdoor advertising on billboards to advertisers that seek to target consumers located in geographic areas no larger than each of the Metropolitan Markets, and likely smaller areas within each of those market where the parties own and operate billboards in close proximity to each other, constitute relevant markets under Section 7 of the Clayton Act.

Clear Channel and Fairway sell outdoor advertising to local and national businesses that seek to promote their products and services to consumers in each of the Metropolitan Markets and in certain smaller areas within each of the Metropolitan Markets.

Outdoor advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media, like radio, television, the Internet, newspapers and magazines. Outdoor advertising is suitable for highly visual, limited-information advertising, because consumers are exposed to an outdoor advertisement for only a brief period of time as they travel through specific geographic areas. Outdoor advertisements typically are less expensive and more cost-efficient when compared to other media at reaching an advertiser's target audience. Many advertisers use outdoor advertisements when they want a large number of exposures to consumers at a low cost per exposure. Such advertisers do not view other advertising mediums or platforms as close substitutes.

Outdoor advertising is available in a variety of sizes and forms for advertising campaigns of differing styles and duration. Outdoor advertising sales include selling space on billboards and posters, public transportation, such as subways and buses, and other public spaces, such as bus stops, kiosks, and benches. Advertisers often choose a particular form of outdoor advertising over other outdoor advertising forms based upon the purpose of an advertising campaign, the target demographic group, and the geographic area where that campaign is to occur. For this reason, some outdoor advertising forms compete more closely with each other when compared to other outdoor advertising forms. And certain outdoor advertising forms compete more closely with each other depending upon their specific geographic locations.

With respect to outdoor advertising forms, billboards compete most closely with other billboards located in the same geographic area. Advertisers select billboards over other outdoor advertising forms based upon a number of factors. These include the size and demographic of the target audience (individuals most likely to purchase the advertiser's products or services), the traffic and commuting patterns of the audience, and other audience characteristics. Additionally, in certain geographic areas, other forms of outdoor advertising are not present.

The precise geographic location of a particular billboard is also important to advertisers. Many advertisers need to reach consumers in a particular city, part of a city, metropolitan area, or part of a metropolitan area. They also seek to reach certain demographic categories of consumers within a city or metropolitan area. Consequently, many advertisers select billboards that are located on highways, roads and streets where the vehicle and pedestrian traffic of that target audience is high, or where that traffic is close to the advertiser's commercial locations. By selecting billboards in these locations, advertisers can ensure that their target audience will frequently view billboards that contain their advertisements. If different firms own billboards that are located in close proximity to each other that would efficiently reach an advertiser's target audience, the advertiser would benefit from the competition among those billboard firms to offer better prices and services.

At a minimum, billboard companies could profitably impose a small but significant and non-transitory increase in price (''SSNIP'') to those advertisers who view billboards in certain geographic locations either as their sole method of advertising or as a necessary advertising complement to other media, including other outdoor advertising forms. Consequently, for many advertisers who want to advertise on billboards in each of the Metropolitan Markets or in certain smaller areas within each of the Metropolitan

Markets, the imposition of a SSNIP would not cause these advertisers to switch some of their advertising to other media, other outdoor advertising forms, or to billboards located outside each area.

For all of the above reasons, for purposes of analyzing the competitive effects of the proposed transaction, the relevant product market is outdoor advertising on billboards and the relevant geographic markets are no larger than each of the Metropolitan Markets, and may consist of considerably smaller areas within each of those Metropolitan Markets where the parties own and operate billboards in close proximity to each other.

2. Harm to Competition within Each of the Metropolitan Markets

The Complaint alleges that the proposed acquisition likely would substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and likely would have the following effects, among others:

a) competition in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain smaller areas within each of the Metropolitan Markets would be substantially lessened;

b) actual and potential competition between Clear Channel and Fairway in the sale of outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would be substantially lessened; and

c) prices for outdoor advertising on billboards in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets would likely increase, and the quality of services would likely decline.

As alleged in the Complaint, in each of the Metropolitan Markets and in certain areas within each of the Metropolitan Markets, the market for outdoor advertising on billboards is highly concentrated and the proposed transaction would substantially increase that concentration.

Using the Herfindahl-Hirschman Index (''HHI''), a standard measure of market concentration, the proposed transaction between Clear Channel and Fairway would result in HHIs in excess of 2,500 in each of the Metropolitan Markets and in certain areas within each Metropolitan Market. These post-transaction HHIs reflect increases of more than 200 points in each Metropolitan Market and in certain areas within each Metropolitan Market. As a result, the proposed transaction in those Metropolitan Markets is presumed likely to enhance market power under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission.

Moreover, in addition to increasing concentration, the proposed transaction will eliminate head-to-head competition between Clear Channel and Fairway by bringing under the control of one firm billboards that are close substitutes, based on their geographic locations, in areas with limited alternatives. In some of the areas within each of the Metropolitan Markets, there are no other competing billboards that would be attractive competitive alternatives to Clear Channel's and Fairway's billboards. In other areas within each of the Metropolitan Markets, there are other competitors present, but the number of billboards or their quality is insufficient to preclude the exercise of market power by Clear Channel or Fairway post-transaction. Because a significant number of advertisers would likely be unable to reach their desired audiences as effectively unless they advertise on billboards that Clear Channel or Fairway would control after the proposed transaction, those advertisers' bargaining positions would be weaker, and the advertising rates they pay would likely increase.

3. Entry

The Complaint alleges that entry or expansion in outdoor advertising on billboards in each of the Metropolitan Markets would not be timely, likely, or sufficient to prevent any anticompetitive effects. In each of the Metropolitan Markets, there are significant barriers to entry including those due to governmental regulations that limit new billboard construction. Therefore, it is unlikely that any new entry or repositioning from existing firms would be sufficient or timely to defeat Clear Channel or Fairway from profitably imposing a SSNIP on their billboards in the Metropolitan Markets and certain areas within the Metropolitan Markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the transaction in each of the Metropolitan Markets by maintaining the Divestiture Assets as independent, economically viable and competitive. The proposed Final Judgment requires Clear Channel and Fairway to divest the Divestiture Assets to the following Acquirers:

- Divestiture Assets located in the Indianapolis Metropolitan Market to Circle City Outdoor, LLC; and
- Divestiture Assets located in the Atlanta Metropolitan Market to Link Media Georgia, LLC.

The United States has approved each of these Acquirers as suitable divestiture buyers. The United States required Clear Channel and Fairway to identify each Acquirer of a Divestiture Asset in order to provide greater certainty and efficiency in the divestiture process. If, for any reason, Defendants are unable to complete the divestitures to either of these Acquirers, Defendants must divest the remaining Divestiture Assets to one or more alternative Acquirers approved by the United States in its sole discretion.

The Divestiture Assets are defined in Paragraph II.F of the proposed Final Judgment to include all assets set forth in Schedules A and B to the proposed Final Judgment, tangible or intangible, relating to each outdoor advertising display face, including all real property (owned or leased), all licenses, permits and authorizations issued by any governmental organization relating to the operation of the asset, and all contracts, agreements, leases, licenses, commitments and understandings pertaining to the sale of outdoor advertising on each asset.

To ensure that the Divestiture Assets are operated independently from Clear Channel and Fairway after the divestitures, Section XII of the proposed Final Judgment prohibits Defendants from reacquiring any part of the Divestiture Assets during the term of the Final Judgment and Section VII prohibits Defendants from financing all or any part of the Acquirers' purchase of the Divestiture Assets.

Defendants are required to take all steps reasonably necessary to accomplish the divestitures quickly and to cooperate with prospective purchasers. Pursuant to Paragraph IV.A of the proposed Final Judgment, divestiture of each of the Divestiture Assets must occur within ten calendar days after the Court's signing of the Asset Preservation Order or consummation of the Transaction, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total, and shall notify the Court in such circumstances.

In the event that Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a trustee selected by the United States to effect any remaining divestitures. If a trustee is appointed, the proposed Final Judgment provides that Clear Channel and Fairway will pay all costs and expenses of the trustee. The trustee's commission will be structured to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States describing his or her efforts to accomplish the divestiture of any remaining stations. If the divestiture has not been accomplished after 6 months, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a. Specifically, Fairway must provide at least thirty days advance written notice to the United States before it acquires, directly or indirectly, any interest in any outdoor advertising asset in the form of a billboard or any outdoor advertising business that owns billboards in the metropolitan statistical areas associated with Rochester, Minnesota and Indianapolis; and Clear Channel must provide at least thirty days advance written notice to the United States before it (a) acquires any assets located in the Atlanta metropolitan statistical area that were included in, but later removed from, the original transaction agreement between Clear Channel and Fairway; and (b) directly or indirectly acquires any outdoor advertising assets in the form of billboards or any interest, including any financial, security, loan, equity or management interest, in any outdoor advertising business that owns billboards in the Atlanta metropolitan statistical area where the assets or interests acquired have annual revenues for the last twelve months in excess of $5 million. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas may be consummated.

The geographic areas that Section XI applies to include one metropolitan area not subject to divestitures: Rochester, Minnesota. Although, as discussed above, Rochester billboard assets were ultimately excluded from the Defendants' asset swap transaction, given the highly concentrated market for outdoor advertising on billboards in Rochester and the fact that the Rochester billboard assets originally were part of the transaction, the United States sought to ensure that it would have the opportunity to review future acquisitions in that area so that it can seek effective relief, if necessary.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States, if any, will be filed with the Court. In addition, comments will be posted on the Antitrust Division's Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Owen M. Kendler
Acting Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 5th Street NW., Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and Defendants may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the transaction between Clear Channel and Fairway. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of outdoor advertising on billboards in each of the Metropolitan Markets and the affected smaller areas within each Metropolitan Market. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint

including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *US Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also US Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also US Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft,* 56 F.3d at 1461); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also US Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also US Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004) *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways,* 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 22, 2016

Respectfully submitted,

Mark A. Merva* (D.C. Bar #451743),

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* *Attorney of Record*

CERTIFICATE OF SERVICE

I, Mark A. Merva, of the Antitrust Division of the United States Department of Justice, do hereby certify that true copies of the Complaint, Competitive Impact Statement, Asset Preservation Stipulation and Order, Proposed Final Judgment, and Plaintiff's Explanation of Consent Decree Procedures were served this 22 day of December, 2016, by email, to the following:

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/s/ Mark A. Merva

Mark A. Merva

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Clear Channel Outdoor Holdings, Inc., and Fairway Media Group, LLC, Defendants.*

Case No.: 1:16–cv–02497

Judge: Randolph D. Moss

Filed: 12/22/2016

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, the United States of America, filed its Complaint on December 22, 2016, and Defendant Clear Channel Outdoor Holdings, Inc. (''Clear Channel'') and Defendant Fairway Media Group, LLC (''Fairway''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. DEFINITIONS

As used in this Final Judgment:

A. ''Clear Channel'' means Defendant Clear Channel Outdoor Holdings, Inc., a Delaware corporation headquartered in San Antonio, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Fairway'' means Defendant Fairway Media Group, LLC, a Delaware limited liability company headquartered in Duncan, South Carolina, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Circle City'' means Circle City Outdoor, LLC, a Washington limited liability company headquartered in Spokane, Washington, its successor and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''Link Media'' means Link Media Georgia, LLC, a Georgia limited liability company headquartered in Wichita, Kansas, its successor and assigns, parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, including Link Media Holdings, LLC and Boston Omaha Corporation, and their directors, officers, managers, agents, and employees.

E. ''Acquirer'' means Circle City, Link Media, or another entity or entities to which Defendants divest the Divestiture Assets.

F. ''Atlanta Divestiture Assets'' means all of Defendants' interests in the assets set forth in Schedule A, including all assets, tangible or intangible, relating to each outdoor advertising display face, including all real property (owned or leased), all licenses, permits and authorizations issued by any governmental organization relating to the operation of the assets, and all contracts, agreements, leases, licenses, commitments and understandings pertaining to the sale of outdoor advertising on the assets.

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D.Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

G. ''Indianapolis Divestiture Assets'' means all of Defendants' interests in the assets set forth in Schedule B, including all assets, tangible or intangible, relating to each outdoor advertising display face, including all real property (owned or leased), all licenses, permits and authorizations issued by any governmental organization relating to the operation of the assets, and all contracts, agreements, leases, licenses, commitments and understandings pertaining to the sale of outdoor advertising on the assets.

H. ''Divestiture Assets'' means the Indianapolis Divestiture Assets and the Atlanta Divestiture Assets.

I. ''Transaction'' means the Asset Purchase and Exchange Agreement, dated March 3, 2016, between Clear Channel and Fairway.

III. APPLICABILITY

A. This Final Judgment applies to Clear Channel and Fairway, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURES

A. Defendants are ordered and directed, within ten (10) calendar days after (i) the Court's signing of the Asset Preservation Stipulation and Order in this matter or (ii) consummation of the Transaction, whichever is later, to divest in a manner consistent with this Final Judgment the Indianapolis Divestiture Assets to Circle City and the Atlanta Divestiture Assets to Link Media or another Acquirer(s) acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Indianapolis Divestiture Assets and the Atlanta Divestiture Assets as expeditiously as possible.

B. In the event that Defendants are attempting to divest the Indianapolis Divestiture Assets to an Acquirer other than Circle City, or the Atlanta Divestiture Assets to an Acquirer other than Link Media:

(1) Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets to be divested; and

(2) Defendants shall inform any person making an inquiry regarding a possible purchase of the relevant Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment.

C. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the relevant Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine; and Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to make inspections of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirers that each Divestiture Asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each Divestiture Asset, and that, following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

H. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV, or by a Divestiture Trustee appointed pursuant to Section V of this Final Judgment, shall include the entire Divestiture Assets and be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirers as part of a viable, ongoing outdoor advertising business. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable, and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

(1) shall be made to Acquirers that, in the United States' sole judgment, have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the outdoor advertising business; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirers and Defendants gives Defendants the ability unreasonably to raise the costs of the Acquirers, to lower the efficiency of the Acquirers, or otherwise to interfere in the ability of the Acquirers to compete effectively.

V. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If Defendants have not divested the Divestiture Assets within the time period specified in Section IV(A), Defendants shall notify the United States of that fact in writing, specifically identifying the Divestiture Assets that have not been divested. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets that have not yet been divested.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the relevant Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the relevant Divestiture Assets and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets subject to sale by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the relevant divestitures ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such report shall not be filed in the public docket of the Court. Such report shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the relevant Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report contains information that the Divestiture Trustee deems confidential, such report shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. NOTICE OF PROPOSED DIVESTITURE

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer, any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirers. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer, any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. ASSET PRESERVATION

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestitures ordered by this Court.

IX. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V of this Final Judgment, Defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitations on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Asset Preservation Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copies or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. NOTIFICATION

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''): (1) Fairway, without providing advance notification to DOJ, shall not directly or indirectly acquire any outdoor advertising assets in the form of billboards or any interest, including any financial, security, loan, equity or management interest, in any outdoor advertising business that owns billboards in the metropolitan statistical areas associated with Rochester, Minnesota and Indianapolis, Indiana; and (2) Clear Channel, without providing advance notification to DOJ, shall not (a) acquire any outdoor advertising assets located in the Atlanta metropolitan statistical area that were originally included in, but later removed from, the Transaction; and (b) directly or indirectly acquire any outdoor advertising assets in the form of billboards or any interest, including any financial, security, loan, equity or management interest, in any outdoor advertising business that owns billboards in the metropolitan statistical area associated with Atlanta, Georgia where the assets or interests to be acquired have annual revenues for the last twelve months in excess of $5 million.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about outdoor advertising. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. NO REACQUISITION

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XV. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ____________________

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16

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United States District Judge

SCHEDULE A

Metropolitan area	Structure ID
Atlanta	FWY184
Atlanta	CCO000059
Atlanta	FWY140
Atlanta	CCO000075
Atlanta	CCO000179

SCHEDULE A—Continued

Metropolitan area	Structure ID
Atlanta	CCO000935
Atlanta	FWY5115
Atlanta	CCO000335
Atlanta	CCO000612
Atlanta	CCO000266
Atlanta	CCO000395
Atlanta	FWY174
Atlanta	CCO000049
Atlanta	CCO000277
Atlanta	CCO000091
Atlanta	CCO000278
Atlanta	CCO001993
Atlanta	CCO000150
Atlanta	CCO001276
Atlanta	CCO001274
Atlanta	CCO000860
Atlanta	CCO000861
Atlanta	CCO000173
Atlanta	CCO000175
Atlanta	FWY244
Atlanta	FWY245
Atlanta	CCO001763
Atlanta	FWY210
Atlanta	CCO001417
Atlanta	CCO001501
Atlanta	CCO000009
Atlanta	FWY220
Atlanta	FWY221
Atlanta	FWY216
Atlanta	CCO000904
Atlanta	CCO000905
Atlanta	FWY148
Atlanta	FWY190
Atlanta	FWY191
Atlanta	FWY194
Atlanta	FWY266
Atlanta	FWY271
Atlanta	CCO000367
Atlanta	CCO001132

SCHEDULE B

Metropolitan area	Structure ID
Indianapolis	IN2008
Indianapolis	IN2009
Indianapolis	IN2036
Indianapolis	IN2087
Indianapolis	IN2088
Indianapolis	IN2089
Indianapolis	IN2165
Indianapolis	CCO000915
Indianapolis	CCO000665
Indianapolis	CCO000668
Indianapolis	CCO000687
Indianapolis	CCO000318
Indianapolis	CCO000322

[FR Doc. 2016–31653 Filed 12–29–16; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

[OMB Number 1190–0001]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change, of a Previously Approved Collection Procedures for the Administration of Section 5 of the Voting Rights Act of 1965

AGENCY: Civil Rights Division, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Department of Justice (DOJ), Civil Rights Division, Voting Section, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 69855 on October 7, 2016, allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until January 30, 2017.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Robert S. Berman, Deputy Chief, Department of Justice, Civil Rights Division, Voting Section, 950 Pennsylvania Avenue 7243 NWB, (phone: 202–514–8690).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Civil Rights Division, 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* None (Civil Rights Division).

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary respondents: State, Local, or Tribal Government. Other: None. Abstract: Jurisdictions specially covered under the Voting Rights Act are required to comply with Sections 3 or 5 of the Act before they may implement any change in a standard, practice, or procedure affecting voting. One option for such compliance is to submit that change to Attorney General for review and establish that the proposed voting changes are not racially discriminatory. The procedures facilitate the provision of information that will enable the Attorney General to make the required determination.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 1 respondent will complete each form within approximately 3.0 hours.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 3.0 total hours.

If additional information is required contact: Melody D. Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405A, Washington, DC 20530.

Dated: December 27, 2016.

Melody D. Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–31691 Filed 12–29–16; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0057]

Agency Information Collection Activities; Proposed eCollection eComments Requested; A Newly Approved Data Collection National Use-of-Force Data Collection

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division (CJIS) has submitted the following Information Collection Request to the Office of Management and Budget (OMB) for review and clearance in accordance with the established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** on October 5, 2016, Volume 81, Number 193, Pages 69084–69087 allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional days until January 30, 2017.

FOR FURTHER INFORMATION CONTACT: To ensure that comments on the information collection are received, OMB recommends that written comments be emailed to *useofforce publicnotice@ic.fbi.gov*.

If you have additional comments especially on the estimated public burden or associated response time, suggestions, or copy of the proposed information collection instrument with instructions or additional information, please contact Ms. Amy Blasher, Unit Chief, FBI CJIS Division, Module D–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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/or
—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.

Overview of This Information Collection

1. *Type of Information Collection:* New collection.

2. *The Title of the Form/Collection:* National Use-of-Force Data Collection.

3. *The agency form number:* The form number is unnumbered. The applicable component within the DOJ is the FBI CJIS Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Local, state, tribal, and federal law enforcement agencies.

Other: Local, state, tribal, and federal government.

Abstract: The FBI has a long-standing tradition of providing crime statistics collected from local, state, tribal, and federal law enforcement agencies on Law Enforcement Officers Killed and Assaulted (LEOKA) and justifiable homicides which enable transparency and accountability. To provide a better understanding of the incidents of use of force by law enforcement, the Uniform Crime Reporting (UCR) Program is proposing a new data collection for law enforcement agencies to provide information on incidents where use of force by a law enforcement officer (as defined by the LEOKA Program) has led to the death or serious bodily injury of a person, as well as when a law enforcement officer discharges a firearm at or in the direction of a person.

The current LEOKA definition of a law enforcement officer is: ''All local, county, state, and federal law enforcement officers (such as municipal, county police officers, constables, state police, highway patrol, sheriffs, their deputies, federal law enforcement officers, marshals, special agents, etc.) who are sworn by their respective government authorities to uphold the law and to safeguard the rights, lives, and property of American citizens. They must have full arrest powers and be members of a public governmental law enforcement agency, paid from government funds set aside specifically for payment to sworn police law enforcement organized for the purposes of keeping order and for preventing and detecting crimes, and apprehending those responsible.''

The definition of ''serious bodily injury'' will be based, in part, on 18 United States Code (U.S.C.), Section 2246 (4), to mean ''bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.'' These actions include the use of a firearm; an electronic control weapon (*e.g.,* Taser); an explosive device; pepper or OC (oleoresin capsicum) spray or other chemical agent; a baton; an impact projectile; a blunt instrument; hands-fists-feet; or canine.

Local, state, tribal and federal law enforcement agencies will provide information on characteristics of the incident, subjects of the use of force, and the officers that applied force in the incident. Agencies will also be asked to positively affirm, on a monthly basis, whether they did or did not have any use of force that resulted in a fatality, a serious bodily injury to a person, or firearm discharges at or in the direction of a person. Enrollment information from agencies and state points of contact will be collected at the initiation of the collection and updated no less than annually to assist with the managing of this data. The process for developing a robust national collection on use of force involves a multistage, collaborative approach. With this request, the FBI proposes a pilot study. The pilot study will be conducted in two phases, each with its own focus. The pilot study design will be informed by pretesting activities conducted under the FBI's generic clearance [OMB 1110–0057] as discussed briefly here. Both pretesting and pilot efforts will rely upon effective collaboration between the FBI and the Bureau of Justice Statistics (BJS) to achieve and maintain a high level of data quality in an efficient manner.

Pretesting

Pretesting activities were conducted prior to the initiation of a pilot study and allowed for finalization of the data collection instructions and associated instructions before the pilot data collection. These activities provided the preliminary information needed to both construct the sample of targeted agencies for the pilot study and identify early problem areas that could be resolved prior to formal testing. The pretesting consisted of three parts: Cognitive testing of survey items (including those relating to the time of the incident and measures of serious bodily harm), testing of questionnaire design (to better assess respondent burden and functionality), and a canvass of state UCR program managers (to assist with developing the sample frame for the proposed pilot). Cognitive testing was conducted in a manner to capture differences in measurement by region and law enforcement agency type, should they exist. Testing of questionnaire design includes follow-up with respondents to assess any difficulty with definitions or administration. Canvassing state UCR programs indicates the means by which use-of-force statistics are reported—either through the UCR Program itself or directly from state and local law enforcement agencies.

Pilot

The purpose of the pilot study is to evaluate the quality of information collected through the use-of-force data collection tool against information collected through coding of state law enforcement records. Instructions and manuals, as well as training modules and curricula, all serve to help guide individuals at law enforcement agencies to translate their local records into a uniform manner when reporting. However, it may be difficult to communicate coding schemes based upon a common set of definitions. Therefore, after providing basic instructions to respondents, the pilot study will evaluate the accuracy of codes assigned by respondents to identify concepts with less consensus across locations and types of law enforcement agencies and thereby improve coding instructions. Potential sources of nonresponse and incomplete information will also be evaluated. Both phases of the pilot will include a set of target agencies and states that will allow for sufficient data to evaluate intercoder reliability in the application of definitions and guidance. The phases of the pilot differ by the mode of submission for incident data, the addition of site visits, and the number of sites recruited.

Phase 1

The first phase of the pilot will provide a prospective comparison of reported incidents in the use-of-force data collection through the use-of-force data collection tool to the original records voluntarily provided by the reporting agency to the FBI. Those agencies that are recruited and agree to participate in the pilot study will understand that local records will be forwarded to the FBI upon submission of statistical information to the use of force data collection tool. The local case information will be redacted of any personally identifiable information prior to being forwarded to the FBI, and all local records will be destroyed upon completion of the pilot study.

The goal of this review is to ascertain whether the agencies are applying the definitions and using the provided instructions in a uniform manner. The records review and comparison will also identify problematic areas where instructions need more detail or more training should be provided to agencies. The data will also be used in the planning of the second phase of the pilot that will involve a site visit to a subset of agencies. Finally, the FBI will work with state UCR program managers in the pilot states to identify any potential problems with local and state record-keeping that impedes the ability to provide the use-of-force information to the FBI.

Phase II

The second phase of the pilot will include the set of agencies recruited for the first phase, as well as two additional states recruited to provide their use-of-force data in a bulk data submission. These states will be nominated based upon the information gained from the canvass of state UCR program managers during pretesting. The FBI will also continue to accept agencies and states that voluntarily provide data to the data collection.

In addition to the records review and comparison begun during Phase 1, Phase II will include targeted, on-site visits with a subsample of pilot agencies. The subsample will be selected to include different geographic areas. The primary goal of the on-site visits is to ascertain the level and source of underreporting of within-scope incidents—especially those with serious bodily injury or firearm discharges. The on-site visits will also allow for an assessment of local record-keeping capabilities and changes to the data collection process.

At the conclusion of Phase II, the FBI will release a report detailing the results of its data collection, analysis, and recommendations to inform the design of a main study.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 701,486 law enforcement officers will participate in the National Use-of-Force Data Collection. The estimated burden hours per incident is 0.63 for completion.

6. *An estimate of the total public burden (in hours) associated with the collection:* Two separate burden estimates are provided for the proposed

collection—one for the pilot study and a second for the annual collection to include all law enforcement agencies. Burden estimates were based on sources from the FBI UCR Program, the BJS, and the Centers for Disease Control (CDC). The BJS has recently estimated that approximately 1,400 fatalities attributed to a law enforcement use of force occur annually (Planty, et al., 2015, *Arrest-Related Deaths Program: Data Quality Profile, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5260*). In addition, the CDC estimates the incidences of fatal and nonfatal injury—including those due to legal intervention—from emergency department data. In their piece entitled, ''The real risks during deadly police shootouts: Accuracy of the naïve shooter,'' Lewinski, *et al.* (2015) estimates law enforcement officers miss their target approximately 50 percent of the time at the firing range and was used as a simple estimate for the number of firearm discharges at or in the direction of a person, but did not strike the individual. In addition, the UCR Program collects counts of the number of law enforcement sworn and civilian employees in law enforcement agencies.

The table below uses a rate per officer to estimate the anticipated number of reports that could be received within the two pilot phases and an annual collection. Because the nonfatal injury due to legal intervention estimate from the CDC does not provide any overt measure of severity, these injuries are estimated to be as high as 82,283 or as low as 5,546. Based upon these estimates, the FBI is requesting 52,416 burden hours for an annual collection of this data.

ESTIMATED BURDEN FOR PILOT STUDY

Timeframe	Reporting group	Annual rate per officer			Estimated number of incidents		Estimated burden hours		
		Approximate number of officers	Maximum	Minimum	Maximum (3 mos)	Minimum (3 mos)	Estimated burden hours per incident	Maximum	Minimum
Pilot I (3 months)	Large agencies	178,557	0.112	0.012	5,000	536	0.63	3,150	338
	Pilot I States	54,781	0.112	0.012	1,534	165	0.63	966	104
Pilot II (3 months)	Large agencies	178,557	0.112	0.012	5,000	554	0.63	3,150	349
	Pilot I & II States	82,172	0.112	0.012	2,300	247	0.63	6,140	156
Pilot Total (6 months)	—	—	—	—	13,834	1,502	0.63	13,406	947

Estimated Burden for All Law Enforcement Agencies in Annual Collection

Timeframe	Reporting group	Approximate number of officers	Maximum	Minimum	Maximum	Minimum	Estimated burden hours per incident	Maximum	Minimum
Collection (Annual)	All agencies	701,486	0.112	0.012	83,200	8,700	0.63	52,416	5,481

If additional information is required contact: Ms. Amy Blasher, Unit Chief, United States DOJ, FBI CJIS Division, Crime Data Modernization Team, Module D–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

Dated: December 27, 2016.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–31697 Filed 12–29–16; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–NEW]

BJS Confidentiality Pledge Revision Notice

AGENCY: Bureau of Justice Statistics, Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Justice Statistics (BJS), a component of the Office of Justice Programs (OJP) in the U.S. Department of Justice (DOJ), is announcing revisions to the confidentiality pledge(s) it provides to its respondents. These revisions are required by the passage and implementation of provisions of the federal Cybersecurity Enhancement Act of 2015, which requires the Secretary of the Department of Homeland Security (DHS) to provide Federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. More details on this announcement are presented in the **SUPPLEMENTARY INFORMATION** section below.

DATES: These revisions become effective on December 30, 2016.

ADDRESSES: Questions about this notice should be addressed to the Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, ATTN: Allina Lee, 810 7th Street NW., Washington, DC 20151.

FOR FURTHER INFORMATION CONTACT: Allina Lee by telephone at 202–305–0765 (this is not a toll-free number); by email at *Allina.Lee@usdoj.gov;* or by mail or courier to the Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, ATTN: Allina Lee, 810 7th Street NW., Washington, DC 20151. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

SUPPLEMENTARY INFORMATION: Federal statistics provide key information that the Nation uses to measure its performance and make informed choices about budgets, employment, health, investments, taxes, and a host of other significant topics. Most federal surveys are completed on a voluntary basis. Respondents, ranging from businesses to households to institutions, may choose whether or not to provide the requested information. Many of the most valuable federal statistics come from surveys that ask for highly sensitive information such as proprietary business data from companies or particularly personal information or practices from individuals. BJS protects all data collected under its authority under the confidentiality provisions of 42 U.S.C. 3789g. Strong and trusted confidentiality and exclusively statistical use pledges under Title 42 U.S.C. 3789g and similar statutes are effective and necessary in honoring the trust that businesses, individuals, and institutions, by their responses, place in statistical agencies.

Under statistical confidentiality protection statutes, federal statistical agencies make statutory pledges that the information respondents provide will be seen only by statistical agency personnel or their agents and will be used only for statistical purposes. These statutes protect such statistical information from administrative, law enforcement, taxation, regulatory, or any other non-statistical use and immunize the information submitted to statistical agencies from legal process. Moreover, many of these statutes carry monetary fines and/or criminal penalties for conviction of a knowing and willful unauthorized disclosure of covered information. Any person violating the confidentiality provisions of 42 U.S.C. 3789g may be punished by a fine of up to $10,000, in addition to any other penalties imposed by law.

As part of the Consolidated Appropriations Act for Fiscal Year 2016 (Pub. L. 114–113) signed on December 17, 2015, the Congress included the Federal Cybersecurity Enhancement Act of 2015 (codified in relevant part at 6 U.S.C. 151). This act, among other provisions, permits and requires the Secretary of Homeland Security to provide federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. The technology currently used to provide this protection against cyber malware is known as Einstein 3A. Einstein 3A electronically searches internet traffic in and out of federal civilian agencies in real time for malware signatures.

When such a signature is found, the internet packets that contain the malware signature are shunted aside for further inspection by DHS personnel. Because it is possible that such packets entering or leaving a statistical agency's information technology system may contain a small portion of confidential statistical data, statistical agencies can no longer promise their respondents that their responses will be seen only by statistical agency personnel or their agents. However, federal statistical agencies can promise, in accordance with provisions of the Federal Cybersecurity Enhancement Act of 2015, that such monitoring can be used only to protect information and information systems from cybersecurity risks, thereby, in effect, providing stronger protection to the integrity of the respondents' submissions.

Consequently, with the passage of the Federal Cybersecurity Enhancement Act of 2015, the federal statistical community has an opportunity to welcome the further protection of its confidential data offered by DHS' Einstein 3A cybersecurity protection program. The DHS cybersecurity program's objective is to protect federal civilian information systems from malicious malware attacks. The federal statistical system's objective is to endeavor to ensure that the DHS Secretary performs those essential duties in a manner that honors the statistical agencies' statutory promises to the public to protect their confidential data. DHS and the federal statistical system have been successfully engaged in finding a way to balance both objectives and achieve these mutually reinforcing objectives.

However, pledges of confidentiality made pursuant to 42 U.S.C. 3789g and similar statutes assure respondents that their data will be seen only by statistical agency personnel or their agents. Because it is possible that DHS personnel could see some portion of those confidential data in the course of examining the suspicious Internet packets identified by Einstein 3A sensors, statistical agencies are revising their confidentiality pledges to reflect this process change.

Therefore, BJS is providing this notice to alert the public to these confidentiality pledge revisions in an efficient and coordinated fashion. Below is a listing of BJS's current Paperwork Reduction Act (PRA) OMB numbers and information collection titles and their associated revised confidentiality pledge(s) for the Information Collections whose confidentiality pledges will change to reflect the statutory implementation of DHS' Einstein 3A monitoring for cybersecurity protection purposes.

The following BJS statistical confidentiality pledge will now apply to the Information Collections conducted by BJS and protected under 42 U.S.C. 3789g, whose PRA OMB numbers and titles are listed below. The new lines added to address the new cybersecurity monitoring activities are bolded for reference only, and will not be bolded in the pledge provided to respondents:

''*The Bureau of Justice Statistics (BJS) is dedicated to maintaining the confidentiality of your personally identifiable information, and will protect it to the fullest extent under federal law. BJS, BJS employees, and BJS data collection agents will use the information you provide for statistical purposes only, and will not disclose your information in identifiable form without your consent to anyone outside of the BJS project team. All data collected under BJS's authority are protected under the confidentiality provisions of 42 U.S.C. 3789g, and any person who violates these provisions may be punished by a fine up to $10,000, in addition to any other penalties imposed by law. Further, per the Cybersecurity Enhancement Act of 2015 (codified in relevant part at 6 U.S.C. 151), federal information systems are protected from malicious activities through cybersecurity screening of transmitted data. For more information on the federal statutes, regulations, and other authorities that govern how BJS, BJS employees, and data collection agents use, handle, and protect your information, see the BJS Data Protection Guidelines.*''

OMB Control No.	Information collection title
1121–0094 ...	Deaths in Custody Reporting Program.
1121–0065 ...	National Corrections Reporting Program.

BJS has also added information about the Cybersecurity Enhancement Act and Einstein 3A to the BJS Data Protection Guidelines to provide more details to interested respondents about the new cybersecurity monitoring requirements. The following text has been added to Section V. Information System Security and Privacy Requirements:

''*The Cybersecurity Enhancement Act of 2015 (codified in relevant part at 6 U.S.C. 151) required the Department of Homeland Security (DHS) to provide cybersecurity protection for federal civilian agency information technology systems and to conduct cybersecurity screening of the Internet traffic going in and out of these systems to look for viruses, malware, and other cybersecurity threats. DHS has implemented this requirement by instituting procedures such that, if a potentially malicious malware signature were found, the Internet packets that contain the malware signature would be further inspected, pursuant to any legal required legal process, to identify and mitigate the cybersecurity threat. In accordance with the Act's provisions, DHS conducts these cybersecurity screening activities solely to protect federal information and information systems from cybersecurity risks. OJP has installed DHS's cybersecurity protection software, Einstein 3A, on its information technology systems to comply with the Act's requirements and to further safeguard the information transmitted to and from its systems, including BJS data, from cybersecurity threats and vulnerabilities.*''

The Census Bureau collects data on behalf of BJS for the below listing of PRA OMB numbers and information collection titles. These collections are protected under Title 13 U.S.C. Section 9. The Census Bureau issued a **Federal Register** notice (FRN) and submitted an emergency clearance request to OMB for revised confidentiality pledge language, with the new line to address the new cybersecurity screening requirements bolded for reference:

''*The U.S. Census Bureau is required by law to proteect your information. The Census Bureau is not permitted to publicly release your responses in a way that could identify you. Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data.*''

OMB Control No.	Information collection title
1121–0111 ...	National Crime Victimization Survey (NCVS).
1121–0184 ...	School Crime Supplement to the NCVS.
1121–0317 ...	Identity Theft Supplement to the NCVS.
1121–0260 ...	Police Public Contact Supplement to the NCVS.
1121–0302 ...	Supplemental Victimization Survey to the NCVS.

The FRN submitted by the Census Bureau can be accessed at *https://www.federalregister.gov/documents/2016/12/14/2016-30014/confidentiality-pledge-revision-notice,* and the Census Bureau's PRA clearance request can be accessed at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-0607-001.*

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: December 27, 2016.

Melody Braswell,

Department Clearance Officer, U.S. Department of Justice.

[FR Doc. 2016–31705 Filed 12–29–16; 8:45 am]

BILLING CODE 4410–18–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc., Vogtle Electric Generating Plant, Units 3 and 4; Tier 1 Editorial and Consistency Changes

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 56 to Combined Licenses (COL) NPF–91 and NPF–92. The COLs were issued to Southern Nuclear Operating Company, Inc., and Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC, MEAG Power SPVJ, LLC, MEAG Power SPVP, LLC, Authority of Georgia, and the City of Dalton, Georgia (the licensee); for construction and operation of the Vogtle Electric Generating Plant (VEGP) Units 3 and 4, located in Burke County, Georgia. The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

ADDRESSES: Please refer to Docket ID NRC–2008–0252 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated June 3, 2016, and available in ADAMS under Accession No. ML16155A366.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3025; email: *Chandu.Patel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of section III, ''Scope and Contents,'' of appendix D, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 56 to COLs, NPF–91 and NPF–92, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' appendix D, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes that would correct editorial errors in plant-specific Tier 1 information, with corresponding changes to the associated COL Appendix C information, to promote consistency with the Updated Final Safety Analysis Report Tier 2 information. One of the proposed changes to plant-specific Tier 1 information also involves a change to Updated Final Safety Analysis Report Tier 2 information. The proposed amendment also involves a proposed editorial correction to COL Paragraph 2.D.(12)(g)1. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of appendix D to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML16244A345.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VEGP Units 3 and 4 (COLs NPF–91 and NPF–92). The exemption documents for VEGP Units 3 and 4 can be found in ADAMS under Accession Nos. ML16244A301 and ML16244A324, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–91 and NPF–92 are available in ADAMS under Accession Nos. ML16244A270 and ML16244A283, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VEGP Units 3 and Unit 4. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In an application dated June 3, 2016, the licensee requested from the Commission an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, appendix D, as part of license amendment request 16–008, ''Tier 1 Editorial and Consistency Changes.''

For the reasons set forth in Section 3 of the NRC's Safety Evaluation, which can be found at ADAMS Accession No. ML16244A345, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified DCD Tier 1 information, with corresponding information in COL Appendix C of the Facility Combined License as described in the licensee's request dated June 3, 2016. This exemption is related to, and necessary for the granting of License Amendment No. 56, which is being issued concurrently with this exemption.

3. As explained in Section 5.0 of the NRC's Safety Evaluation (ADAMS Accession No. ML16244A345), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated June 3, 2016, the licensee requested that the NRC amend the COLs for VEGP, Units 3 and 4, COLs NPF–91 and NPF–92. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on August 2, 2016 (81 FR 50729). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the NRC granted the exemption and issued the amendment that the licensee requested on June 3, 2016. The exemption and amendment were issued on October 12, 2016 as part of a combined package to the licensee (ADAMS Accession No. ML16308A174).

Dated at Rockville, Maryland, this 19th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–31720 Filed 12–29–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–025 and 52–026; NRC–2008–0252]

Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 3 and 4; Consolidation of Uninterruptible Power Supply System Spare Battery Terminal Boxes

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 54 to Combined Licenses (COL), NPF–91 and NPF–92. The COLs were issued to Southern Nuclear Operating Company, Inc., and Georgia Power Company, Oglethorpe Power Corporation, MEAG Power SPVM, LLC, MEAG Power SPVJ, LLC, MEAG Power SPVP, LLC, Authority of Georgia, and the City of Dalton, Georgia (the licensee); for construction and operation of the Vogtle Electric Generating Plant (VEGP) Units 3 and 4, located in Burke County, Georgia.

The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

ADDRESSES: Please refer to Docket ID NRC–2008–0252 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0252. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then

select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated April 9, 2015, and available in ADAMS under Accession No. ML15099A568.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Chandu Patel, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3025; email: *Chandu.Patel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of Section III, "Scope and Contents," of Appendix D, "Design Certification Rule for the AP1000," to part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 54 to COLs, NPF–91 and NPF–92, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, "Processes for Changes and Departures," Appendix D, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes to the Class 1E direct current (DC) and Uninterruptible Power Supply System by replacing four Spare Termination Boxes with a single Spare Battery Termination Box. Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix D to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML16202A163.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VEGP Units 3 and 4 (COLs NPF–91 and NPF–92). The exemption documents for VEGP Units 3 and 4 can be found in ADAMS under Accession Nos. ML16202A128 and ML16202A136, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–91 and NPF–92 are available in ADAMS under Accession Nos. ML16202A112 and ML16202A118, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VEGP Units 3 and Unit 4. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated April 9, 2015, the licensee requested from the Commission an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, Appendix D, as part of license amendment request 15–004, "Consolidation of Uninterruptible Power System Spare Battery Termination Boxes."

For the reasons set forth in Section 3.1 of the NRC staff's Safety Evaluation that supports this license amendment, which can be found at ADAMS Accession Number ML16202A163, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified DCD Tier 1 information related to Class 1E DC and Uninterruptible Power Supply System, as described in the licensee's request dated April 9, 2015. This exemption is related to, and necessary for the granting of License Amendment No. 54, which is being issued concurrently with this exemption.

3. As explained in Section 5.0 of the NRC staff's Safety Evaluation that supports this license amendment (ADAMS Accession Number ML16202A163), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated April 9, 2015, the licensee requested that the NRC amend the COLs for VEGP, Units 3 and 4, COLs NPF–91 and NPF–92. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or COL, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on July 21, 2015 (80 FR 43123). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on April 9, 2015.

The exemption and amendment were issued on September 20, 2016, as part of a combined package to the licensee (ADAMS Accession No. ML16202A099).

Dated at Rockville, Maryland, this 19th day of December 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–31714 Filed 12–29–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0001]

Sunshine Act Meeting Notice

DATES: January 2, 9, 16, 23, 30, 2017.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of January 2, 2017

There are no meetings scheduled for the week of January 2, 2017.

Week of January 9, 2017—Tentative

Friday, January 13, 2017

9:00 a.m. Briefing on Operator Licensing Program (Public Meeting); (Contact: Nancy Salgado: 301–415–1324)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of January 16, 2017—Tentative

There are no meetings scheduled for the week of January 16, 2017.

Week of January 23, 2017—Tentative

Monday, January 23, 2017

10:00 a.m. Discussion of Management and Personnel Issues (Closed Ex. 2 & 6)

Week of January 30, 2017—Tentative

There are no meetings scheduled for the week of January 30, 2017.

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The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0981 or via email at *Denise.McGovern@nrc.gov.*

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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Dated: December 28, 2016.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2016–31785 Filed 12–28–16; 11:15 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 282 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–68, CP2017–96.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31672 Filed 12–29–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 283 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–69, CP2017–97.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31673 Filed 12–29–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 41 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–67, CP2017–95.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31671 Filed 12–29–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* December 30, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 72 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–70, CP2017–98.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31674 Filed 12–29–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79690; File No. SR–BX–2016–073]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at Rule 7019 (Market Data Distributor Fees)

December 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2016, NASDAQ BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Rule 7019 (Market Data Distributor Fees) to (i) increase the Monthly Internal Distributor Fee from $500 to $750 for BX TotalView, and (ii) increase the Monthly External Distributor Fee from $1,250 to $1,500 for BX TotalView, as described further below.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to increase the Monthly Internal Distributor Fee from $500 to $750 for BX TotalView, and to increase the Monthly External Distributor Fee from $1,250 to $1,500 for BX TotalView.

TotalView is a proprietary feed that provides subscribers with full depth-of-book data on BX for Nasdaq-listed securities and securities not listed on Nasdaq. TotalView allows customers to view all displayed quotes and orders attributed to specific market participants at every price level on BX, access total displayed anonymous interest at every price level on BX, and to see the total size of all displayed quotes and orders on BX. TotalView also offers trade data for BX executions that occur on BX.

Customers may access TotalView as either a Distributor, or through Direct Access. Rule 7019(b) defines a ''distributor'' of Exchange data as ''any entity that receives a feed or data file of Exchange data directly from the Exchange or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity).'' [3] Rule 7019(c) defines ''Direct Access'' as ''a telecommunications interface with the Exchange for receiving Exchange data, or receiving an Exchange data feed within the Exchange co-location facility, or receiving Exchange data via an Extranet access provider or other such provider that is fee-liable under 7025.'' [4]

The Exchange proposed the TotalView fees, among others, in 2009, following its acquisition by Nasdaq, Inc. and the resumption of its cash equities trading business.[5] The Exchange proposed that Distributors of TotalView would pay a $500 monthly fee to distribute the data feed internally (*i.e.,* to employees) and a $1,250 monthly fee to distribute to external customers.[6]

In support of these fees, the Exchange noted that the TotalView fee structure is similar to the structure for the TotalView data product offered by The NASDAQ Stock Market LLC (''Nasdaq''), but that the overall level of fees is lower than for Nasdaq TotalView. The lower fee levels for BX TotalView reflected the start-up nature of the Exchange's new equities trading platform, and was designed help to attract order flow to the Exchange, since, at its inception, the Exchange had zero market share and therefore set its fees, including data fees, with a view to attracting order flow. Finally, the Exchange noted that the alternatives that exist for market participants to determine market depth—such as other depth of book products that may be associated with markets with more liquidity, or order routing strategies designed to ascertain market depth—provided incentives for the Exchange to ensure that its fees for BX TotalView were set reasonably.[7]

With this proposal, BX proposes to increase the Monthly Internal Distributor Fee from $500 to $750 for BX TotalView, and increase the Monthly External Distributor Fee from

[3] *See* Rule 7019(b). The Rule also provides that all distributors shall execute an Exchange distributor agreement, and states that the Exchange itself is a vendor of its data feed(s) and has executed an Exchange distributor agreement and pays the distributor charge. *Id.*

[4] *See* Rule 7019(c).

[5] *See* Securities Exchange Act Release No. 59307 (January 28, 2009), 74 FR 6069 (February 4, 2009) (Notice of filing of SR–BX–2009–005). BX proposed, for the first year of BX's operation, to make TotalView available free of charge. *Id.*

[6] *Id.* The Exchange also proposed that Distributors pay a $1,000 monthly fee to receive the data directly from the Exchange, since the Exchange incurs costs to support the connection to each direct Distributor; indirect Distributors (*i.e.,* those receiving data from a direct Distributor) would not pay this charge.

[7] *Id.*

$1,250 to $1,500 for BX TotalView. BX is only changing the fee for the Monthly Internal and External Distributor Fees. The terms of access for TotalView, and the definition of ''Direct Access'' and ''Distributor,'' remain the same.

This fee increase is justified because BX has not increased the Distributor fees for TotalView since they were initially proposed in 2009, although the value of BX TotalView has increased since that time. Since 2009, BX's market share for quoting and trading of Nasdaq-listed securities and securities not listed on Nasdaq has increased, which has, in turn, increased the content and therefore the value of the TotalView product. In addition, various technical changes have enhanced TotalView by improving the performance and the resiliency of the BX matching engine, which, in turn, has improved outbound messaging through TotalView, especially during peak times of messaging traffic.[8] BX also notes that the proposed new TotalView fees remain consistent with fees for comparable products offered by other exchanges. This fee increase therefore reflects the increased value of the TotalView product and the comparative cost of other similar products.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [12] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[13] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [14]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [15]

More specifically, the SEC recognized the importance of competition in setting fees for non-core market data products when approving the TotalView fees in 2009.[16] The SEC noted that TotalView related to the distribution of non-core, depth of book market data products, and the SEC was therefore able to use a market-based approach in analyzing the appropriateness of the fees.[17] Accordingly, the SEC recognized both BX's compelling need to attract order flow from market participants; and the availability to market participants of alternatives to purchasing BX's depth-of-book order data.[18] The SEC stated that, given the competitive landscape of trading in cash equities, BX must compete vigorously for order flow to maintain its share of trading volume.[19] This compelling need to attract order flow imposed significant pressure on BX to act reasonably in setting its fees for BX market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom BX must attract order flow. The SEC also noted that, in setting the fees for its TotalView data, BX must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data.[20] The Commission stated that the availability of those alternatives, as well as the BX's compelling need to attract order flow, imposed significant competitive pressure on the BX to act equitably, fairly, and reasonably in setting the terms of its proposal.[21]

The same arguments apply with respect to the proposed fee increase here. Although BX is a more mature market than in 2009, competition for order flow remains fierce, and some of the market participants that purchase TotalView are the same market participants from whom BX must attract order flow. Additionally, market participants continue to have a range of other market data products that they could purchase as alternatives to TotalView. As with the initial TotalView fees, the significant competitive pressure with respect to order flow and market data products therefore requires BX to act equitably, fairly, and reasonably in setting the terms of its proposed TotalView fees.

The Exchange also believes that the increase in the Monthly Internal Distributor Fee from $500 to $750 and the increase in the Monthly External Distributor Fee from $1,250 to $1,500 is reasonable because these fee increases reflect the current value of the TotalView product. TotalView provides comprehensive order and trade information for Nasdaq-listed securities and securities not listed on Nasdaq, and the value of a product that offers such information increases as BX's market share increases. As noted above, when TotalView was initially proposed, BX was seeking to resume its cash equities trading business, which was reflected in the initial TotalView fees. Given that BX's market share in those securities

[8] Specifically, in 2016, BX split its matching engine into four matching engines to improve the handling and execution of orders by increasing system resiliency and reduce the impact of peaks in messaging traffic. In anticipation of this change, BX implemented a series of system upgrades in 2015, including upgrading the servers for the BX matching engine, upgrading the matching engine to the newest and most efficient version, and upgrading the necessary tools to effectively monitor the Nasdaq BX marketplace.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[12] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[13] *See NetCoalition,* at 534–535.

[14] *Id.* at 537.

[15] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[16] *See* Securities Exchange Act Release No. 59615 (March 20, 2009), 74 FR 14604 (March 31, 2009) (Order approving SR–BX–2009–005). Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans. In contrast, individual exchanges and other market participants distribute non-core data voluntarily. *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* In approving the TotalView fees, the Commission also did not find a substantial countervailing basis to conclude that the proposal nevertheless failed to meet an applicable requirement of the Act or the rules thereunder.

has increased since 2009, and given the technical enhancements to TotalView since that time, the proposed increase reasonably reflects the increased value of TotalView to market participants. The proposed fees are also fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

The Exchange believes that these fees are an equitable allocation and are not unfairly discriminatory because the proposed fees for subscribers are uniform for all subscribers within a particular category, *e.g.,* external Distributors will all pay the same Monthly External Distributor Fee. The proposal maintains the current distinction between internal and external Distributors in that external Distributors will continue to be charged a higher amount. Although the amount of the fee increase is proportionally greater for internal Distributors than external Distributors, the Exchange believes that this is equitable and not unfairly discriminatory because the fee increase better aligns the value of TotalView for purposes of internal distribution to the value of TotalView for purposes of external distribution. Under the proposal, the Exchange notes that internal Distributors will still pay a fee that is 50% less than external Distributors.

The Exchange also believes that it is equitable and not unfairly discriminatory to increase the fee for internal and external distribution, and not for Direct Access. Rule 7019 provides that a distributor may distribute data either internally (within that entity) or externally (outside that entity), whereas a Direct Access subscriber is not permitted to distribute TotalView data. To the extent that the value of TotalView has increased since 2009 as the BX market has grown, the fee increase for internal and external distribution reflects this increased value and the fact that Distributors, by definition, have more ways than Direct Access subscribers to benefit from this increased value, *e.g.,* through distribution.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or fee levels available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Here, the proposed changes to the charges assessed for internal and external Distributors of TotalView do not impose a burden on competition because TotalView is completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. As is discussed in greater detail below, competition for order flow remains fierce, and some of the market participants that purchase TotalView are the same market participants from whom BX must attract order flow. Firms make decisions regarding TotalView and other proprietary data based on the total cost of interacting with the Exchange, and order flow would be harmed by the supracompetitive pricing of any proprietary data product. Additionally, market participants continue to have a range of other proprietary market data products that they could purchase as alternatives to TotalView. Third, competition among Distributors for customers will further constrain the cost of TotalView. There is therefore significant competitive pressure with respect to order flow and market data products that requires BX to act equitably, fairly, and reasonably in setting the terms of its proposed TotalView fees.

Competition for Order Flow

Fees related to TotalView are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the ''life blood'' of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and BATS/Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with BX and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products. In this manner, the competition for order flow will constrain prices for proprietary data products.

Substitute Products

The price of depth-of-book data is constrained by the existence of competition from other exchanges, such as NYSE and BATS, which sell proprietary depth-of-book data. While a small number of highly sophisticated traders purchase depth-of-book products from multiple exchanges, most customers do not. Because most customers would not pay an excessive price for TotalView when substitute data is available from other proprietary sources, the Exchange is constrained in its pricing decisions.

Competition Among Distributors

Competition among Distributors provides another form of price discipline for proprietary data products. If the price of TotalView were set above competitive levels, Distributors purchasing TotalView would be at a disadvantage relative to their competitors, and would therefore either purchase a substitute or forego the product altogether.

In summary, market forces constrain the price of depth-of-book data such as TotalView through competition for order flow, competition from substitute products, and in the competition among vendors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2016–073 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2016–073. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2016–073, and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31681 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79682; File No. SR–FINRA–2016–048]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Eliminate Fees for Historical Trade Data Accessed Through the FINRA ADDS Web Site

December 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2016, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as ''establishing or changing a due, fee or other charge'' under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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 the Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rules 7510, 7710 and 7730 to eliminate the fees for historical trade data accessed through the FINRA Automated Data Delivery System (''FINRA ADDS'') Web site relating to trades reported to the Alternative Display Facility (''ADF''), OTC Reporting Facility (''ORF'') and Trade Reporting and Compliance Engine (''TRACE'').

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

FINRA ADDS is a data delivery system that provides members, by market participant identifier (''MPID''), access to trade journal files containing key information regarding the member's trades reported to the ADF, ORF and TRACE. FINRA ADDS also provides member clearing firms access to data regarding their correspondents' trades reported to the ORF. Members use the trade journal files to reconcile the trade information captured by their own systems and the information captured by the FINRA trade reporting systems. Members can access FINRA ADDS data via the secure FINRA ADDS Web site and via Secure File Transfer Protocol (''SFTP'').

Pursuant to Rules 7510(d), 7710(c) and 7730(g), FINRA makes recent ADF, ORF and TRACE trade journals available for free and offers subscribers the option of receiving historical data and retrieving data automatically via SFTP for a fee.[5] Specifically, a member has access via the FINRA ADDS Web site to ADF, ORF or TRACE trade data associated with its MPID for the three prior business days (ADF and ORF) or 30 prior business days (TRACE) free of charge without having to subscribe and pay for additional optional data services.

In addition, members can subscribe to receive their data for dates older than the most recent three or 30 business days through the Data Delivery Plus service for a monthly fee. Through this service, subscribers can access up to two years of trade journal files via the FINRA ADDS Web site. The fee is charged per month to an MPID that is a subscriber for Data Delivery Plus reports (''Plus Reports''), which are provided in response to requests by the MPID. The monthly fees for ORF and TRACE data are based on the subscriber's reported volume and the number of Plus Reports the subscriber receives, and for ADF data, the fees are based on the number of Plus Reports the subscriber receives. The ORF and TRACE fees range from a low of $10 to a high of $100 a month, and the ADF fees range from a low of $60 to a high of $100 a month. Thus, subscribers' fees may vary during a calendar year, depending on the number of reports FINRA makes available to the subscriber in response to the subscriber's requests. Clearing firms that subscribe to access their correspondents' historic ORF data pay a flat fee of $150 per Clearing Number per month, irrespective of the number of reports received.

FINRA is proposing to amend Rules 7510(d), 7710(c) and 7730(g) to eliminate the fees for historical data through the FINRA ADDS Web site. As such, all trade journals (recent and historical for up to two years) through the FINRA ADDS Web site will be free of charge.[6] The proposed rule change will enable all ADF, ORF and TRACE participants to look up their historical trade data free of charge via the FINRA ADDS Web site to reconcile with transaction and clearing data captured by their own systems.

FINRA believes that the proposed rule change will assist members in meeting their trade reporting and trade management obligations and will not result in any burden on members. The overall revenue that FINRA collects from fees for Plus Reports through the FINRA ADDS Web site is de minimis, and as such, FINRA does not believe that the fees warrant the administrative burden of calculating members' fees based on reported volume and number of reports under the current fee schedule. In addition, the proposed rule change would eliminate the uncertainty of the current fee schedule for members, whose fees may vary according to the number of Plus Reports the member requests. Under the proposed rule change, members will be able to request an unlimited number of reports through the FINRA ADDS Web site at no charge.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be January 3, 2017.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[7] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. All similarly situated members are subject to the same fee structure and access to the ADF, ORF and TRACE is offered on fair and non-discriminatory terms. FINRA believes that the proposed rule change provides for the equitable allocation of reasonable fees in that it will eliminate a fee and enable all ADF, ORF and TRACE participants to access their trade data through the FINRA ADDS Web site at no charge. Thus, all ADF, ORF and TRACE participants will have the ability to look up their historical trade data via the FINRA ADDS Web site to reconcile with transaction and clearing data captured by their own systems. Members will continue to have the option of subscribing and paying for FINRA ADDS data delivered via SFTP, if they prefer automated retrieval of their trade data.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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. FINRA believes that the proposed rule change, by eliminating the fee for historical ADF, ORF and TRACE data via the FINRA ADDS Web site and enabling all ADF, ORF and TRACE participants to access their trade data at no charge, will assist members in meeting their trade reporting and trade management obligations and will not result in any burden on members. To the extent that the fees that are being proposed to be eliminated were viewed as burdensome among market participants, those participants may choose to utilize the data accessed through the FINRA ADDS Web site to reconcile with transaction and clearing data captured by their own systems, which would permit members to mitigate any direct or indirect costs imposed by the inability to reconcile such data.

[5] FINRA notes that a member that subscribes to the optional FINRA ADDS services via the FINRA ADDS Web site or SFTP for ADF, ORF and TRACE data pays three separate fees under Rules 7510(d), 7710(c) and 7730(g).

[6] FINRA notes that the proposed rule change does not modify the fees for FINRA ADDS data delivered via SFTP under Rules 7510(d), 7710(c) and 7730(g).

[7] 15 U.S.C. 78*o*–3(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and paragraph (f)(2) of Rule 19b–4 thereunder.[9] 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–FINRA–2016–048 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2016–048. 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 FINRA. 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–FINRA–2016–048, and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31682 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79686; File No. SR–ISE–2016–31]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change to Amend the Supplementary Material to ISE Rule 1901

December 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2016, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Supplementary Material to ISE Rule 1901, titled ''Order Protection'' in connection with a system migration to Nasdaq INET technology.

The text of the proposed rule change is available on the Exchange's Web site at *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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to amend the Supplementary Material to ISE Rule 1901, titled ''Order Protection'' to reflect the ISE, ISE Gemini, LLC and ISE Mercury, LLC technology migration to a Nasdaq, Inc. (''Nasdaq'') supported architecture. INET is the proprietary core technology utilized across Nasdaq's global markets and utilized on The NASDAQ Options Market LLC (''NOM''), NASDAQ PHLX LLC (''Phlx'') and NASDAQ BX, Inc. (''BX'') (collectively, ''Nasdaq Exchanges''). The migration of ISE to the Nasdaq INET architecture would result in higher performance, scalability, and more robust architecture. With this system migration, the Exchange intends to adopt certain trading functionality currently utilized at Nasdaq Exchanges. The functionality being adopted is described in this filing.

Generally

With the re-platform, the Exchange will now be built on the Nasdaq INET architecture, which allows certain trading system functionality to be performed in parallel. The Exchange believes that this architecture change will improve the member experience by reducing overall latency compared to the current ISE, ISE Gemini, LLC and ISE Mercury, LLC system because of the manner in which the system is segregated into component parts to handle processing.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Trading Halts

Pursuant to Supplementary Material .02 to Rule 1901, when the automatic execution of an incoming order would result in an impermissible trade-through, such order is exposed at the current national best bid or offer to all members for a time period established by the Exchange not to exceed one (1) second.[3] The Exchange proposes to amend Supplementary Material .02 to Rule 1901 to provide that if a trading halt is initiated during this exposure period, the exposure period will be terminated without execution. Today, when a trading halt is triggered during the auction process described above, ISE terminates the exposure period and executes eligible interest. The proposed treatment of trading halts is based on Phlx Rule 1047(c), which provides that in the event the exchange halts trading, all trading in the affected option shall be halted. This is interpreted to restrict executions after a halt unless there is a specific rule specifying that such trades should take place. Halting the exposure period without execution is a change from current ISE behavior. However, the Exchange believes participants prefer certainty in regard to how their interest will be handled in the event of a trading halt and prefer consistency of behavior across market centers.

Implementation

The Exchange intends to begin implementation of the proposed rule change in tandem with a technology migration to Nasdaq INET architecture. The migration will be on a symbol by symbol basis, and the Exchange will issue a notice to provide Members with notification of the symbols that will migrate and the relevant dates. With respect to the amendment to Supplementary Material .02 to Rule 1901, the rule change impact not only ISE, but also ISE Gemini, LLC and ISE Mercury, LLC because Chapter 19 is incorporated by reference into those rulebooks. The Exchange proposes that the implementation of this rule change into each rulebook occur as specified herein. ISE rule changes will be implemented in Q2 2017 on a symbol by symbol basis, as noted above. ISE Gemini, LLC rule changes will be implemented in Q1 2017 on a symbol by symbol basis. ISE Mercury, LLC rule changes will be implemented in Q3 2017 on a symbol by symbol basis. The Exchange will add the following rule text to make clear the implementation date in each rulebook: ''The amended rule text will be implemented on a symbol by symbol basis for ISE Gemini, LLC in Q1 2017, for ISE in Q2 2017 and for ISE Mercury, LLC in Q3 2017, the specific dates will be announced in a separate notice.''

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(5) of the Act,[5] in particular, in that it is 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, and, in general to protect investors and the public interest for the reasons stated below.

Trading Halts

The Exchange's proposal to amend Supplementary Material .02 to Rule 1901 to add a new provision to memorialize the impact of a trading halt on the exposure period is consistent with the Act because halting the exposure period without execution provides certainty to market participants with respect to how their interest will be handled in the event of a trading halt. This method will also provide consistency of behavior across market centers. Memorializing this behavior will increase transparency of the operation of the Exchange for the benefit of Members and investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As explained above, the Exchange is re-platforming it's trading system onto the Nasdaq INET architecture, and is making certain other changes to its trading functionality in connection with this migration. Amending the Supplementary Material .02 to Rule 1901 will not impact the intense competition that exists in the options market. In fact, the Exchange believes that this proposal will provide clarity as to the manner in which a trading halt impacts exposure periods, thereby providing certainty to all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ISE–2016–31 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–ISE–2016–31.* 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

[3] During the exposure period, Exchange Members may enter responses up to the size of the order being exposed in the regular trading increment applicable to the option.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–ISE–2016–31* and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31678 Filed 12–29–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79688; File No. SR–NYSEArca–2016–170]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rules 7.11, 7.31, and 7.34

December 23, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 20, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rules 7.11, 7.31, and 7.34 to specify order behavior for orders entered via the Pillar phase II protocols. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rules 7.11 (Limit Up-Limit Down Plan and Trading Pauses in Individual Securities Due to Extraordinary Market Volatility) (''Rule 7.11''), 7.31 (Orders and Modifiers) (''Rule 7.31''), and 7.34 (Trading Sessions) (''Rule 7.34'') to specify order behavior for orders entered via the Pillar phase II protocols.

Background

On January 29, 2015, the Exchange announced the implementation of Pillar, which is an integrated trading technology platform designed to use a single specification for connecting to the equities and options markets operated by the Exchange and its affiliates, NYSE MKT, Inc. (''NYSE MKT'') and New York Stock Exchange LLC (''NYSE'').[4] NYSE Arca Equities, which operates the equities trading platform for the Exchange, was the first trading system to migrate to Pillar. In connection with this implementation, the Exchange filed four rule proposals relating to Pillar.[5]

ETP Holders enter orders and order instructions by using communication protocols that map to the order types and modifiers described in Exchange rules. Currently, all ETP Holders communicate with the NYSE Arca Marketplace using Pillar phase I protocols. The Exchange is introducing new technology to support how ETP Holders communicate with the NYSE Arca Marketplace (''Pillar phase II protocols''). Because Pillar phase II protocols will support new order functionality, the Exchange proposes to revise its rules to reflect these changes.

During this implementation, there will be a period when both the Pillar phase I and Pillar phase II protocols will be available to ETP Holders. Accordingly, the Exchange proposes to amend its rules to describe how an ETP Holder's orders would behave depending on the protocol an ETP Holder chooses to use.

Proposed Amendments to Rule 7.11

Currently, under Rule 7.11 any Limit Order that is priced or would trade outside of a Price Band under the Plan[6] is cancelled, unless an ETP Holder enters instructions for adjustment of the Limit Order's working price. Specifically, Rule 7.11(a)(5) specifies that a buy (sell) order that is priced or could be traded above (below) the Upper (Lower) Price Band will be cancelled, except as specified in Rule 7.11(a)(6). Rule 7.11(a)(6) further provides that ETP Holders may enter an instruction for the working price of a Limit Order to buy (sell) with a limit price above (below) the Upper (Lower) price Band to be adjusted to a price that is equal to the Upper (Lower) Price Band rather than cancel the order. Paragraphs (A)–(D) to Rule 7.11(a)(6) provide more specifics regarding how such repricing instructions operate.

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[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Trader Update dated January 29, 2015, available here: *https://www.nyse.com/publicdocs/nyse/markets/nyse/Pillar_Trader_Update_Jan_2015.pdf.*

[5] *See* Securities Exchange Act Release Nos. 74951 (May 13, 2015), 80 FR 28721 (May 19, 2015) (Notice) and 75494 (July 20, 2015), 80 FR 44170 (July 24, 2015) (SR–NYSEArca–2015–38) (Approval Order of NYSE Arca Pillar I Filing, adopting rules for Trading Sessions, Order Ranking and Display, and Order Execution); Securities Exchange Act Release Nos. 75497 (July 21, 2015), 80 FR 45022 (July 28, 2015) (Notice) and 76267 (October 26, 2015), 80 FR 66951 (October 30, 2015) (SR–NYSEArca–2015–56) (Approval Order of NYSE Arca Pillar II Filing, adopting rules for Orders and Modifiers and the Retail Liquidity Program); Securities Exchange Act Release Nos. 75467 (July 16, 2015), 80 FR 43515 (July 22, 2015) (Notice) and 76198 (October 20, 2015), 80 FR 65274 (October 26, 2015) (SR–NYSEArca–2015–58) (Approval Order of NYSE Arca Pillar III Filing, adopting rules for Trading Halts, Short Sales, Limit Up-Limit Down, and Odd Lots and Mixed Lots); and Securities Exchange Act Release Nos. 76085 (October 6, 2015), 80 FR 61513 (October 13, 2015) (Notice) and 76869 (January 11, 2016), 81 FR 2276 (January 15, 2016) (Approval Order of NYSE Arca Pillar IV Filing, adopting rules for Auctions).

[6] Under Rule 7.11(a)(1), the ''Plan'' is defined as the Plan to Address Extraordinary Market Volatility Submitted to the Securities and Exchange Commission Pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934, Exhibit A to Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012), as it may be amended from time to time. Under Rule 7.11(a)(2), capitalized terms not otherwise defined in Rule 7.11 have the meaning set forth in the Plan.

Accordingly, under current rules, repricing instructions are discretionary and available only for specified Limit Orders.

As proposed, when using Pillar phase II protocols, the default behavior would be to reprice Limit Orders rather than cancel them if they would trade or are priced through the Price Bands. In addition, the Exchange proposes to offer a discretionary instruction to cancel such orders rather than reprice them. This proposed default behavior is similar to how Limit Orders are processed on the Nasdaq Stock Market LLC (''Nasdaq'').[7] When ETP Holders use Pillar phase II protocols, the processing of Market Orders, Limit Orders designated IOC, Day ISO, Q Orders, or Primary Only Orders under Rule 7.11 would be the same as current processing of such orders.[8]

To effect these changes, the Exchange proposes new Rule 7.11(a)(5P), which would specify order behavior for all orders under the Pillar phase II protocols. Proposed Rule 7.11(a)(5P) would thus consolidate into a single sub-section of Rule 7.11(a) all repricing and cancellation behavior for orders, rather than have this content separated into two sub-sections of Rule 7.11(a), as under the current Rule. Rules 7.11(a)(5) and (a)(6) would continue to govern order processing when an ETP Holder uses Pillar phase I protocols.

Proposed Rule 7.11(a)(5P) would provide that Exchange systems would reprice or cancel buy (sell) orders that are priced or could be traded above (below) the Upper (Lower) Price Band.

• Proposed Rule 7.11(a)(5P)(A) would govern those order types that would be cancelled if they are priced or could trade at prices outside the Price Bands. This proposed rule text would not make any substantive changes to the current rule and is based on current Rule 7.11(a)(5)(A), which describes the default behavior to cancel orders, and Rule 7.11(a)(6)(A), which specifies the order types that are not eligible for repricing instructions. The Exchange proposes a non-substantive change to restructure the rule into a single sub-paragraph that describes how these orders would be processed when an ETP Holder sends orders using Pillar Phase II protocols.

As proposed, incoming Market Orders, Limit Orders designated IOC, and Day ISOs would be traded, or if applicable, routed to an Away Market, to the fullest extent possible, subject to Rule 7.31(a)(1)(B) (Trading Collars for Market Orders) and 7.31(a)(2)(B) (price check for Limit Orders) at prices at or within the Price Bands. This list of order types is based on the list of order types not eligible for repricing instructions in current Rule 7.11(a)(6)(A).[9] Proposed Rule 7.11(a)(5P)(A)(i) would further provide that any quantity of such orders that cannot be traded or routed at prices at or within the Price Bands would be cancelled and the ETP Holder would be notified of the reason for the cancellation.

Proposed Rule 7.11(a)(5P)(A)(ii) would further provide that if Price Bands move and the working price of a resting Market Order or Day ISO to buy (sell) is above (below) the updated Upper (Lower) Price Band, such orders would be cancelled. This is new rule text designed to provide additional transparency regarding how resting Market Orders or Day ISOs would be processed if Price Bands move into the working price of such orders. Consistent with proposed Rule 7.11(a)(5P)(A)(i) that states that such orders would not be repriced if they were to trade outside of the Price Bands, such orders would also be cancelled if they were required to be repriced due to a change in Price Bands.

• Proposed Rule 7.11(a)(5P)(B) would set forth the proposed default behavior to reprice a Limit Order priced through the Price Bands, unless the Exchange receives an instruction to cancel such an order. As proposed, incoming Limit Orders would be traded, or if applicable, routed to an Away Market, to the fullest extent possible, subject to Rule 7.31(a)(2)(B) (price check for Limit Orders) at prices at or within the Price Bands. Proposed Rule 7.11(a)(5P)(B)(i) would further provide that, unless the ETP holder has entered an instruction to cancel any quantity of a Limit Order that cannot be traded or routed at prices at or within the Price Bands, such order would be assigned a working price, and if applicable, display price, at the Upper (Lower) Price Band, consistent with the terms of the order.[10] This proposed rule text therefore specifies that the default behavior would be to reprice Limit Orders and the discretionary instruction would be to cancel such orders.

Proposed Rule 7.11(a)(5P)(B)(ii) would provide that the repricing of Limit Orders would be applicable to both incoming and resting orders and if the Price Bands move and the limit price of a repriced order is at or within the Price Band, such Limit Order would be adjusted to its limit price. This proposed rule text is based on current Rule 7.11(a)(6)(B) without any substantive changes. The Exchange proposes a non-substantive change to use the term ''limit price'' instead of ''original limit price'' because under Rule 7.36(a)(2), the term ''limit price'' means the highest (lowest) specified price at which a Limit Order to buy (sell) is eligible to trade. Thus, use of the word ''original'' with the term ''limit price'' is redundant.

Proposed Rule 7.11(a)(5P)(B)(iii) would provide that Primary Until 9:45 Orders and Primary After 3:55 Orders would be priced under Rule 7.11(a)(5P)(B) only when such orders are entered on or resting on the NYSE Arca Book. This proposed rule text is based on the second sentence of Rule 7.11(a)(6)(A), without any substantive changes.

• Proposed Rule 7.11(a)(5P)(C) would specify how sell short orders would be processed and is based on current Rule 7.11(a)(6). The Exchange proposes a substantive change to the proposed rule text to reflect the proposed new default processing for Limit Orders, *i.e.,* to reprice rather than cancel such orders. As proposed, if a Limit Order does not include a cancel instruction and is also a sell short order, during a Short Sale Price Test, as set forth in Rule 7.16(f), such short sale order priced below the Lower Price Band would be repriced to the higher of the Lower Price Band or the Permitted Price, as defined in Rule 7.16(f)(5)(A). The rule would further provide that sell short orders that are not eligible to be repriced would be treated as any other order pursuant to proposed Rule 7.11(a)(5P)(A) above. The proposed substantive changes are reflected in the first clause of this proposed rule text and the last sentence of this proposed rule text. The remainder of the proposed rule text is based on current Rule 7.11(a)(6) without any changes.

• Proposed Rule 7.11(a)(5P)(D) would provide that incoming Q Orders to buy (sell) with a limit price above (below) the Upper (Lower) Price Band would be rejected. The proposed rule would further provide that if Price Bands move and the limit price of a resting Q Order to buy (sell) is above (below) the updated Upper (Lower) Price Band, the

[7] *See* Nasdaq Rule 4120(a)(12)(E)(2).

[8] Primary Only Orders are addressed in Rule 7.11(a)(7), which is not changing.

[9] The Exchange does not believe it is necessary to reference Auction-Only Orders in this proposed rule because under Rule 7.35, Auction-Only Orders are not subject to any repricing. Rather, by design, they trade at the Indicative Match Price of the auction.

[10] For example, consistent with Rule 7.31(e)(2), if the PBO is equal to the Upper Price Band and the Exchange receives an ALO to buy with a limit price above the PBO, such ALO would be assigned a working price equal to the PBO (and Upper Price Band) and a display price one minimum price variation below the PBO (and Upper Price Band).

Q Order would be cancelled. This proposed rule text is based on how Q Orders are currently processed because Q Orders are not eligible for repricing instructions.[11]

- Proposed Rule 7.11(a)(5P)(E) would provide that Limit IOC Cross Orders with a cross price above (below) the Upper (Lower) Price Band would be rejected. This proposed rule text is based on current Rule 7.11(a)(5)(B), with a non-substantive change to refer to ''Limit IOC Cross Orders'' rather than ''Cross Orders.'' Under Rule 7.31(g), the only form of Cross Order available at the Exchange is a Limit IOC Cross Order.
- Proposed Rule 7.11(a)(5P)(F) would provide that if the midpoint of the PBBO is above (below) the Upper (Lower) Price Band, an MPL Order to buy (sell) would not be repriced or rejected and would not be eligible to trade and would further provide that an MPL Order would be cancelled or rejected if the ETP Holder enters an instruction to cancel or reject such MPL Order. This proposed rule text is based in part on current Rule 7.11(a)(6)(C), which states that an MPL Order that has an instruction to reprice will not cancel, but will not be repriced or be eligible to trade if the midpoint of the PBBO is below the Lower Price Band or above the Upper Price Band. Proposed Rule 7.11(a)(5P)(F) is different than current Rule 7.11(a)(6)(C) to reflect that the new default behavior is to reprice rather than cancel Limit Orders. As applied to MPL Orders, ETP Holders using Pillar Phase II protocol would not need to include an instruction to reprice an MPL Order. The proposed default behavior for MPL Orders would be that such orders would not be repriced or rejected and would not be eligible to trade outside of the Price Bands. Consistent with the proposed discretionary instruction to cancel a Limit Order, the Exchange proposes to include a discretionary instruction to cancel (a resting) or reject (an incoming) an MPL Order to buy (sell) if the midpoint of the PBBO is above (below) the Upper (Lower) Price Band.

Finally, to provide transparency regarding which rules would govern order behavior under the different protocols, the Exchange proposes to add the following preamble to Rule 7.11:

> Rules 7.11(a)(5) and (a)(6) govern order processing when ETP Holders communicate with the NYSE Arca Marketplace using Pillar phase I protocols. Rule 7.11(a)(5P) governs order processing when ETP Holders communicate with the NYSE Arca Marketplace using Pillar phase II protocols. The Exchange will file a separate proposed rule change to delete Rules 7.11(a)(5) and (a)(6) when the Pillar phase I protocols are no longer available.

Proposed Amendment to Rule 7.31

The Exchange proposes to amend Rule 7.31 to reflect that under the Pillar phase II protocols, the Exchange would use an ETP Holder's MPID, rather than an ETP ID, to assess whether to apply Self-Trade Prevention Modifiers (''STP'') against two matching orders. To reflect this change, the Exchange proposes to add new subsection (E) to Rule 7.31(i)(2) that would provide that for purposes of STP, references to ETP ID mean an ETP ID when using Pillar phase I protocols to communicate with the NYSE Arca Marketplace or an MPID when using Pillar phase II protocols to communicate with the NYSE Arca Marketplace.

Proposed Amendments to Rule 7.34

The Exchange proposes to amend Rule 7.34 to reflect that under the Pillar phase II protocols, the Exchange would reject orders that do not include a designation for which trading session(s) the order will remain in effect. Current Rule 7.34(b)(1) provides that any order entered into the NYSE Arca Marketplace must include a designation for which trading session(s) the order will remain in effect.

However, current Rule 7.34(b)(2) further provides that an order with a day time-in-force instruction entered before or during the Early Trading Session will be deemed designated for the Early Trading Session and the Core Trading Session. Current Rule 7.34(b)(3) further provides that an order with a day time-in-force instruction entered during the Core Trading Session will be deemed designated for the Core Trading Session. Accordingly, under current rules, orders that include a day designation, but do not include a trading session designation, will be accepted and deemed designated for the specified trading sessions.

The Exchange proposes that when ETP Holders use Pillar phase II protocols to enter an order, the Exchange would reject any order that does not include a trading session designation, including day orders entered during the Early or Core Trading Sessions. To reflect this functionality, the Exchange proposes to add the following sentence to Rule 7.34(b)(1): ''For ETP Holders that communicate with the NYSE Arca Marketplace using Pillar phase II protocols, orders entered without a trading session designation will be rejected.'' To specify that the current rule processing is available only for orders entered via the Pillar phase I protocols, the Exchange proposes to add the following introductory text to Rules 7.34(b)(2) and (3): ''For ETP Holders that communicate with the NYSE Arca Marketplace using Pillar phase I protocols.''

* * * * *

Because of the technology changes associated with this proposed rule change, the Exchange will announce the implementation date by Trader Update. The Exchange anticipates implementing these changes before the end of the first quarter 2017.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[12] in general, and furthers the objectives of Section 6(b)(5),[13] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that the proposed rule change to reprice Limit Orders that would trade or are priced through the Price Bands under the Plan rather than cancel them, and instead offer a discretionary instruction to cancel such orders, would remove impediments to and perfect the mechanism of a free and open market and a national market system by promoting the display of orders. In addition, the proposed changes are similar to how Nasdaq operates.[14] The Exchange further believes that the proposed non-substantive changes to consolidate in proposed Rule 7.11(a)(5P) how orders would be repriced or cancelled if they are priced through or would trade outside of the Price Bands would simplify Exchange rules, thereby

[11] The Exchange proposes a non-substantive amendment to update current Rule 7.11(a)(6) to reflect that Q Orders are not eligible to include repricing instructions. The rule filing to adopt current Rule 7.11 described that Q orders were not included in the list of orders eligible for repricing and due to a typographical error, Q Orders were not also included in the rule text. *See* Securities Exchange Act Release No. 75467 (July 16, 2016), 80 FR 43515, 43524 (July 22, 2016) (SR–NYSEArca–2015–58) (Notice of Filing of Pillar III Filing, adopting rules for Trading Halts, Short Sales, Limit Up-Limit Down, and Odd Lots and Mixed Lots).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *See supra* note 7.

promoting transparency and clarity in Exchange rules.

The Exchange believes that the proposed rule change to specify that an ETP Holder's MPID rather than ETP ID would be used for STP purposes when an ETP Holder uses Pillar phase II protocols would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing notice to ETP Holders of which orders would be matched for purposes of STP, depending on the communication protocol that they use.

The Exchange believes that the proposed rule change to reject orders that do not include a trading session designation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it provides transparency and uniformity of the circumstances when an order would be rejected.

The Exchange further believes that amending Exchange rules to specify order behavior depending on which Pillar protocol is used to communicate with the NYSE Arca Marketplace would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing transparency to investors and the public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change would not impose any burden on competition because the proposed changes to how Limit Orders would be processed if priced through the Price Bands is similar to the rules of a competing exchange, and thus is familiar behavior to market participants. The proposed change to reject orders if they do not include a trading session designation is not designed to address any competitive issues, but rather, would promote transparency and uniformity by specifying when an order would be rejected.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (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.[15]

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 change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–170 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–NYSEArca–2016–170. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–170, and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31680 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32401; 812–14690]

Northern Lights Fund Trust IV and Blue Sky Asset Management, LLC; Notice of Application

December 23, 2016.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) index-based series of certain open-end management investment companies (''Funds'') to issue shares

[15] 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.

[16] 17 CFR 200.30–3(a)(12).

redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Funds of Funds'') to acquire shares of the Funds; and (f) certain Funds (''Feeder Funds'') to create and redeem Creation Units in-kind in a master-feeder structure.

APPLICANTS: Northern Lights Fund Trust IV (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company, and Blue Sky Asset Management, LLC (the ''Initial Adviser''), a Colorado limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'').

FILING DATES: The application was filed on August 16, 2016, and amended on November 21, 2016.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 17, 2017, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: Northern Lights Fund Trust IV, 17605 Wright Street, Omaha, NE 68130, and Blue Sky Asset Management, LLC, 6400 S. Fiddlers Green Circle, Suite 350, Greenwood Village, CO 80111.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Mary Kay Frech, Branch Chief, at (202) 551–6814 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. Applicants request an order that would allow Funds to operate as index exchange traded funds (''ETFs'').[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant'', which will have signed a participant agreement with a broker-dealer that will be registered under the Securities Exchange Act of 1934 (''Exchange Act'') (the ''Distributor''). Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Certain Funds will operate as Feeder Funds in a master-feeder structure. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will hold investment positions selected to correspond generally to the performance of an Underlying Index. In the case of Self-Indexing Funds, an affiliated person, as defined in section 2(a)(3) of the Act (''Affiliated Person''), or an affiliated person of an Affiliated Person (''Second-Tier Affiliate''), of the Trust or a Fund, of the Adviser, of any sub-adviser to or promoter of a Fund, or of the Distributor will compile, create, sponsor or maintain the Underlying Index.[2]

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that effect creations and redemptions of Creation Units in kind and that are based on certain Underlying Indexes that include foreign securities, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of

[1] Applicants request that the order apply to the existing series of the Trust that are index ETFs and any additional series of the Trust, and any other open-end management investment company or series thereof, that may be created in the future (each, included in the term ''Fund''), each of which will operate as an ETF and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an ''Underlying Index''). Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each, an ''Adviser'') and (b) comply with the terms and conditions of the application.

[2] Each Self-Indexing Fund will post on its Web site the identities and quantities of the investment positions that will form the basis for the Fund's calculation of its NAV at the end of the day. Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will help address, together with other protections, conflicts of interest with respect to such Funds.

section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Funds of Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are Affiliated Persons, or Second Tier Affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those investment positions currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[3] The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the policies of the Fund of Funds and will be based on the NAVs of the Funds.

9. Applicants also request relief to permit a Feeder Fund to acquire shares of another registered investment company managed by the Adviser having substantially the same investment objectives as the Feeder Fund (''Master Fund'') beyond the limitations in section 12(d)(1)(A) and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B).

10. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields,

Secretary.

[FR Doc. 2016–31684 Filed 12–29–16; 8:45 am]

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[3] The requested relief would apply to direct sales of shares in Creation Units by a Fund to a Fund of Funds and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an Affiliated Person, or a Second-Tier Affiliate, of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79683; File No. SR–NYSEArca–2016–82]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3 Thereto, To List and Trade Shares of the JPMorgan Diversified Event Driven ETF Under NYSE Arca Equities Rule 8.600

December 23, 2016.

I. Introduction

On June 20, 2016, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the JPMorgan Diversified Event Driven ETF (''Fund'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on July 7, 2016.[3] On August 18, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[4] On the same day, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] On September 1, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[7] On

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78218 (Jul. 1, 2016), 81 FR 44339 (''Notice'').

[4] In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange clarified: (a) Certain aspects relating to the Fund's investment strategy, including descriptions of (i) certain return factors that the Fund seeks to utilize to achieve its investment objective, (ii) the Fund's total net long market exposure, (iii) the Fund's use of derivative instruments and its market exposure to such instruments, and (iv) the Fund's investments in mutual funds; (b) that *the common stock into which convertible securities held by the Fund can be converted will be exchange-traded;* (c) that the Fund may invest no more than 5% of its assets*, in the aggregate,* in over-the-counter (''OTC'') common stocks, preferred stocks, warrants, rights, and contingent value rights (''CVRs'') of U.S. and foreign corporations (including emerging market securities); (d) the redemption order submission cut-off time; (e) that no more than 10% of the net assets of the Fund will be invested in *Depositary Receipts (as defined herein)* that are not exchange-listed; and (f) the use of certain defined terms. Amendment No. 1 to the proposed rule change is available at: *https://www.sec.gov/comments/sr-nysearca-2016-82/nysearca201682-1.pdf.* Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 78610, 81 FR 57960 (Aug. 24, 2016). The Commission designated October 5, 2016, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] In Amendment No. 2, which partially amended the proposed rule change, as modified by Amendment No. 1 thereto, the Exchange clarified (a) the Fund's holdings in mutual fund shares as the only non-exchange-traded investment company securities the Fund may hold, and (b) that Depositary Receipts (as defined herein) are included as equity securities subject to the 10% limitation on equity securities whose principal market is not a member of the Intermarket Surveillance Group (''ISG'') or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. Amendment No. 2 to the proposed rule change is available at: *https://www.sec.gov/comments/sr-nysearca-2016-82/nysearca201682-2.pdf.* Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or

Continued

September 2, 2016, the Exchange filed Amendment No. 3 to the proposed rule change.[8] On October 5, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[9] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto.[10] The Commission has received no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto.

II. Exchange's Description of the Proposal

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Fund is a series of J.P. Morgan Exchange-Traded Fund Trust (''Trust''), a Delaware statutory trust.[11] J.P. Morgan Investment Management Inc. (''Adviser'') will be the investment adviser to the Fund. The Adviser will also provide administrative services for, and will oversee the other service providers of, the Fund. SEI Investments Distribution Co. will be the distributor of the Fund's Shares. The Exchange represents that the Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a fire wall with respect to such broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.[12]

The Fund will seek to provide long-term total return and will seek to achieve its investment objective by employing an event-driven investment strategy, primarily investing in companies that the Adviser believes will be impacted by pending or anticipated corporate or special situation events. Under normal market conditions,[13] the Fund will seek to achieve its investment objective by employing its investment strategy to access certain ''return factors.'' The Fund will invest its assets globally to gain exposure to equity securities (across market capitalizations) in developed markets. The Fund may use both long and short positions (achieved primarily through the use of derivative instruments as described below). The Fund generally will maintain a total net long market exposure, meaning that the Fund's aggregate exposure will be greater to instruments that the Adviser expects to outperform. However, the Fund may have net long or net short exposure to one or more industry sectors, individual markets, and/or currencies based on the return factors.

The Adviser will make use of derivatives (as described below) in implementing its strategies. Under normal market conditions, the Adviser currently expects that a significant portion of the Fund's exposure will be attained through the use of derivatives in addition to its exposure through direct investments. Derivatives will primarily be used as an efficient means of implementing a particular strategy in order to gain exposure to a desired return factor. For example, the Fund may use a total return swap to establish both long and short positions in order to gain the desired exposure rather than physically purchasing and selling short each instrument. Derivatives may also be used to increase gain, to effectively gain targeted exposure from its cash positions, to hedge various investments, and/or for risk management. As a result of the Fund's use of derivatives and to serve as collateral, the Fund may hold significant amounts of U.S. Treasury obligations, including Treasury bills, bonds and notes and other obligations issued or guaranteed by the U.S. Treasury, other short-term investments, including money market funds, and foreign currencies, in which certain derivatives are denominated.

The amount that may be invested in any one instrument will vary and generally depend on the return factors employed by the Adviser at that time. However, with the exception of specified investment limitations for certain assets described below, there are no stated percentage limitations on the amount that can be invested in any one type of instrument, and the Adviser may, at times, focus on a smaller number of instruments. Moreover, the Fund will generally be unconstrained by any particular capitalization, style, or sector, and may invest in any developed region or country. The Adviser will make use of quantitative models and information and data supplied by third parties to, among other things, help determine the portfolio's weightings among various investments and construct sets of transactions and investments.

In addition to its main return factors, the Fund may utilize return factors that use debt securities. The Fund may invest, either directly or through financial derivative instruments, debt securities that are subject to a downgrade from investment grade to non-investment grade (also known as high yield/junk bond) status. For example, the Fund may invest in the bonds that have been downgraded while hedging credit risk more broadly by using credit default swaps indices in order to attempt to keep the Fund's exposure market neutral.

The Exchange has made the following representations and statements in describing the Fund.[14]

raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

[8] In Amendment No. 3, which partially amended the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, the Exchange (a) made conforming changes to the Statutory Basis section of the filing to reflect the same changes made by Amendment No. 2 to the proposed rule change, and (b) clarified a reference to the term ''advisor'' to mean ''Adviser.'' Amendment No. 3 to the proposed rule change is available at: *https://www.sec.gov/comments/sr-nysearca-2016-82/nysearca201682-3.pdf.* Because Amendment No. 3 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment.

[9] 15 U.S.C. 78s(b)(2)(B).

[10] *See* Securities Exchange Act Release No. 79052, 81 FR 70455 (Oct. 12, 2016). Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.,* 81 FR at 70459.

[11] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). The Exchange states that, on April 22, 2016, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (''Securities Act'') and the 1940 Act relating to the Fund (File Nos. 333–191837 and 811–22903) (''Registration Statement''). The Exchange also notes that an exemptive order (''Exemptive Order'') was issued under the 1940 Act on February 19, 2016. The Exchange represents that investments made by the Fund will comply with the conditions set forth in the Exemptive Order.

[12] The Exchange further represents that, in the event (a) the Adviser becomes registered as a broker-dealer or newly affiliated with one or more broker-dealers, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

[13] The term ''under normal market conditions'' includes, but is not limited to, the absence of extreme volatility or trading halts in the securities markets or the financial markets generally; circumstances under which the Fund's investments are made for temporary defensive purposes; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as cyber-attacks, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[14] The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, creation and redemption procedures, calculation of net asset value (''NAV''), fees, distributions, and taxes, among other things, can be found in the Notice, Amendment Nos. 1, 2, and 3, and the Registration Statement, as applicable. *See supra* notes 3, 4, 7, 8, and 11, respectively, and accompanying text.

A. Exchange's Description of the Fund's Principal Investments

Under normal market conditions, the Fund will invest principally (*i.e.,* more than 50% of the Fund's assets) in the securities and financial instruments described below, which may be represented by derivatives, as discussed below.

The Fund may invest in exchange-listed and traded common stocks, preferred stocks, warrants and rights of U.S. and foreign corporations (including emerging market securities), and U.S. and non-U.S. real estate investment trusts (''REITs''). Exchange-listed and traded common stocks, preferred stocks, warrants and rights of U.S. corporations, and U.S. REITs will be traded on U.S. national securities exchanges.

The Fund may invest in exchange-listed and OTC ''Depositary Receipts'' [15] as described below.

The Fund may invest in the following cash and cash equivalents: Investments in money market funds (for which the Adviser and/or its affiliates serve as investment adviser or administrator), bank obligations,[16] commercial paper, repurchase agreements, and short-term funding agreements.[17]

The Fund may invest in corporate debt.[18]

In addition to money market funds referenced above, the Fund may invest in shares of non-exchange-traded investment company securities, that is, mutual fund shares, including mutual fund shares for which the Adviser and/or its affiliates may serve as investment adviser or administrator, to the extent permitted by Section 12(d)(1)[19] of the 1940 Act and the rules thereunder.

In addition, the Fund may invest in exchange traded funds (''ETFs''),[20] purchase and sell futures contracts on indexes of securities, invest in swaps (credit default swaps (''CDSs''), CDS indices, and total return swaps on equity securities, equity indexes, fixed income securities, and fixed income futures), invest in forward and spot currency transactions [21] (such investments consist of non-deliverable forwards (''NDFs''), foreign forward currency contracts, and spot currency transactions), and invest in OTC and exchange-traded call and put options on equities, fixed income securities, and currencies or options on indexes of equities, fixed income securities, and currencies.

The Fund may invest in U.S. Government obligations, which may include direct obligations of the U.S. Treasury, including Treasury bills, notes and bonds, all of which are backed as to principal and interest payments by the full faith and credit of the United States, and separately traded principal and interest component parts of such obligations that are transferable through the Federal book-entry system known as Separate Trading of Registered Interest and Principal of Securities and Coupons Under Book Entry Safekeeping.

B. Exchange's Description of the Fund's Other Investments

While the Fund, under normal market conditions, will invest at least fifty percent (50%) of its assets in the securities and financial instruments described above, the Fund may invest its remaining assets in other assets and financial instruments, as described below.

The Fund may invest in U.S. and non-U.S. convertible securities, which are bonds or preferred stock that can convert to common stock. The common stock into which convertible securities can be converted will be exchange-traded.

The Fund may invest in reverse repurchase agreements.

The Fund may invest in sovereign obligations, which are investments in debt obligations issued or guaranteed by a foreign sovereign government or its agencies, authorities, or political subdivisions.

The Fund may invest no more than 5% of its assets in equity and debt securities that are restricted securities (Rule 144A securities), in addition to Rule 144A securities deemed illiquid by the Adviser, as referenced below.

Under normal market conditions, the Fund may invest no more than 5% of its assets, in the aggregate, in OTC common stocks, preferred stocks, warrants, rights, and CVRs of U.S. and foreign corporations (including emerging market securities).[22]

C. Exchange's Description of the Fund's Investment Restrictions

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, consistent with Commission guidance. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund may invest in other investment companies to the extent permitted by Section 12(d)(1) of the 1940 Act and rules thereunder and/or any applicable exemption or exemptive order under the 1940 Act with respect to such investments.

The Fund may invest in securities denominated in U.S. dollars, major reserve currencies, and currencies of other countries in which the Fund may invest.

The Fund may invest in both investment grade and high yield debt securities.

The Fund intends to qualify for and to elect treatment as a separate regulated investment company under Subchapter M of the Internal Revenue Code. Furthermore, the Fund may not concentrate investments in a particular industry or group of industries, as concentration is defined under the 1940 Act, the rules or regulations thereunder,

[15] Depositary Receipts include American Depositary Receipts (''ADRs''), Global Depositary Receipts (''GDRs'') and European Depositary Receipts (''EDRs''). No more than 10% of the net assets of the Fund will be invested in Depositary Receipts that are not exchange-listed.

[16] Bank obligations include the following: Bankers' acceptances, certificates of deposit, and time deposits.

[17] Short-term funding agreements are agreements issued by banks and highly rated U.S. insurance companies such as Guaranteed Investment Contracts and Bank Investment Contracts.

[18] The Adviser expects that, under normal market conditions, the Fund will invest at least 75% of its corporate debt securities in issuances that have at least $100,000,000 par amount outstanding in developed countries, or at least $200,000,000 par amount outstanding in emerging market countries.

[19] 15 U.S.C. 80a–12(d)(1).

[20] The ETFs in which the Fund may invest will be registered under the 1940 Act and include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). Such ETFs all will be listed and traded in the U.S. on registered exchanges. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (*e.g.,* 2X, –2X, 3X, or –3X) ETFs.

[21] The Fund will limit its investments in currencies to those currencies with a minimum average daily foreign exchange turnover of USD $1 billion as determined by the Bank for International Settlements (''BIS'') Triennial Central Bank Survey.

[22] The Exchange further represents that not more than 10% of the net assets of the Fund, in the aggregate, invested in equity securities (other than mutual fund shares) shall consist of equity securities, including common stock into which convertible securities can be converted and Depositary Receipts, whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. *See* Amendment No. 2 to the proposed rule change, *supra* note 7.

or any exemption therefrom, as such statute, rules, or regulations may be amended or interpreted from time to time.

The Fund is a diversified series of the Trust. The Fund intends to meet the diversification requirements of the 1940 Act.

The Fund's investments, including derivatives, will be consistent with the Fund's investment objective and will not be used to enhance leverage (although certain derivatives may result in leverage). That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[23]

D. Exchange's Description of the Fund's Use of Derivatives

The Fund proposes to seek certain exposures through transactions in the specific derivative instruments described above. The derivatives to be used are futures, swaps, NDFs, foreign forward currency contracts, and call and put options. Derivatives, which are instruments that have a value based on another instrument, exchange rate, or index, may also be used as substitutes for securities in which the Fund can invest. The Fund may use these derivative instruments to increase gain, to effectively gain targeted exposure from its cash positions, to hedge various investments, and/or for risk management.

Investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies. To limit the potential risk associated with such transactions, the Fund will segregate or ''earmark'' assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged.[24] Because the markets for certain assets, or the assets themselves, may be unavailable or cost prohibitive as compared to derivative instruments, suitable derivative transactions may be an efficient alternative for the Fund to obtain the desired asset exposure.

E. Exchange's Description of the Impact on the Arbitrage Mechanism

The Exchange states that, according to the Adviser, there will be minimal impact to the arbitrage mechanism as a result of the use of derivatives. Market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. The price at which Shares trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem creation Shares at their NAV, which should ensure that Shares will not trade at a material discount or premium in relation to their NAV.

In addition, the Exchange states that, according to the Adviser, there will not be any significant impacts to the settlement or operational aspects of the Fund's arbitrage mechanism due to the use of derivatives. Because derivatives generally are not eligible for in-kind transfer, they will typically be substituted with a ''cash in lieu'' amount when the Fund processes purchases or redemptions of creation units in-kind.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[25] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[26] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[27] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares and for portfolio holdings of the Fund that are U.S. exchange listed, including common stocks, preferred stocks, warrants, rights, ETFs, REITs, and U.S. exchange-traded ADRs will be available via the Consolidated Tape Association (''CTA'') high speed line. Quotation and last-sale information for such U.S. exchange-listed securities, as well as futures, also will be available from the exchange on which they are listed. Quotation and last-sale information for exchange-listed options cleared via the Options Clearing Corporation will be available via the Options Price Reporting Authority, and quotation and last-sale information for non-U.S. equity securities (including GDRs and EDRs) will be available from the exchanges on which they trade and from major market data vendors, as applicable.

In addition, the Intra-day Indicative Value (''IIV''), which is the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.[28] According to the Exchange, a third party market data provider will calculate the IIV for the Fund. The third party market data provider may use market quotes if available or may fair value securities against proxies (such as swap or yield curves).

With respect to specific derivatives:

• NDFs and foreign forward currency contracts may be valued intraday using market quotes, or another proxy as determined to be appropriate by the third party market data provider.

• Futures may be valued intraday using the relevant futures exchange data, or another proxy as determined to be appropriate by the third party market data provider.

• CDS and CDS indices swaps may be valued using intraday data from market

[23] The Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund's first full calendar year of performance.

[24] To mitigate leveraging risk, the Adviser will segregate or ''earmark'' liquid assets or otherwise cover the transactions that may give rise to such risk.

[25] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[28] According to the Exchange, several major market data vendors display and/or make widely available IIVs taken from the CTA or other data feeds.

vendors, or based on underlying asset price, or another proxy as determined to be appropriate by the third party market data provider.

- Total return swaps may be valued intraday using the underlying asset price, or another proxy as determined to be appropriate by the third party market data provider.
- Exchange-listed options may be valued intraday using the relevant exchange data, or another proxy as determined to be appropriate by the third party market data provider.
- OTC options may be valued intraday through option valuation models (*e.g.,* Black-Scholes) or using exchange traded options as a proxy, or another proxy as determined to be appropriate by the third party market data provider.

On each business day, before commencement of trading in Shares in the Core Trading Session (normally, 9:30 a.m. to 4:00 p.m., Eastern Time or ''E.T.'') on the Exchange, the Adviser will disclose on the Fund's Web site the Disclosed Portfolio for the Fund as defined in NYSE Arca Equities Rule 8.600(c)(2) that will form the basis for the Fund's calculation of NAV at the end of the business day.[29] According to the Exchange, the Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. On a daily basis, the Adviser will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, index, or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value, or number of shares, contracts, or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

The NAV of Shares, under normal market conditions, will be calculated each business day as of the close of the Exchange, which is typically 4:00 p.m. E.T. On occasion, the Exchange will close before 4:00 p.m. E.T. When that happens, NAV will be calculated as of the time the Exchange closes.[30]

Price information for OTC common stocks (including certain OTC ADRs), preferred stocks, warrants, rights, and CVRs will be available from one or more major market data vendors or broker-dealers in the securities. Quotation information for OTC options, cash equivalents, swaps, money market funds, non-exchange-listed investment company securities (other than money market funds), Rule 144A securities, U.S. Government obligations, U.S. Government agency obligations, sovereign obligations, corporate debt, and reverse repurchase agreements may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements. The U.S. dollar value of foreign securities, instruments, and currencies can be derived by using foreign currency exchange rate quotations obtained from nationally recognized pricing services. Forwards and spot currency price information will be available from major market data vendors. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable,[31] and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which Shares of the Fund may be halted.

The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees. In addition, Commentary .06 to NYSE Arca Equities Rule 8.600 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio. The Exchange represents that the Adviser is not registered as a broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a fire wall with respect to such broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.[32] The Commission also notes that, pursuant to NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the ''Reporting Authority'' that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to

[29] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[30] Securities for which market quotations are readily available will generally be valued at their current market value. Other securities and assets, including securities for which market quotations are not readily available or market quotations are determined not to be reliable; or, if their value has been materially affected by events occurring after the close of trading on the exchange or market on which the security is principally traded but before the Fund's NAV is calculated, may be valued at fair value in accordance with policies and procedures adopted by the Trust's Board of Trustees. Fair value represents a good faith determination of the value of a security or other asset based upon specifically applied procedures. Fair valuation may require subjective determinations. *See* Notice, *supra* note 3, 81 FR at 44344 (describing additional details with respect to the Fund's NAV valuation methodology).

[31] These reasons may include: (1) The extent to which trading is not occurring in the securities or financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. With Respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.

[32] *See supra* note 12. The Exchange further notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[33]

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. The Exchange represents that that trading in the Shares will be subject to the existing trading surveillances administered by the Exchange as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[34]

The Exchange represents that it deems the Shares to be equity securities, thus rendering the trading of the Shares subject to the Exchange's existing rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following additional representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) The Exchange, or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, certain exchange-listed equity securities (including Depositary Receipts, ETFs, REITs, common and preferred stocks, common stock into which convertible securities can be converted, warrants, rights, certain futures, and certain exchange-traded options with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[35] FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine.

(5) Not more than 10% of the net assets of the Fund, in the aggregate, invested in equity securities (other than mutual fund shares) shall consist of equity securities, including common stock into which convertible securities can be converted and Depositary Receipts, whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. In addition, not more than 10% of the net assets of the Fund in the aggregate invested in futures contracts or exchange-traded options shall consist of futures contracts or options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(6) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in a Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated; (d) how information regarding the IIV and the Disclosed Portfolio is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information. The Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act.

(7) For initial and continued listing, the Fund must be in compliance with Rule 10A–3 under the Act.[36]

(8) Exchange-listed and traded common stocks, preferred stocks, warrants and rights of U.S. corporations, and U.S. REITs will be traded on U.S. national securities exchanges. In addition, no more than 10% of the net assets of the Fund will be invested in Depositary Receipts that are not exchange-listed, and the common stock into which convertible securities holdings can be converted will be exchange-traded.

(9) The ETFs in which the Fund may invest will be registered under the 1940 Act and include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). Such ETFs all will be listed and traded in the U.S. on registered exchanges. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (*e.g.,* 2X, –2X, 3X, or –3X) ETFs.

(10) The Adviser expects that, under normal market conditions, the Fund will invest at least 75% of its corporate debt securities in issuances that have at least $100,000,000 par amount outstanding in developed countries, or at least $200,000,000 par amount outstanding in emerging market countries.

(11) The Fund will limit its investments in currencies to those currencies with a minimum average daily foreign exchange turnover of USD $1 billion as determined by the BIS Triennial Central Bank Survey.

(12) The Fund may invest no more than 5% of its assets in equity and debt securities that are restricted securities (Rule 144A securities), in addition to Rule 144A securities deemed illiquid by the Adviser. In addition, under normal market conditions, the Fund may invest no more than 5% of its assets, in the aggregate, in OTC common stocks, preferred stocks, warrants, rights, and CVRs of U.S. and foreign corporations (including emerging market securities).

(13) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, consistent with Commission guidance. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of

[33] ''Reporting Authority'' is defined in NYSE Arca Equites Rule (c)(4).

[34] The Exchange represents that FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement, and the Exchange is responsible for FINRA's performance under this regulatory services agreement.

[35] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[36] *See* 17 CFR 240.10A–3.

liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

(14) The Fund's investments, including derivatives, will be consistent with the Fund's investment objective and will not be used to enhance leverage (although certain derivatives may result in leverage). That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).

(15) Investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies. To limit the potential risk associated with such transactions, the Fund will segregate or ''earmark'' assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged.[37]

The Exchange also represents that all statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares of the Fund on the Exchange.

[37] To mitigate leveraging risk, the Adviser will segregate or ''earmark'' liquid assets or otherwise cover the transactions that may give rise to such risk.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.[38] If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice,[39] Amendment Nos. 1, 2 and 3 to the proposed rule change,[40] and the Exchange's description of the Fund. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange on an initial and continued basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, is consistent with Section 6(b)(5) of the Act[41] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[42] that the proposed rule change (SR–NYSEArca–2016–82), as modified by Amendment Nos. 1, 2, and 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31683 Filed 12–29–16; 8:45 am]

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[38] The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will ''surveil'' for compliance with the continued listing requirements. *See, e.g.,* Securities Exchange Act Release No. 78005 (Jun. 7, 2016), 81 FR 38247 (Jun. 13, 2016) (SR–BATS–2015–100). In the context of this representation, it is the Commission's view that ''monitor'' and ''surveil'' both mean ongoing oversight of a fund's compliance with the continued listing requirements. Therefore, the Commission does not view ''monitor'' as a more or less stringent obligation than ''surveil'' with respect to the continued listing requirements.

[39] *See supra* note 3.

[40] *See supra* notes 4, 7, and 8.

[41] 15 U.S.C. 78f(b)(5).

[42] *Id.*

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79687; File No. SR–NASDAQ–2016–183]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Shorten the Settlement Cycle From T+3 to T+2

December 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Nasdaq Rules 11140 (Transactions in Securities ''Ex-Dividend,'' ''Ex-Rights'' or ''Ex-Warrants''), 11150 (Transactions ''Ex-Interest'' in Bonds Which Are Dealt in ''Flat''), 11210 (Sent by Each Party), 11320 (Dates of Delivery), 11620 (Computation of Interest), and IM–11810 (Sample Buy-In Forms), to conform to the Commission's proposed amendment to SEA Rule 15c6–1(a) to shorten the standard settlement cycle for most broker-dealer transactions from three business days after the trade date (''T+3'') to two business days after the trade date (''T+2'') and the industry-led initiative to shorten the settlement cycle from T+3 to T+2.[3]

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78962 (September 28, 2016), 81 FR 69240 (October 5, 2016) (Amendment to Securities Transaction Settlement Cycle) (File No. S7–22–16) (''SEC Proposing Release'').

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

SEC Proposing Release

On September 28, 2016, the Commission proposed amending SEA Rule 15c6–1(a) to shorten the standard settlement cycle for most broker-dealer transactions from T+3 to T+2 on the basis that the shorter settlement cycle would reduce the risks that arise from the value and number of unsettled securities transactions prior to the completion of settlement, including credit, market, and liquidity risk directly faced by U.S. market participants.[4] The proposed rule amendment was published for comment in the **Federal Register** on October 5, 2016.[5]

Background

In 1995, the standard U.S. trade settlement cycle for equities, municipal and corporate bonds, and unit investment trusts, and financial instruments composed of these products was shortened from five business days after the trade date (''T+5'') to T+3.[6] Accordingly, Nasdaq and other self-regulatory organizations (''SROs'') amended their respective rules to conform to the T+3 settlement cycle.[7] Since that time, the SEC and the financial services industry have continued to explore the idea of shortening the settlement cycle even further.[8]

In April 2014, the Depository Trust & Clearing Corporation (''DTCC'') published its formal recommendation to shorten the standard U.S. trade settlement cycle to T+2 and announced that it would partner with market participants and industry organizations to devise the necessary approach and timelines to achieve T+2.[9]

In an effort to improve the overall efficiency of the U.S. settlement system by reducing the attendant risks in T+3 settlement of securities transactions, and to align U.S. markets with other major global markets that have already moved to T+2, DTCC, in collaboration with the financial services industry, formed an Industry Steering Committee (''ISC'') and an industry working group and sub-working groups to facilitate the move to T+2.[10] In June 2015, the ISC published a White Paper outlining the activities and proposed time frames that would be required to move to T+2 in the U.S.[11] Concurrently, the Securities Industry and Financial Markets Association (''SIFMA'') and the Investment Company Institute (''ICI'') jointly submitted a letter to SEC Chair White, expressing support of the financial services industry's efforts to shorten the settlement cycle and identifying SEA Rule 15c6–1(a) and several SRO rules that they believed would require amendments for an effective transition to T+2.[12] In March 2016, the ISC announced the industry target date of September 5, 2017 for the transition to a T+2 settlement cycle to occur.[13]

Proposed Rule Change

In light of the SEC Proposing Release that would amend SEA Rule 15c6–1(a) to require standard settlement no later than T+2 and similar proposals from other SROs,[14] Nasdaq is proposing changes to its rules pertaining to securities settlement by, among other things, amending the definition of ''standard'' settlement as occurring on T+2. SEA Rule 15c6–1(a) currently establishes ''standard'' settlement as occurring no later than T+3 for all securities, other than an exempt security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills.[15] Nasdaq is proposing changes to rules pertaining to securities settlement to support the industry-led initiative to shorten the standard settlement cycle to two business days. Most of the rules that Nasdaq has identified for these changes are successors to provisions under the legacy NASD Rules of Fair Practice and NASD Uniform Practice Code (''UPC'') that were amended when the Commission adopted SEA Rule 15c6–1(a), which established T+3 as the standard settlement cycle.[16] As such, Nasdaq is proposing to amend Nasdaq Rules 11140 (Transactions in Securities ''Ex-Dividend,'' ''Ex-Rights'' or ''Ex-Warrants''), 11150 (Transactions ''Ex-Interest'' in Bonds Which Are Dealt in ''Flat''), 11320 (Dates of Delivery), and 11620 (Computation of Interest). In addition, Nasdaq is proposing to amend

[4] *See* Securities and Exchange Commission Press Release 2016–200: ''SEC Proposes Rule Amendment to Expedite Process for Settling Securities Transactions'' (September 28, 2016).

[5] *See supra* note 3.

[6] In 1993, the Commission adopted SEA Rule 15c6–1 which became effective in 1995. *See* Securities Exchange Act Release Nos. 33023 (October 6, 1993), 58 FR 52891 (October 13, 1993) and 34952 (November 9, 1994), 59 FR 59137 (November 16, 1994). SEA Rule 15c6–1(a) provides, in relevant part, that ''a broker or dealer shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.'' 17 CFR 240.15c6–1(a). Although not covered by SEA Rule 15c6–1, in 1995, the Commission approved the Municipal Securities Rulemaking Board's rule change requiring transactions in municipal securities to settle by T+3. *See* Securities Exchange Act Release No. 35427 (February 28, 1995), 60 FR 12798 (March 8, 1995) (Order Approving File No. SR–MSRB–94–10).

[7] *See, e.g.,* Securities Exchange Act Release No. 35507 (March 17, 1995), 60 FR 15616 (March 24, 1995) (Order Approving File No. SR–NASD–94–56); Securities Exchange Act Release No. 35506 (March 17, 1995), 60 FR 15618 (March 24, 1995) (Order Approving File No. SR–NYSE–94–40); and Securities Exchange Act Release No. 35553 (March 31, 1995), 60 FR 18161 (April 10, 1995) (Order Approving File No. SR–Amex–94–57).

[8] *See, e.g.,* Securities Industry Association (''SIA''), ''SIA T+1 Business Case Final Report'' (July 2000); Concept Release: Securities Transactions Settlement, Securities Exchange Act Release No. 49405 (March 11, 2004), 69 FR 12922 (March 18, 2004); and Depository Trust & Clearing Corporation, ''Proposal to Launch a New Cost-Benefit Analysis on Shortening the Settlement Cycle'' (December 2011).

[9] *See* DTCC, ''DTCC Recommends Shortening the U.S. Trade Settlement Cycle'' (April 2014).

[10] The ISC includes, among other participants, DTCC, the Securities Industry and Financial Markets Association and the Investment Company Institute.

[11] *See* ''Shortening the Settlement Cycle: The Move to T+2'' (June 18, 2015).

[12] *See* Letter from ICI and SIFMA to Mary Jo White, Chair, SEC, dated June 18, 2015. *See* also Letter from Mary Jo White, Chair to Kenneth E. Bentsen, Jr., President and CEO, SIFMA, and Paul Schott Stevens, President and CEO, ICI, dated September 16, 2015 (expressing her strong support for industry efforts to shorten the trade settlement cycle to T+2 and commitment to developing a proposal to amend SEA Rule 15c6–1(a) to require standard settlement no later than T+2).

[13] *See* ISC Media Alert: ''US T+2 ISC Recommends Move to Shorter Settlement Cycle On September 5, 2017'' (March 7, 2016).

[14] *See, e.g.,* Securities Exchange Act Release No. 77744 (April 29, 2016), 81 FR 26851 (May 4, 2016) (Order Approving File No. SR–MSRB–2016–04).

[15] *See supra* note 7.

[16] The legacy NASD rules that were changed to conform to the move from T+5 to T+3 included Section 26 (Investment Companies) of the Rules of Fair Practice, and Section 5 (Transactions in Securities ''Ex-Dividend,'' ''Ex-Rights'' or ''Ex-Warrants''), Section 6 (Transactions ''Ex-Interest'' in Bonds Which Are Dealt in ''Flat''), Section 12 (Dates of Delivery), Section 46 (Computation of Interest) and Section 64 (Acceptance and Settlement of COD Orders) of the UPC. *See* Securities Exchange Act Release No. 35507 (March 17, 1995), 60 FR 15616 (March 24, 1995) (Order Approving File No. SR–NASD–94–56). *See also* Notice to Members 95–36 (May 1995) (enumerating the various sections under the NASD Rules of Fair Practice and UPC that were amended to implement T+3 settlement for securities transactions).

Nasdaq Rules 11210 (Sent by Each Party) and IM–11810 (Sample Buy-In Forms) to conform provisions, where appropriate, to the T+2 settlement cycle.[17]

The details of the proposed rule change are described below.

(1) Nasdaq Rule 11140 (Transactions in Securities ''Ex-Dividend,'' ''Ex- Rights'' or ''Ex-Warrants'')

Rule 11140(b)(1) provides that for dividends or distributions, and the issuance or distribution of warrants, that are less than 25 percent of the value of the subject security, if definitive information is received sufficiently in advance of the record date, the date designated as the ''ex-dividend date'' shall be the second business day preceding the record date if the record date falls on a business day, or the third business day preceding the record date if the record date falls on a day designated by Nasdaq Regulation as a non-delivery date. Nasdaq is proposing to shorten the time frames in Rule 11140(b)(1) by one business day.

(2) Nasdaq Rule 11150 (''Ex-Interest'' in Bonds Which Are Dealt in ''Flat'')

Rule 11150(a) prescribes the manner for establishing ''ex-interest dates'' for transactions in bonds or other similar evidences of indebtedness which are traded ''flat.'' Such transactions are ''ex-interest'' on the second business day preceding the record date if the record date falls on a business day, on the third business day preceding the record date if the record date falls on a day other than a business day, or on the third business day preceding the date on which an interest payment is to be made if no record date has been fixed. Nasdaq is proposing to shorten the time frames in Rule 11150(a) by one business day.

(3) Nasdaq Rule 11210 (Sent by Each Party)

Paragraphs (c) and (d) of Rule 11210 set forth the ''Don't Know'' (''DK'') voluntary procedures for using ''DK Notices'' or other forms of notices, respectively. Depending upon the notice used, a confirming member may follow the ''DK'' procedures when it sends a comparison or confirmation of a trade (other than one that clears through the National Securities Clearing Corporation (''NSCC'') or other registered clearing agency), but does not receive a comparison or confirmation or a signed ''DK'' from the contra-member by the close of four business days following the trade date of the transaction (''T+4''). The procedures generally provide that after T+4, the confirming member shall send a ''DK Notice'' (or similar notice) to the contra-member. The contra-member then has four business days after receipt of the confirming member's notice to either confirm or ''DK'' the transaction.

Nasdaq is proposing to amend paragraphs (c) and (d) of Rule 11210 to provide that the ''DK'' procedures may be used by the confirming member if it does not receive a comparison or confirmation or signed ''DK'' from the contra-member by the close of one business day following the trade date of the transaction, rather than the current T+4.[18] In addition, Nasdaq is proposing amendments to paragraphs (c)(2)(A), (c)(3), and (d)(5) of Rule 11210 to adjust the time in which a contra-member has to respond to a ''DK Notice'' (or similar notice) from four business days after the contra-member's receipt of the notice to two business days.

(4) Nasdaq Rule 11320 (Dates of Delivery)

Rule 11320 prescribes delivery dates for various transactions. Paragraph (b) states that for a ''regular way'' transaction, delivery must be made on, but not before, the third business day after the date of the transaction. Nasdaq is proposing to amend Rule 11320(b) to change the reference to third business day to second business day. Paragraph (c) provides that in a ''seller's option'' transaction, delivery may be made by the seller on any business day after the third business day following the date of the transaction. Nasdaq is proposing to amend Rule 11320(c) to change the reference to third business day to second business day.

(5) Nasdaq Rule 11620 (Computation of Interest)

In the settlement of contracts in interest-paying securities other than for cash, Rule 11620(a) requires the calculation of interest at the rate specified in the security up to, but not including, the third business day after the date of the transaction. The proposed amendment would shorten the time frame to the second business day. In addition, the proposed amendment would make non-substantive technical changes to the title of paragraph (a).

(6) Nasdaq Rule IM–11810 (Sample Buy-In Forms)

Rule IM–11810(i)(1)(A) sets forth the fail-to-deliver and liability notice procedures where a securities contract is for warrants, rights, convertible securities or other securities which have been called for redemption; are due to expire by their terms; are the subject of a tender or exchange offer; or are subject to other expiring events such as a record date for the underlying security and the last day on which the securities must be delivered or surrendered is the settlement date of the contract or later.[19]

Under Rule IM–11810(i)(1)(A), the receiving member delivers a liability notice to the owing counterparty. The liability notice sets a cutoff date for the delivery of the securities by the counterparty and provides notice to the counterparty of the liability attendant to its failure to deliver the securities in time. If the owing counterparty, or delivering member, delivers the securities in response to the liability notice, it has met its delivery obligation. If the delivering member fails to deliver the securities on the expiration date, it will be liable for any damages that may accrue thereby.

Rule IM–11810(i)(1)(A) further provides that when both parties to a contract are participants in a registered clearing agency that has an automated liability notification service, transmission of the liability notice must be accomplished through such system.[20] When the parties to a contract are not both participants in a registered clearing agency that has an automated liability notification service, such notice must be issued using written or comparable

[17] Nasdaq Rules 11210 and IM–11810 are successors to legacy NASD UPC Section 9 (Sent by Each Party) and 59 (''Buying-in''), respectively, which remained unchanged during the transition from T+5 to T+3. *See supra* note 17 [sic].

[18] As stated above, the time frames in Rule 11210 remained unchanged during the transition from T+5 to T+3. In light of the industry-led initiative to shorten the standard settlement cycle and the SEC Proposing Release to amend SEA Rule 15c6–1(a) to establish T+2 as the standard settlement for most broker dealer transactions, the Exchange believes that the current time frames in Rule 11210 are more protracted than necessary even in a T+3 environment and as such, the Exchange is proposing to amend these time frames to reflect more current industry practices.

[19] Rule IM–11810(i) is the successor to legacy NASD UPC Section 59(i) (Failure to Deliver and Liability Notice Procedures). When this provision was added to NASD's existing close-out procedures in 1984, it was drafted to be similar to the liability notice provisions adopted by the NSCC so that members that were also participants in NSCC could use the same procedures for both ex-clearing and NSCC cleared transactions, thereby simplifying members' back office procedures.

[20] In 2007, NYSE Rule 180 was amended to require that when the parties to a failed contract were both participants in a registered clearing agency that had an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver and the contract was to be settled through the facilities of that registered clearing agency, the transmission of the liability notification must be accomplished through the use of the registered clearing agency's automated liability notification system. *See* Securities Exchange Act Release No. 55132 (January 19, 2007), 72 FR 3896 (January 26, 2007) (Order Approving File No. SR–NYSE–2006–57).

electronic media having immediate receipt capabilities not later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by the Rule.[21]

Given the proposed shortened settlement cycle, Nasdaq is proposing to amend Rule IM–11810(i)(1)(A) in situations where both parties to a contract are not participants of a registered clearing agency with an automated notification service, by extending the time frame for delivery of the liability notice. Rule IM–11810(i)(1)(A) would be amended to provide that in such cases, the receiving member must send the liability notice to the delivering member as soon as practicable but not later than two hours prior to the cutoff time set forth in the instructions on a specific offer or other event to obtain the protection provided by the Rule. Nasdaq believes that extending the time given to the receiving member to transmit liability notifications will maintain the efficiency of the notification process while mitigating the possible overuse of such notifications.

Currently, Nasdaq understands that the identity of the counterparty, or delivering member, becomes known to the receiving member by mid-day on the business day after trade date (''T+1''), and by that time, the receiving member will generally also know which transactions are subject to an event identified in Rule IM–11810(i)(1)(A) that would prompt the receiving member to issue a liability notice to the delivering member. Nasdaq believes that the receiving member regularly issues liability notices to the seller or other parties from which the securities involved are due when the security is subject to an event identified in Rule IM–11810(i)(1)(A) during the settlement cycle as a way to mitigate the risk of a potential fail-to-deliver. In the current T+3 settlement environment, the one business day time frame gives the receiving member the requisite time needed to identify the parties involved and undertake the liability notification process.

However, Nasdaq believes that the move to a T+2 settlement environment will create inefficiencies in the liability notification process under Rule IM–11810(i)(1)(A) when both parties to a contract are not participants in a registered clearing agency with an automated notification service. The shorter settlement cycle, with the loss of one business day, would not afford the receiving member sufficient time to: (1) ascertain that the securities are subject to an event listed in Rule IM–11810(i)(1)(A) during the settlement cycle; (2) identify the delivering member and other parties from which the securities involved are due; and (3) determine the likelihood that such parties may fail to deliver. Where the receiving member has sufficient time (*e.g.,* one business day after), it can transmit liability notices as needed to the right parties. However, as a consequence of the shortened settlement cycle, the receiving member would be compelled to issue liability notices proactively to all potentially failing parties as a matter of course to preserve its rights against such parties without the benefit of knowing which transactions would actually necessitate the delivery of such notice. This would create a significant increase in the volume of liability notices members send and receive, many of which may be unnecessary. Members would then have to manage this overabundance of liability notices, increasing the possibility of errors, which would adversely impact the efficiency of the process. Therefore, Nasdaq believes its proposal to extend the time for the receiving member to deliver a liability notice when the parties to a contract are not both participants in a registered clearing agency with an automated notification service would help alleviate the potential burden on the liability notification process in a T+2 settlement environment.

Implementation

Nasdaq will announce the effective date of the proposed rule change in an Equity Regulatory Alert, which date would correspond with the industry-led transition to a T+2 standard settlement, and the effective date of the Commission's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2.[22]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[23] in general, and furthers the objectives of Section 6(b)(5) of the Act,[24] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change supports the supports [sic] the industry-led initiative to shorten the settlement cycle to two business days. Moreover, the proposed rule change is consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. Nasdaq believes that the proposed rule change will provide the regulatory certainty to facilitate the industry-led move to a T+2 settlement cycle. As noted herein, upon approval, Nasdaq will announce the effective date of the proposed rule change in an Equity Regulatory Alert, which date would correspond with the industry-led transition to a T+2 standard settlement, and the effective date of the Commission's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change makes changes to rules pertaining to securities settlement and is intended to facilitate the implementation of the industry-led transition to a T+2 settlement cycle. Moreover, the proposed rule changes are consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. Accordingly, Nasdaq believes that the proposed changes do not impose any burdens on the industry in addition to those necessary to implement amendments to SEA Rule 15c6–1(a) as described and enumerated in the SEC Proposing Release.[25]

These conforming changes include changes to rules that specifically establish the settlement cycle as well as rules that establish time frames based on settlement dates, including for certain post-settlement rights and obligations. Nasdaq believes that the proposed changes set forth in the filing are necessary to support a standard settlement cycle across the U.S. for secondary market transactions in equities, corporate and municipal bonds, unit investment trusts, and financial instruments composed of these

[21] While Rule IM–11810 has undergone amendments over the years, the one-day time frame in paragraph (j) has remained unchanged. The one-day time frame also appears in comparable provisions of other SROs. *See, e.g.,* NSCC Rules & Procedures, Procedure X (Execution of Buy-Ins) (Effective August 10, 2016); NYSE Rule 282.65 (Fail to Deliver and Liability Notice Procedures). *See* also infra note 28 and accompanying text.

[22] *See supra* note 3.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] *See supra* note 3.

products, among other things.[26] A standard U.S. settlement cycle for such products is critical for the operation of fair and orderly markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

A previous version of the proposed rule change was published for comment in Equity Regulatory Alert 2016–4 on May 18, 2016. Two comments were received in response to the Regulatory Alert.[27] A copy of the Regulatory Alert is attached as Exhibit 2a. A list of comments is attached as Exhibit 2b [sic] and copies of the comment letters received in response to the Regulatory Notice are attached as Exhibits 2c [sic].

Both of the letters received expressed support for the industry led move to T+2 stating, among other benefits, that the move will align U.S. markets with international markets that already work in the T+2 environment, improve the overall efficiency and liquidity of the securities markets, and the stability of the financial system by reducing counterparty risk and pro-cyclical and liquidity demands, and decreasing clearing capital requirements. SIFMA also provided their view on the proposed amendments to two rules under the Nasdaq Rule 11800 Series (Buying In).

Nasdaq Rule IM–11810(i)—Sample Buy-In Forms

In its comment letter, SIFMA raised a concern with the one-day time frame in Rule IM–11810(i)(1)(A), asserting that the requirement for the delivering member to deliver a liability notice to the receiving member no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by the Rule may no longer be appropriate in a T+2 environment in some situations such as where the delivery obligation is transferred to another party as a result of continuous net settlement, settlements outside of the NSCC, and settlements involving a third party that is not a Nasdaq member firm. SIFMA noted that NYSE Rule 180 (Failure to Deliver) includes a similar requirement for NYSE member firms that are participants in a registered clearing agency to transmit liability notification through an automated notification service and proposed amending Rule IM–11810(i)(1)(A) to omit the reference to a notification time frame, which would align with NYSE Rule 180.[28] In the alternative, SIFMA proposed amending Rule IM–11810(i)(1)(A) to require that the liability notice be delivered in a ''reasonable amount of time'' ahead of the settlement obligation in light of facts and circumstances. SIFMA maintained that under either proposed amendment to paragraph (j), the delivering member would be liable for any damages caused by its failure to deliver in a timely fashion.

While Nasdaq did not initially propose amendments to Rule IM–11810 for the T+2 initiative,[29] in light of SIFMA's concern regarding Rule IM–11810(i)(1)(A), Nasdaq is proposing to amend the Rule to provide that, where both parties to a contract are not participants of a registered clearing agency with an automated notification service, the receiving member must send the liability notice to the delivering member as soon as practicable but not later than two hours prior to the cutoff time set forth in the instructions on a specific offer or other event to obtain the protection provided by the Rule.[30]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–183 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–183. 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–

[26] *See supra* note 3.

[27] *See* Letter from Martin A. Burns, Chief Industry Operations Officer, Investment Company Institute to John Zecca, Senior Vice President, Marketwatch dated June 8, 2016 (''ICI''); letter from Thomas F. Price, Managing Director, Operations, Securities Industry and Financial Markets Association, to John Zecca, Senior Vice President Market Watch dated June 8, 2016 (''SIFMA'').

[28] See NYSE Rule 180 (Failure to Deliver) providing in part that ''[w]hen the parties to a contract are both participants in a registered clearing agency which has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver and that contract was to be settled through the facilities of said registered clearing agency, the transmission of the liability notification must be accomplished through use of said automated notification service.'' Nasdaq notes that NYSE Rule 180 does not address the transmission of the liability notification for parties to a contract that are not both participants in a registered clearing agency (or non-participants). The transmission of the liability notification for non-participants is addressed under NYSE Rule 282.65 (Failure to Deliver and Liability Notice Procedures). *See supra* note 22.

[29] *See* Equity Regulatory Alert 2016–4.

[30] Nasdaq expects similar amendments to other comparable SRO provisions in NYSE Rule 282.65 (Fail to Deliver and Liability Notice Procedures) and FINRA Rule 11810 (Buying-in), and NSCC Rules & Procedures, Procedure X (Execution of Buy-Ins) to address SIFMA's concern about the one-day notification time frame.

NASDAQ–2016–183 and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31679 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79685; File No. SR–MIAX–2016–48]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify the Exchange's Other Market Participant Transaction Fees

December 23, 2016.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2016, Miami International Securities Exchange LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to increase the fees charged to Exchange Members [3] for simple and complex order executions in standard options classes in the Penny Pilot Program [4] (''Penny Pilot'') for Firms.[5] Specifically, the Exchange proposes to increase the fees charged to Members for simple and complex order executions in standard options in the Penny Pilot for Firms from $0.45 to $0.47 per contract executed. The Exchange believes that this proposed fee increase is reasonable, equitable and not unfairly discriminatory because it makes the transaction fee consistent among the Exchange's market participants who are not Priority Customers [6] or MIAX Options Market Makers [7] by charging all such participants the same rate for transactions for simple and complex order executions in standard options in the Penny Pilot. The Exchange has historically kept the Firm transaction fee at a lower rate than the transaction fee for other market participants who are not Priority Customers or MIAX Options Market Makers, primarily as a competitive measure to attract Firm order flow. The Exchange believes that this measure is no longer necessary, and thus believes it is appropriate to increase the Firm transaction fee rate to the same rate charged for other market participants who are not Priority Customers or MIAX Options Market Makers. This proposed change brings the Exchange's Firm transaction fee in line and comparable with similar fees of other competing options exchanges.[8]

In addition, the Exchange proposes to continue to offer Members the opportunity to reduce their Firm transaction fees by $0.02 per executed contract resulting from simple order executions in standard options in the Penny Pilot.[9] In order to accomplish this reduction, any Member, including any Affiliate [10] of the Member, that qualifies for the Priority Customer Rebate Program (''PCRP'') volume tiers 3 or higher,[11] will be assessed a reduced Firm transaction fee of $0.45 per contract resulting from simple order executions in standard options in the Penny Pilot. The Exchange believes that this continuing incentive will encourage Members to send their Firm order flow to the Exchange.

The Exchange proposes to implement the proposed change to the Fee Schedule effective as of January 1, 2017.

2. Statutory Basis

The Exchange proposes to amend its Fee Schedule to increase the fees charged to Exchange Members [12] for simple and complex order executions in standard options classes in the Penny Pilot Program [13] (''Penny Pilot'') for

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[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release Nos. 78080 (June 15, 2016), 81 FR 40377 (June 21, 2016) (SR–MIAX–2016–16); 79432 (November 30, 2016), 81 FR 87990 (December 6, 2016) (SR–MIAX–2016–45).

[5] A ''Firm'' transaction fee is assessed on a MIAX Options Electronic Exchange Member ''EEM'' that enters an order that is executed for an account identified by the EEM for clearing in the Options Clearing Corporation (''OCC'') ''Firm'' range. *See* Fee Schedule, Section 1)a)ii.

[6] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). A ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[7] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100. A Directed Order Lead Market Maker (''DLMM'') and Directed Primary Lead Market Maker (''DPLMM'') is a party to a transaction being allocated to the LMM or PLMM and is the result of an order that has been directed to the LMM or PLMM. *See* Fee Schedule note 2.

[8] *See,* for example, NASDAQ PHLX LLC Pricing Schedule, Section II.

[9] *See* Securities Exchange Release Nos. 72988 (September 4, 2014), 79 FR 53808 (September 10, 2014) (SR–MIAX–2014–46); 72989 (September 4, 2014), 79 FR 53792 (September 10, 2014) (SR–MIAX–2014–47); 74478 (March 11, 2015), 80 FR 13938 (March 17, 2015) (SR–MIAX–2015–16); 76674 (December 17, 2015), 80 FR 79986 (December 23, 2015) (SR–MIAX–2015–70); 79157 (October 28, 2016), 81 FR 75885 (November 1, 2016) (SR–MIAX–2016–38).

[10] For purposes of the MIAX Options Fee Schedule, the term ''Affiliate'' means an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A (''Affiliate''). *See* Fee Schedule note 1.

[11] Under the PCRP, a Member receives certain transaction fee discounts provided the Member meets certain percentage thresholds in a month as described in the PCRP table. *See* Fee Schedule, Section (1)(a)(iii).

[12] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[13] *See* Securities Exchange Act Release Nos. 78080 (June 15, 2016), 81 FR 40377 (June 21, 2016)

Firms.[14] Specifically, the Exchange proposes to increase the fees charged to Members for simple and complex order executions in standard options in the Penny Pilot for Firms from $0.45 to $0.47 per contract executed. The Exchange believes that this proposed fee increase is reasonable, equitable and not unfairly discriminatory because it makes the transaction fee consistent among the Exchange's market participants who are not Priority Customers [15] or MIAX Options Market Makers [16] by charging all such participants the same rate for transactions for simple and complex order executions in standard options in the Penny Pilot. The Exchange has historically kept the Firm transaction fee at a lower rate than the transaction fee for other market participants who are not Priority Customers or MIAX Options Market Makers, primarily as a competitive measure to attract Firm order flow. The Exchange believes that this measure is no longer necessary, and thus believes it is appropriate to increase the Firm transaction fee rate to the same rate charged for other market participants who are not Priority Customers or MIAX Options Market Makers. This proposed change brings the Exchange's Firm transaction fee in line and comparable with similar fees of other competing options exchanges.[17]

In addition, the Exchange proposes to continue to offer Members the opportunity to reduce their Firm transaction fees by $0.02 per executed contract resulting from simple order executions in standard options in the Penny Pilot.[18] In order to accomplish this reduction, any Member, including any Affiliate [19] of the Member, that qualifies for the Priority Customer Rebate Program (''PCRP'') volume tiers 3 or higher,[20] will be assessed a reduced Firm transaction fee of $0.45 per contract resulting from simple order executions in standard options in the Penny Pilot. The Exchange believes that this continuing incentive will encourage Members to send their Firm order flow to the Exchange.

The Exchange proposes to implement the proposed change to the Fee Schedule effective as of January 1, 2017.

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 proposal is similar to the transaction fees found on other options exchanges; therefore, the Exchange believes the proposal is consistent with robust competition by increasing the intermarket competition for order flow from market participants. The proposal aligns the fees of market participants who are not Priority Customers or MIAX Options Market Makers on the Exchange, as well as aligns such fees assessable to Members to those charged by other exchanges for the same market participant type. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposal reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[21] and Rule 19b–4(f)(2) [22] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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–MIAX–2016–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2016–48. 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

(SR–MIAX–2016–16); 79432 (November 30, 2016), 81 FR 87990 (December 6, 2016) (SR–MIAX–2016–45).

[14] A ''Firm'' transaction fee is assessed on a MIAX Options Electronic Exchange Member ''EEM'' that enters an order that is executed for an account identified by the EEM for clearing in the Options Clearing Corporation (''OCC'') ''Firm'' range. *See* Fee Schedule, Section 1)a)ii.

[15] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). A ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[16] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100. A Directed Order Lead Market Maker (''DLMM'') and Directed Primary Lead Market Maker (''DPLMM'') is a party to a transaction being allocated to the LMM or PLMM and is the result of an order that has been directed to the LMM or PLMM. *See* Fee Schedule note 2.

[17] *See,* for example, NASDAQ PHLX LLC Pricing Schedule, Section II.

[18] *See* Securities Exchange Release Nos. 72988 (September 4, 2014), 79 FR 53808 (September 10, 2014) (SR–MIAX–2014–46); 72989 (September 4, 2014), 79 FR 53792 (September 10, 2014) (SR–MIAX–2014–47); 74478 (March 11, 2015), 80 FR 13938 (March 17, 2015) (SR–MIAX–2015–16); 76674 (December 17, 2015), 80 FR 79986 (December 23, 2015) (SR–MIAX–2015–70); 79157 (October 28, 2016), 81 FR 75885 (November 1, 2016) (SR–MIAX–2016–38).

[19] For purposes of the MIAX Options Fee Schedule, the term ''Affiliate'' means an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A (''Affiliate''). *See* Fee Schedule note 1.

[20] Under the PCRP, a Member receives certain transaction fee discounts provided the Member meets certain percentage thresholds in a month as described in the PCRP table. *See* Fee Schedule, Section (1)(a)(iii).

[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] 17 CFR 240.19b–4(f)(2).

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2016–48, and should be submitted on or before January 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31677 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79684; File No. SR–NSX–2016–16]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change in Connection With the Proposed Acquisition of the Exchange by NYSE Group, Inc.

December 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on December 22, 2016, National Stock Exchange, Inc. (''NSX®'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'') [3] and Rule 19b–4 thereunder,[4] National Stock Exchange, Inc. (''NSX'' or the ''Exchange'') proposes, in connection with the proposed acquisition of the Exchange by NYSE Group, Inc. (''NYSE Group''), to: (1) Amend the Amended and Restated Certificate of Incorporation of National Stock Exchange, Inc. (''Certificate of Incorporation''), and the Third Amended and Restated Bylaws of National Stock Exchange, Inc. (''Bylaws'') and make certain conforming amendments to the cover page, Table of Contents and first page of the Exchange's rulebook as well as Rules 2.10, 5.7, and the Schedule of Fees and Rebates; and (2) amend certain organizational documents of NYSE Group, NYSE Holdings LLC (''NYSE Holdings''), Intercontinental Exchange Holdings, Inc. (''ICE Holdings''), and Intercontinental Exchange, Inc. (''ICE'').

The text of the proposed rule change is available on the Exchange's Web site at *www.nsx.com,* at the Exchange's principal office, and at the Commission's public reference room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 14, 2016, ICE entered into an agreement with the Exchange pursuant to which its wholly-owned subsidiary NYSE Group would acquire all of the outstanding capital stock of the Exchange (the ''Acquisition''). As a result of the Acquisition, the Exchange would be renamed NYSE National, Inc. (''NYSE National'') and would be operated as a wholly-owned subsidiary of NYSE Group. NYSE Group is a wholly-owned subsidiary of NYSE Holdings, which is in turn 100% owned by ICE Holdings. ICE, a public company listed on the New York Stock Exchange LLC (the ''NYSE''), owns 100% of ICE Holdings.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

Following the Acquisition, the Exchange would continue to be registered as a national securities exchange and as a separate self-regulatory organization (''SRO''). As such, the Exchange would continue to have separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of the three other registered national securities exchanges and SROs owned by NYSE Group, namely, the NYSE, NYSE MKT LLC (''NYSE MKT''), and NYSE Arca, Inc. (''NYSE Arca'') (together, the ''NYSE Exchanges'').

In connection with the Acquisition and as discussed more fully below, the Exchange proposes to amend its Certificate of Incorporation and Bylaws and make certain conforming amendments to the headings on the cover page, Table of Contents and first page of the Exchange's rulebook as well as Rules 2.10, 5.7, and the Schedule of Fees and Rebates. Generally, the amendments would reflect the Exchange's proposed new ownership and, in certain cases, align the Exchange's governance provisions to those of other NYSE Exchanges that the Commission has already approved, as described in greater detail below.

The Exchange also proposes amendments to the following organizational documents of NYSE Group and its intermediary and ultimate parent entities:

- ICE bylaws and director independence policy,
- ICE Holdings bylaws and certificate of incorporation,
- NYSE Holdings operating agreement, and
- NYSE Group bylaws and certificate of incorporation.

These proposed changes would reflect the proposed new ownership of the Exchange by the NYSE Group, and, indirectly, ICE.[5]

The Exchange would effect the changes described herein following approval of this rule filing no later than February 28, 2017, on a date determined by its Board.

[5] The NYSE Exchanges describe these proposed revisions in the NYSE, NYSE MKT and NYSE Arca companion rule filings related to the Acquisition. *See* SR–NYSE–2016–90; SR–NYSEMKT–2016–122; SR–NYSEArca–2016–167.

Amendments to Exchange Certificate of Incorporation and Bylaws

In connection with the Acquisition, the Exchange proposes to make various revisions to its Certificate of Incorporation and Bylaws. Following consummation of the transaction, the Exchange would become part of a corporate family that would include four separate exchanges. Accordingly, the Exchange believes that it is important for each of the four exchanges to have a consistent approach to corporate governance. Therefore, to simplify and create greater consistency with the organizational documents and governance practices of the NYSE Exchanges, the Exchange proposes to revise certain provisions of its Certificate of Incorporation and Bylaws.[6]

The Exchange believes that the proposed changes to the Certificate of Incorporation and Bylaws are consistent with the requirements of the Exchange Act. Finally, in proposing these revisions to the Certificate of Incorporation and Bylaws, the Exchange emphasizes that it also believes that the proposed rule change is not inconsistent with the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Order, entered by the Commission on May 19, 2005 (the ''2005 Order'').[7]

Set forth below are the specific proposed changes to the Certificate of Incorporation and Bylaws.

Certificate of Incorporation

The Exchange proposes to make the following amendments to its Certificate of Incorporation.

- To reflect the Exchange's name change, it proposes to replace ''National Stock Exchange'' with ''NYSE National'' before the word ''Inc.'' in the heading, the preamble, Article First and in the signature block.
- In the preamble, the Exchange proposes to add (a) '', and February 18, 2015'' following ''December 30, 2011'' to reflect the last time the Certificate of Incorporation was restated, (b) a reference to Section 228 of the General Corporation Law of the State of Delaware.

The Exchange proposes to restructure and augment Article Third to conform the ''Purpose'' section to Article 3 of the certificate of incorporation of NYSE Arca.[8] Accordingly, under the ''Purpose'' heading following the word ''Third,'' the phrase ''purpose or'' before ''purposes'' would be replaced with ''nature of the business or'' and the phrase ''of the Corporation is'' would be replaced with ''to be conducted or promoted are:''. New sections (a) through (d), based on Article 3(a)–(d) of the certificate of incorporation of NYSE Arca, would also be added to the ''Purpose'' section to reflect the nature of the Exchange's business to be conducted or promoted.

Proposed subsection (a) would describe the first purpose of the Corporation as being to conduct and carry on the functions of an ''exchange,'' as that term is defined in the Exchange Act, and state that, in connection with managing the business and affairs of the Exchange, the Exchange Board shall consider applicable requirements for registration as a national securities exchange under Section 6(b) of the Exchange Act, including, without limitation, the requirements that (i) the rules of the Exchange shall be designed to protect investors and the public interest, and (ii) the Exchange shall be so organized and have the capacity to carry out the purposes of the Exchange Act and to enforce compliance by its members, as that term is defined in Section 3 of the Exchange Act (such statutory members being hereinafter referred to as the ''ETP Holders''), and persons associated with its ETP Holders, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. In addition, proposed subsection (a) would state that the rules of the Exchange may set forth provisions for the regulation of the conduct of ETP Holders, the dues and assessments payable by ETP Holders, the grounds for and the method of expulsion from the status as an ETP Holder and other termination of trading permits held by ETP Holders, the limitations upon or qualifications of the voting power of ETP Holders and such other matters pertaining to the ETP Holders, including the transfer of trading permits, as the Board shall from time to time determine.

Proposed subsection (b) would describe the second purpose as to maintain high standards of commercial honor and integrity among the Exchange's ETP Holders.

Proposed subsection (c) would describe the third purpose as to promote and inculcate just and equitable principles of trade and business.

Finally, proposed subsection (d) would reflect the current text of the ''Purpose'' section except that the ''t'' in ''to'' would be capitalized. Proposed subsection (d) would describe the fourth purpose as to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

- The Exchange proposes to amend the ''Authorized Stock'' section of the Certificate of Incorporation to indicate that NYSE Group would be the shareholder. Accordingly, the Exchange would delete the phrase ''At all times, a'' in the second sentence and begin the sentence with ''All.'' The Exchange would add ''issued and'' before ''outstanding'' and ''shares of'' after ''outstanding'' and before ''stock'' and replace the phrase ''owned by National Stock Exchange Holdings, Inc., a Delaware corporation.'' with ''held by NYSE Group, Inc., a corporation organized and existing under the Delaware General Corporation Law (''NYSE Group'').''
- The Exchange proposes to amend the ''Board of Directors'' section of the Certificate of Incorporation to replace ''ETP Holder Director'' with ''Non-Affiliated Director'' to reflect changes proposed in Section 3.2 of the Bylaws, which are described below.
- The Exchange proposes to amend the ''Bylaws'' section of the Certificate of Incorporation. In describing the effectiveness of changes to the Bylaws that require a rule filing, the Exchange proposes to replace the current formulation ''approved by or filed with'' with ''filed with or filed with and approved by,'' to reflect the fact that, while all changes to the Bylaws must be filed with the Commission, not all rule filings are approved by the Commission. Because ''Exchange Act'' would be defined in the new text in Article Third, the Exchange proposes to remove the definition in Article Seventh by deleting ''Securities'' before ''Exchange [sic] and the phrase ''Act of 1934, as amended (the 'Act').''

Bylaws

The Exchange proposes to make the following amendments to the Bylaws.

General

''Third'' would be changed to ''Fourth'' and ''National Stock Exchange'' would be replaced with ''NYSE National'' on the cover page

[6] Because NYSE Arca, a non-stock corporation organized under Delaware law, is the most similar to the Exchange in corporate organization and in its use of ''permit holders,'' as opposed to ''members,'' the Exchange has primarily relied on NYSE Arca as a precedent. The New York Stock Exchange and NYSE MKT are limited liability companies.

[7] *See* Securities Exchange Act Release No. 51714 (May 19, 2005).

[8] *See* Certificate of Incorporation of NYSE Arca, Article 3.

heading, the Table of Contents, and on the first page of the Bylaws.

Section 1.1 (Definitions)

The Exchange proposes to add and remove certain definitions. Most of the changes to the definitions relate to the proposed amendments to the composition of the Exchange Board in proposed Section 3.2, discussed below, to make the composition of the Board consistent with the make-up of the board of directors of NYSE Arca.[9] As part of these changes, the definitions of ''ETP Permit Holder Director,'' ''Independent Director,'' ''Industry Director'' and ''Non-Industry Director'' would be deleted, and definitions of ''Public Directors'' and ''Non-Affiliated Directors'' would be added to Section 1.1.

Currently, subsections F–H and J–M are marked ''reserved.'' Because under the proposed revision subsection (I) would be reserved, the Exchange proposes to amend the list of reserved subsections to read ''F.–M. Reserved.''. In current Section 1.1(E)(4), which defines ''Exchange'', ''NYSE National'' would replace ''National Stock Exchange.''

Article III (Board of Directors)

The Exchange proposes to restructure and amend Article III of the Bylaws governing the powers, composition, nomination and election of its Board to more closely align the Bylaws with those of the other NYSE Exchanges. To effect these changes, the Exchange proposes to restructure Article III, Section 3.2 (General Composition) of the Bylaws, as follows.

The Bylaws currently provide that the Board is composed of between 7 and 25 directors, the exact number of which is determined by the Board. The Exchange proposes to amend Section 3.2 so that the number of directors would be determined from time to time by the stockholders, provided that the Board must meet the composition requirements in the Bylaws. This change would be consistent with the operating agreements of the NYSE and NYSE MKT, which both provide that the number of directors is determined by the member, provided that the boards of directors meet the composition requirements set out in the operating agreement.[10]

In addition, the Exchange proposes to make the composition of the Board consistent with the make-up of the board of directors of NYSE Arca and its subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities'').[11] Accordingly, the Exchange proposes to replace Section 3.2(a), (b) and (c) with new subsections (a)–(d), which are substantially similar to Section 3.02(a)–(c) and (f) of the NYSE Arca Bylaws.

New paragraph (a) would require that the Board be made up as follows:

(1) At least fifty percent (50%) of the directors would be persons from the public and would not be, or be affiliated with, a broker-dealer in securities or employed by, or involved in any material business relationship with, the Exchange or its affiliates (''Public Directors''); and

(2) at least twenty percent (20%) of the directors would consist of individuals nominated by the ETP Holders of the Exchange (''Non-Affiliated Directors'').

The Exchange proposes that subsection (a) retain the provision from current subsection (b) that the term of office of a director shall not be affected by any decrease in the authorized number of directors.

Proposed new subsection (b) would provide that nominees for a director position shall provide such information as is reasonably necessary to serve as the basis for a determination of the nominee's qualifications as a director, and that the Secretary shall make such determination concerning the nominee's qualifications.

Proposed subsection (c) would provide that at the first annual meeting and at each subsequent annual meeting of the stockholders, except as otherwise provided by the Bylaws, the stockholders would elect directors to serve until the next annual meeting or until their successors are elected and qualified.

Proposed new subsection (d) would specify that, except as otherwise provided in the Bylaws or its Rules, the stockholders shall nominate directors for election at the annual meeting of the stockholders and that such nominations shall comply with the Rules and the Bylaws.

Current subsection (d) would become new proposed subsection (e).[12]

Second, the Exchange proposes to replace current Article III, Section 3.4 with text from Section 3.02(e) of the NYSE Arca Bylaws. The proposed provision would be renumbered as Section 3.3, which is currently marked ''Reserved.'' Proposed Section 3.3 would provide that each director shall hold office for a term that expires at the annual meeting of the stockholders next following his or her election, provided that if he or she is not re-elected and his or her successor is not elected and qualified at the meeting and there remains a vacancy on the Board, he or she shall continue to serve until his or her successor is elected and qualified or until his or her earlier death, resignation or removal. Proposed Section 3.3 would also provide that a director may serve for any number of terms, consecutive or otherwise. It would replace the current Section 3.4, which breaks out the term provision by category of director.

Third, current Article III, Section 3.5 (Nomination and Election) would become new Section 3.4, and would incorporate the NYSE Arca process for nominating Non-Affiliate Directors.[13]

The Exchange proposes to retain current subsection (a), but because it proposes to consolidate the ETP Holder Director Nominating Committee and Governance and Nominating Committee into one committee, the ''Nominating Committee,'' it would accordingly delete ''Governance and'' from proposed Article III, Section 3.4(a).

The Exchange proposes to delete the remaining subsections (b) through (f) of current Article III, Section 3.5. In their place, the Exchange proposes two new subsections (b) and (c), based on NYSE Arca Rule 3.2(b)(2)(C)(i) and (ii).

Proposed Article III, Section 3.4(b) would provide that the Nominating Committee shall publish the name(s) of one or more ETP Holders or Persons Associated with an ETP Holder (in any combination) as its nominee(s) for Non-Affiliated Directors of the Board of Directors of the Exchange. The Nominating Committee would name sufficient nominees so that at least twenty percent of the directors consist of Non-Affiliated Directors. The proposal would further provide that the names of the nominees shall be published on a date in each year sufficient to accommodate the process described. The date would be known as the ''Announcement Date.''

[9] *See* Section 3.02(a) the NYSE Arca Bylaws.

[10] *See* Section 2.03(a) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC and Section 2.03(a) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC. *See also* Securities Exchange Act Release Nos. 79115 (October 18, 2016), 81 FR 73187 (October 24, 2016) (SR–NYSE–2016–66) and 79114 (October 18, 2016), 81 FR 73177 (October 24, 2016) (SR–NYSEMKT–2016–93).

[11] *See* Section 3.02(a) the NYSE Arca Bylaws and Section 3.02(a) of the NYSE Arca Equities Bylaws.

[12] The Exchange notes that it did not incorporate text from Section 3.02(d) of the NYSE Arca Bylaws, as the appointment of the chair of the Board is addressed in current Section 3.5.

[13] *See* NYSE Arca Rule 3.2(b)(2)(C)(i) and (ii). The Exchange notes that because it only has one category of permit holder, it did not incorporate the NYSE Arca provisions for electing Non-Affiliated Directors from the two categories of NYSE Arca permit holders, ETP Holders and OTP Holders. *See also* NYSE Arca Equities Rule 3.2(b)(2)(C).

Further, proposed Section 3.4(b) would provide that, after the name of proposed nominee(s) is published, ETP Holders in good standing may submit a petition to the Exchange in writing to nominate additional eligible candidate(s) to fill Non-Affiliated Director position(s) during the next term. Further, if a written petition of at least 10 percent of ETP Holders in good standing were submitted to the Nominating Committee within two weeks after the Announcement Date, such person(s) would also be nominated by the Nominating Committee, provided, however, that no ETP Holder, either alone or together with other ETP Holders that are deemed its affiliates, may account for more than 50% of the signatories to the petition endorsing a particular petition nominee for the Non-Affiliated Director position(s) on the Board.[14] The proposed Section would further stipulate that each petition for a petition candidate must include a completed questionnaire used to gather information concerning director candidates, which form of questionnaire would be provided by the Exchange upon the request of any ETP Holder. Finally, proposed Section 3.4(b) would provide that, notwithstanding anything to the contrary, the Nominating Committee shall determine whether any petition candidate is eligible to serve on the Board (including whether such person is free of any statutory disqualification (as defined in section 3(a)(39) of the Exchange Act)), and such determination shall be final and conclusive.

Proposed Article III, Section 3.5(c) would set forth the petition election process, providing that, in the event that the number of nominees exceeds the number of available seats, the Nominating Committee shall submit the contested nomination to the ETP Holders for selection. The proposed Section contemplates that ETP Holders shall be afforded a confidential voting procedure and shall be given no less than 20 calendar days to submit their votes. Under the proposed Section, each ETP Holder in good standing may select one nominee for the contested seat on the Board of Directors; provided, however that no ETP Holder, either alone or together with other ETP Holders who are deemed its affiliates, may account for more than 20% of the votes cast for a particular nominee for the Non-Affiliated Director position(s) on the Board of Directors of the Exchange. With respect to the contested position, the proposed Section would provide that the nominee for the Board receiving the most votes of ETP Holders shall be submitted by the Nominating Committee to the Board and that the Nominating Committee shall also submit uncontested nominees to the Board. Under the proposed Section, tie votes shall be decided by the Board of Directors at its first meeting following the election.

Current Section 3.6 describes the election and role of the Board Chairman. The Exchange proposes to renumber Section 3.6 as new Section 3.5. The Exchange would delete the second sentence of the current Section 3.6 in its entirety, which currently provides that the Chairman may also serve as the CEO and/or President of the Exchange, but may hold no other offices in the Exchange and that unless the Chairman of the Board also serves as the Exchange CEO, the Board shall elect the Chairman from among the Non-Industry Directors. The proposed Section 3.5 would be consistent with the Bylaws of NYSE Arca, which provide that the board of directors appoints the Chairman by majority vote.[15] None of the three NYSE Exchanges limits which category of director can serve as Chairman, and so the Exchange proposes to remove the limitation in its Bylaws.

Current Section 3.7 describes the process for filling Board vacancies. The Exchange proposes to renumber Section 3.7 as new Section 3.6, and to make changes to the text to be consistent with Section 3.03 of the NYSE Arca Bylaws.

Current Section 3.7(a)(i) provides that, notwithstanding any provision in the Bylaws to the contrary, any vacancy in the Board, however occurring, including a vacancy resulting from an increase in the number of the directors, may be filled by vote of a majority of the directors then in office, although less than a quorum, or by a sole remaining director, provided such new director qualifies for the category in which the vacancy exists. The Exchange proposes to provide that vacancies would be filled by the Chairman of the Board, subject to approval by a vote of a majority of directors, as is provided in Section 3.03 of the NYSE Arca Bylaws. To effect this change, the phrase ''the Chairman of the Board, subject to approval by'' would be added after ''filled by'' and ''vote of'' immediately following the proposed insertion and before ''a majority'' would be deleted. The Exchange also proposes to add a new second sentence that would provide that any vacancy will be filled with a person who satisfies the classification (*e.g.,* public) associated with the vacant seat. Finally, the Exchange would add a sentence to the end of the proposed Section providing that, in the case of a vacancy in the office of the Chairman of the Board, the Board of Directors may designate an Acting Chairman among the directors then in office, in accordance with Section 3.03 of the NYSE Arca Bylaws.

Current Section 3.7(a)(ii) governs the filling of a vacancy resulting from an ETP Holder Director position becoming vacant prior to the expiration of such ETP Holder Director's term, or resulting from the creation of an additional ETP Holder Director position. The Exchange proposes conforming changes to replace ''ETP Holder'' Director with ''Non-Affiliated'' Director throughout proposed Section 3.6(a)(ii) and to delete ''ETP Holder Director'' in two instances before ''Nominating Committee.'' The Exchange would also delete the parenthetical in current Section 3.7(b) referring to subsection (c), which as noted below would be deleted. References to Section 3.7 throughout the section would be updated with references to proposed Section 3.6.

The Exchange proposes to delete the remaining subsections of current Article III, Section 3.7. Subsection (c) allows the Board in its discretion to provide a director with a grace period for re-qualification, and subsection (d) would allow an ETP Holder Director not to lose his or her qualification as a director by reason of a suspension. The governing documents of the NYSE Exchanges do not have similar provisions, and so the Exchange proposes to remove them from the Bylaws.

Current Article III, Section 3.8 governs the removal of directors. The Exchange proposes to renumber it Section 3.7 and replace one reference to ''ETP Holder Director'' with ''Non-Affiliated Director.''

Current Article III, Sections 3.9 through 3.15 would be renumbered Section 3.8 through 3.14, respectively. No further changes to these Sections are proposed.

Current Article III, Section 3.16, governing compensation of directors, would be amended to provide that the shareholders, rather than the Board, would have authority to fix compensation of all directors. The change would be consistent with the operating agreements of the New York Stock Exchange and NYSE MKT, which

[14] The Exchange notes that NYSE Arca Rule 3.2(b)(2)(C)(ii) and (iii) imposes voting limits on OTP Holders from the same OTP Firm. Because NYSE Arca Equities, like the Exchange, does not have ''ETP Firms,'' the Exchange has followed the model of NYSE Arca Equities and referred to ''ETP Holders who are deemed its affiliates,'' instead. *See* NYSE Arca Rule 3.2(b)(2)(C); NYSE Arca Equities Rule 3.2(b)(2)(C).

[15] *See* Article III, Section 3.02(d) of the NYSE Arca Bylaws.

provide that the member sets director compensation.[16] In connection with this change, the Exchange would also delete the clause ''irrespective of any personal interest of any of its members,'' from proposed new Section 3.15.

Current Article III, Section 3.17, governing the Board's power to interpret the Bylaws, would be deleted in its entirety. The governing documents of the NYSE Exchanges do not have similar provisions, and so the Exchange proposes to remove them from the Bylaws.

Article V (Committees) [17]

The Exchange proposes to reduce the number of Board committees following the Acquisition. The Exchange would retain the disciplinary committees (*i.e.,* the Business Conduct Committee and Appeals Committee) and the Regulatory Oversight Committee (''ROC''). Rather than have two nominating committees, the Exchange proposes to have one Nominating Committee, whose role would be as set forth in proposed Section 3.4. The Exchange proposes to eliminate the Executive Compensation Committee, Executive Committee, and Audit Committee, none of which the NYSE Exchanges have. To effectuate these changes, the Exchange proposes to update the list of committees in the first sentence of Article V, Section 5.1 and delete current Sections 5.8, 5.9 and 5.10, relating to the Executive Compensation Committee, Audit Committee, and Governance & Nominating Committee, respectively.

Article V, Section 5.2 governs appointment, vacancies, and removal of Board committee members. Currently, these functions are undertaken by the Chairman of the Board with Board approval. The Exchange proposes that, consistent with the NYSE Exchanges,[18] the Board shall appoint the members of all committees of the Board. Present Section 5.2 provides that the chairman may, at any time, with or without cause, remove any member of a committee, with the approval of the Board. The Exchange proposes to amend the statement to provide that the Board may, at any time, with or without cause, remove any member of a committee so appointed, unless the Bylaws otherwise provide. To effect this change, the Exchange proposes to make the first sentence of Article V, Section 5.2 governing appointments and removal of committee members new subsection (a); delete the following text: ''Chairman of the Board, with the approval of the''; a comma after ''Board'' and before ''shall''; ''Chairman'' before ''Board may'' and the clause ''with the approval of the Board''; and add ''unless otherwise provided herein'' after ''so appointed,''.

The Exchange proposes that the Exchange CEO, rather than the Chairman of the Board, would fill any committee vacancies, consistent with NYSE Arca Rule 3.2(a)(5). To effect this change, the remaining current text of Section 5.2 governing vacancies would form new subsection (b), and the Exchange would replace ''Chairman of the Board'' in the existing text with ''Chief Executive Officer of the Exchange'' after ''filled by the.''

Proposed new Article V, Section 5.3 would set forth general provisions applicable to Board committees. The Exchange proposes that the last two sentences of current Section 5.2 would become new Section 5.3(a). The existing text would be amended to reflect that, in appointing new members to Board committees, the Board and not the Chairman of the Board would be responsible for determining that any such committee meets the composition requirements of Article V.

The Exchange also proposes to add subsections (b) through (e) of Section 5.3, which are substantially the same as NYSE Arca Rules 3.2(a)(2)–(4) and (10).

Proposed Section 5.3(b) would provide that the presence of a majority of the members of a committee shall be necessary to constitute a quorum for the transaction of business at a meeting of a committee.

Proposed Section 5.3(c) would provide that the act of a majority of the members present at any meeting at which there is a quorum shall be the act of such committee, except as may be otherwise specifically required by the Bylaws, Exchange Rules, or applicable law.

Proposed Section 5.3(d) would provide that, unless otherwise restricted by the Bylaws, the Rules, applicable law, or rules of the particular committee, members of a committee or of any subcommittee thereof may participate in meetings by means of conference call or similar communications equipped [sic] by means of which all persons participating in the meeting can hear each other, and such participation shall constitute presence in person at the meeting.

Finally, proposed subsection (e) of Section 5.3 would provide that no member of a committee shall participate in the adjudication of any matter in which he or she is personally interested, although his or her presence at a meeting at which such matter is considered shall count toward the quorum requirements for the meeting.

The Exchange proposes to change current Section 5.3 (Powers and Duties of Committees) to Section 5.4. Current Section 5.4 (Conduct of Proceedings) would be renumbered Section 5.5.

The Exchange proposes to recast current Section 5.6 governing the ROC to make it more consistent with the ROCs established by the NYSE Exchanges, as follows.[19] Currently, Section 5.6 of the Bylaws provides that the ROC shall be responsible to oversee all of the Exchange's regulatory functions and responsibilities and to advise regularly the Board about the Exchange's regulatory matters. The ROC shall at all times be comprised entirely of Non-Industry Directors.

The Exchange proposes a new subsection (a) that would provide that the Board shall, on an annual basis, appoint the ROC. The existing text of current Section 5.6, with certain minor exceptions, would be deleted.

The Exchange proposes two new subsections (b) and (c) to proposed Section 5.6. First, proposed Section 5.6(b) would describe the ROC composition as consisting of at least three members, each of whom shall be a Public Director of the Exchange.[20] Further, proposed subsection (b) would provide that the Board, on affirmative vote of a majority of directors, may, at any time remove a member of the ROC for cause. Similar authority is found in the rules and bylaws governing the ROCs of the NYSE Exchanges and other SROs.[21] In addition, proposed Section

[16] *See* Section 2.03(b) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC and Section 2.03(b) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC. The NYSE Arca bylaws are silent regarding director compensation.

[17] The Exchange is not proposing any changes to current Article IV (Stockholders).

[18] *See* NYSE Arca Rules 3.2(a)(1) and 3.3, Section 2.03(h) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC; and Section 2.03(h) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC.

[19] *See* NYSE Arca Rule 3.3(a)(1); Section 2.03(h)(ii) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC; and Section 2.03(h)(ii) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC.

[20] *See e.g.,* NYSE Arca Rule 3.3(a)(1)(B).

[21] *See e.g.,* NYSE Arca Rule 3.3(a)(1)(B) (''The Board, on affirmative vote of a majority of directors, may, at any time remove a member of the ROC for cause.''); Section 2.03(h)(ii) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC (''The Board may, on affirmative vote of a majority of directors, at any time remove a member of the ROC for cause.''); Section 2.03(h)(ii) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC (same); BATS Bylaws, Article V, Section 2(a) (''the Chairman may, at any time, with or without cause, remove any member of a committee so appointed, with the approval of the Board.'').

5.6(b) would provide that a failure of the member to qualify as a Public Director shall constitute a basis to remove a member of the ROC for cause. Finally, proposed Section 5.6(b) would provide that if the term of office of a ROC committee member terminates under this section, and the remaining term of office of such committee member at the time of termination is not more than three months, during the period of vacancy the relevant committee shall not be deemed to be in violation of the compositional requirements by virtue the such vacancy. Once again, this is consistent with the rules and bylaws of the NYSE Exchanges and other SROs.[22]

Second, proposed Section 5.6(c) would set forth the proposed ROC's responsibilities, which would be to:

• oversee the Exchange's regulatory and self-regulatory organization responsibilities;

• evaluate the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities;

• assess the Exchange's regulatory performance; and

• advise and make recommendations to the Board or other committees of the Board about the Exchange's regulatory compliance, effectiveness and plans.

These three [sic] core responsibilities of the proposed ROC would be substantially similar to those of the ROCs of other SROs.[23]

In furtherance of these functions, proposed new subsection (c) of Section 5.6 would provide the ROC with the authority and obligation to review the regulatory budget of the Exchange and specifically inquire into the adequacy of resources available in the budget for regulatory activities. Under the proposed amendment, the ROC would be charged with meeting regularly with the Chief Regulatory Officer (''CRO'') in executive session and, in consultation with the Exchange's CEO, establish the goals, assess the performance, and recommend the CRO's compensation. Finally, under the proposed rule, the ROC would be responsible for keeping the Board informed with respect to the foregoing matters.[24]

The Exchange believes that the proposed rule change governing the ROC's authority and responsibility to oversee the adequacy and effectiveness of the Exchange's performance of its self-regulatory responsibilities is consistent with previously approved rule changes for other SROs and would enable the Exchange to discharge its regulatory responsibilities under a corporate governance structure that is consistent with its affiliates and industry peers.[25] Moreover, the Exchange believes that the proposed changes would ensure the continued independence of the Exchange's regulatory process. In particular, integral to the proposal is that the oversight of the Exchange's self-regulatory responsibilities and regulatory performance, including review of the regulatory plan, programs, budget and staffing would be by a ROC composed of individuals independent of Exchange management and a CRO having general supervision of the regulatory operations of the Exchange that meets regularly with the ROC.[26]

Section 5.7 describes the current ETP Holder Director Nominating Committee. Consistent with the Exchange's proposal to have only one Nominating Committee to nominate Non-Affiliated Directors, as described above, ''ETP Holder Director'' would be deleted before ''Nominating Committee'' and ''Non-Affiliated'' substituted for ''ETP Holder'' before ''Directors'' in proposed Section 5.7.

Current Section 5.11 governing the Appeals Committee would be retained and renumbered Section 5.8. The proposed amendments to Section 5.8 would reflect the proposed changes in the makeup of the Board. Specifically, it would provide that the Appeals Committee shall consist of at least one Public Director and at least one Non-Affiliated Director.[27] Further, the proposed Section would provide that if the Public Director recuses himself or herself from an appeal, such Public Director may be replaced by a Non-Affiliated Director for purposes of the applicable appeal if no other Public Director [sic] able to serve as the replacement. To effectuate these changes, the Exchange proposes to add ''at least'' before ''one'' in two places; replace ''Independent'' with ''Public'' before ''Director'' in three places; replace ''ETP Holder'' with ''Non-Affiliated'' and ''Non-Industry'' with ''Non-Affiliated'' before ''Director''; and delete ''one Industry Director'' from the sentence describing the composition of the Appeals Committee. Finally, current Section 5.12, which describes the Business Conduct Committee, would also be retained, and renumbered Section 5.9. Consistent with the changes in proposed Section 5.2(a), the Exchange would delete ''Chairman with the approval of the'' before ''Board'' in the last sentence to specify that the Board shall appoint the Business Conduct Committee members.

Article VI (Officers)

Article VI, Section 6.1 describes the officers of the Exchange. The Exchange proposes that, rather than require that certain officers be appointed, the Board shall elect officers of the Exchange as it deems appropriate, which may include a CEO, President, CRO, Secretary, Treasurer, and such other officers as the Board may determine. The proposed change would be consistent with Section 5.01 of the NYSE Arca Bylaws. To effect this change, the Exchange proposes to add ''Board shall elect'' before ''officers'' in the first sentence and add ''as it deems appropriate, which may include'' in place of ''shall consist of.''

The Exchange would delete the text of current Section 6.2 governing compensation and the next heading such that current Section 6.3 regarding tenure and appointment would become proposed Section 6.2. Current Section 6.2 provides that the Board or a Board committee shall fix the compensation of

[22] *See e.g.,* NYSE Arca Rule 3.3(a)(1)(B); Section 2.03(h)(ii) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC; Section 2.03(h)(ii) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC; NASDAQ Bylaws, Article III, Section 2(b).

[23] *See* Securities Exchange Act Release Nos. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015) (SR–NYSE–2015–27) (order approving establishment of NYSE ROC) (''NYSE ROC Approval Order''); 75148 (June 11, 2015), 80 FR 34751 (June 17, 2015) (SR–NYSEMKT–2015–27) (order approving establishment of NYSE MKT ROC); 75155 (June 11, 2015), 80 FR 34744 (June 17, 2015) (SR–NYSEArca–2015–29) (order approving establishment of NYSE Arca ROC); Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498, 49502 (August 21, 2008) (File No. 10–182) (approving application of BATS Exchange, Inc. (''BATS'') seeking registration as a national securities exchange); Securities Exchange Act Release No. 61698 (March 10 [sic], 2010), 75 FR 13151, 13161 (March 12 [sic], 2010) (approving application of EDGX Exchange, Inc. and EDGA Exchange, Inc., seeking registration as a national securities exchange); and Amended and Restated Bylaws of Miami International Securities Exchange, LLC, Article IV, Section 4.5(c).

[24] The obligations of the proposed ROC would be substantially similar to those of other SROs' ROCs. *See, e.g.,* NYSE Arca 3.3(a)(1)(C); Section 2.03(h)(ii) of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC; Section 2.03(h)(ii) of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC; NASDAQ Bylaws, Article III, Section 5; Bylaws of NASDAQ OMX PHLX LLC, Article V, Section 5–2; Third Amended and Restated Bylaws of BATS-Exchange, Inc., Article V, Section 6(c).

[25] *See* NYSE, NYSE MKT and NYSE Arca approval orders in note 23, *supra. See also* NASDAQ Bylaws, Article III, Section 5(c); BATS Bylaws, Article V, Section 6(c).

[26] *See, e.g.,* NYSE ROC Approval Order, 80 FR at 59838–39.

[27] *See* NYSE Arca Rule 3.3(a)(2) (providing that the Committee for Review, the appeals committee of NYSE Arca, will be composed of the non-affiliated directors (the OTP Directors and ETP Directors) and public directors of NYSE Arca and NYSE Arca Equities). The Bylaws would retain the current requirement that all committees, including the Appeals Committee, be comprised of at least three people and may include persons that are not members of the Board. *See* Article V, Section 5.3.

all the officers of the Exchange. The Exchange does not propose to retain the current provision. Indeed, none of the NYSE Exchanges has provisions requiring that the Board determine the compensation of the relevant exchange's officers.

Current Section 6.3 governing removal and vacancies would become new Section 6.4.

Current Section 6.5 governing powers and duties would become new Section 6.4.

Current Section 6.6 governing appointment of an arbitration director would be deleted, as there is no similar provision in the governing documents of the NYSE Exchanges.

Article VII (Indemnification)

The Exchange proposes to restructure its indemnification policies to align with those of its affiliates. Accordingly, the Exchange has amended Article VII to be substantially the same as Article VII of the NYSE Arca bylaws.[28]

Current Section 7.1 would be renamed ''Indemnification'' and ''Extent of'' in the heading deleted.

Subsection (a) of Article VII, Section 7.1 would be amended to remove the reference to maximum not prohibited by the Delaware General Corporation Law and clarify that the Exchange will indemnify employees and agents, and not solely directors or officers in actions other than those by or in the right of the Exchange. These proposed changes would conform the formulations in current subsection (a) to those in Article VII of the NYSE Arca bylaws.

To effect these changes, the Exchange would delete ''shall, to the maximum extent not prohibited by the General Corporation Law of Delaware or any other applicable laws as'' and ''from time to time be in effect'' in the first sentence and the reference to ''hold harmless'' after ''indemnify''. References to ''director'' would be replaced by ''an employee'' and references to ''officer'' would be replaced by ''agent'' throughout. The parenthetical clause ''other than an action by or in the right of the Exchange'' would also be added in the place of a comma after ''investigative.'' Additional text would be added to the penultimate sentence, to provide that a person indemnified under Section 7.1(a) would be indemnified if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Exchange and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. Further, the paragraph would provide that the termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that such person did not act in good faith and in a manner which they reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action or proceeding, had reasonable cause to believe that their conduct was unlawful. The last sentence of the first full paragraph of subsection (a) providing that the Exchange shall be required to indemnify an Indemnified Person in connection with an action, suit or proceeding initiated by such person only if such action, suit or proceeding was authorized by the Board, would be deleted.

The Exchange also proposes the following non-substantive changes to Section 7.1(a): replacing a reference to ''corporation'' with ''Exchange''; deleting ''all'' before ''expenses'' and adding ''and expenses'' after ''attorneys' fees''; and replacing ''such Indemnified Person'' with ''him or her.''

The Exchange also proposes to delete the entire second full paragraph of current Section 7.1(a).

The following Sections would be deleted in their entirety: Section 7.2. (Expenses), Section 7.3 (Contract), Section 7.4 (Discretionary Indemnification Coverage), Section 7.5 (Continuity of Indemnification and Non-Exclusivity), Section 7.6 (Insurance), and Section 7.7 (Exchange Not Liable).

The Exchange proposes to add new subsections (b) through (j) to Section 7.1, as follows, to align the Exchange's indemnification policy with Article VII of the NYSE Arca bylaws.

Proposed subsection (b) would specify that the Exchange may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Exchange to procure a judgment in its favor by reason of the fact that he or she is or was an employee or agent of the Exchange, or is or was serving at the request of the Exchange as an employee or agent of another Exchange, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees and expenses) actually or reasonably incurred by him or her in connection with the defense or settlement of such action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Exchange. The proposed subsection would also specify that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Exchange unless the Court of Chancery of the State of Delaware or the court in which such action or suit was brought shall determine, despite the adjudication of liability but in view of all the circumstances of the case, that such person is fairly and reasonably entitled to indemnity for such expenses the court deems proper.

Proposed subsection (c) would provide that, to the extent that an employee or agent of the Exchange has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in proposed subsections (a) and (b), or in defense of any claim, issue or matter therein, they shall be indemnified by the Exchange against expenses (including attorneys' fees and expenses) actually and reasonably incurred by them in connection therewith.

Proposed subsection (d) would specify that any indemnification under proposed subsections (a) and (b) (unless ordered by a court) shall be made by the Exchange only as authorized in the specific case upon a determination that indemnification of the employee or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in proposed subsections (a) and (b) and under applicable law. Proposed subsection (d) would further provide that such determination shall be made, with respect to a person who is a director or officer at the time of such determination (1) by a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum, or (2) by a committee of such directors designated by majority vote of such directors, even though less than a quorum, or (3) if there are no such directors, or, if such directors so direct, by independent legal counsel in a written opinion, or (4) by the stockholders.

Proposed subsection (e) would provide that the Exchange shall indemnify, to the fullest extent permitted by applicable law as such may be amended from time to time, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil,

[28] References in Article VII of the NYSE Arca bylaws to ''Holding Member'' and ''Permit Holder Committee member'' are revised to ''stockholders'' and ''ETP Holder committee member'' in proposed Section 7.1. Because the Exchange does not have a separate category of committee called ''Permit Holder Committee,'' a reference to such committees has been deleted.

criminal, administrative or investigative by reason of the fact that he or she is or was an officer, a floor official or a member of the Board of Directors or any committee thereof, or is or was serving at the request of the Exchange as an officer or member of the board of directors or any committee thereof of another Exchange, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees and expenses), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit or proceeding. Proposed subsection (d) would further provide that the Exchange is not authorized to provide indemnification of any officer, floor official, director, or ETP Holder committee member for any acts or omissions or transactions from which a director may not be relieved of liability as set forth in Section 102(b)(7) of the General Corporation Law of the State of Delaware.

Proposed subsection (f) would provide that the indemnification provided by Section 7.1 as proposed shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any Bylaw, agreement, vote of the stockholders or disinterested directors or otherwise.

Proposed subsection (h) would clarify that for purposes of proposed Section 7.1, references to ''the Exchange'' shall include, in addition to the resulting Exchange, any constituent Exchange (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its officers, floor officials, directors, ETP Holder committee members and employees or agents.

Proposed subsection (i) would clarify that for purposes of proposed Section 7.1, references to ''other enterprises'' shall include employee benefit plans; references to ''fines'' shall include any excise taxes assessed on a person with respect to an employee benefit plan; and references to ''serving at the request of the Exchange'' shall include any service as a director, officer, employee or agent of the Exchange which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner he reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner ''not opposed to the best interests of the Exchange'' as referred to in proposed Section 7.1.

Finally, proposed subsection (j) would provide that if any provision or provisions of proposed Section 7.1 shall be held to be invalid, illegal or unenforceable for any reason whatsoever, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired and that, to the fullest extent possible, shall be construed so as to give effect to the intent manifested by the provision held invalid, illegal or unenforceable.

Article VIII (Amendments)

Article VIII, Section 8.1 describes the Board's power to adopt, amend or repeal the Bylaws. The Exchange proposes to update the cross references to Sections 3.1 through 3.8, Section 3.12, and Section 4.5, to reflect the proposed changes to Article III discussed above. Accordingly, the cross references would be updated to read ''Sections 3.1 through 3.7, Section 3.11, or Section 4.5 of these By-Laws.''

In addition, the Exchange proposes to delete the last three sentences of current Section 8.2, which governs amendment or repeal of Exchange Rules. Such sentences provide that all proposals to adopt, alter or amend any rule shall be presented in writing to the Board by the Chairman of the Board, and that the Board shall act on the proposal. The Exchange proposes to align its processes to adopt, alter or amend any rule with those of the NYSE Exchanges, which provide that senior management may approve proposed rule changes pursuant to authority delegated to it by the relevant board of directors.

Article X (Self-Regulatory Function of the Exchange) [29]

Article X, Section 8.1 describes certain considerations relevant to the Exchange's SRO function.

The Exchanges proposes to revise current Section 10.2 governing participation in Board and committee meetings. The Section would be amended to require that all Board and committee meetings relating to the structure of the market which the Exchange regulates (in addition to meetings pertaining to the Exchange's SRO function) shall also be closed to all persons other than members of the Board and officers, staff, counsel or other advisors. To effect this change, the Exchange would add ''or relating to the structure of the market which the Exchange regulates'' in two places. The Exchange would also replace a reference to ''National Stock Exchange Holdings'' with ''NYSE Group.'' The changes will make Section 10.2 consistent with Section 3.13 of the NYSE Arca bylaws.

The current text of Section 10.4, which governs Exchange use of regulatory fees and penalties would also be deleted and replaced with a statement that any regulatory assets or any regulatory fees, fines or penalties collected by the Exchange's regulatory staff will be applied to fund the legal, regulatory and surveillance operations of the Exchange, and the Exchange shall not distribute such assets, fees fines or penalties to pay dividends or be distributed to any other entity. This language is substantially similar to the formulation recently approved for the NYSE and NYSE MKT.[30]

Rule Amendments

The Exchange proposes to make the following conforming amendments to Rules 2.10 and 5.7 and to the Schedule of Fees and Rebates:

- The Exchange proposes to amend the cover page of the Rules, the Table of Contents and the first page of the Rules above the heading ''CHAPTER I. Adoption, Interpretation and Application of Rules, and Definitions'' to replace ''National Stock Exchange'' with ''NYSE National,'' before the word ''Inc.'' The cover page would also be amended to replace ''November 8'' following ''Updated through'' and the number 6 in ''2016'' with placeholders for the effective date of the new rules.
- Rule 2.10 (No Affiliation between Exchange and any ETP Holder) prohibits the Exchange or any affiliated entity from acquiring or maintaining an ownership interest in an ETP Holder but does not prohibit any ETP Holder from being or becoming an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange, solely by reason of such ETP Holder or any officer, director, manager, managing member, partner or affiliate of such ETP Holder being or becoming either (a) an ETP Holder Director or an At-Large Director pursuant to the bylaws, or (b) a member

[29] The Exchange is not proposing any changes to current Article IX (Certificates of Stock and their Transfer) or Article XI (General Provisions).

[30] *See* Section 4.05 of the Eleventh Amended and Restated Operating Agreement of New York Stock Exchange LLC and Section 4.05 of the Tenth Amended and Restated Operating Agreement of NYSE MKT LLC. Reflecting the Exchange's status as a stock corporation rather than a limited liability corporation, the proposed text replaces ''to the Member or any other entity'' with ''pay dividends or be distributed to any other entity.'' The proposed text also replaces ''Company'' with ''Exchange'' throughout. *See also* Securities Exchange Act Release Nos. 79115 (October 18, 2016), 81 FR 73187 (October 24, 2016) (SR–NYSE–2016–66); and 79114 (October 18, 2016), 81 FR 73177 (October 24, 2016) (SR–NYSEMKT–2016–93).

of the Board of Directors of NSX Holdings, Inc.

To reflect the proposed amendment to Section 3.2 of the Bylaws as discussed above, the Exchange proposes to replace the phrase ''ETP Holder Director or an At-Large Director'' with ''Non-Affiliated Director.'' [31] In the immediately following parenthetical, the Exchange proposes to delete ''such terms are'' to reflect that the term ''Non-Affiliated Director'' would be the only term defined in the Bylaws. Finally, the Exchange proposes to replace three references to ''NSX Holdings'' with ''ICE'' before the word ''Inc.''

- Rule 5.7 (Annual Certification of Compliance and Supervisory Processes) requires the chief executive officer of each ETP Holder to provide an annual certification regarding certain of its processes. The Exchange proposes to replace two references in the Rule to ''National Stock Exchange'' with ''NYSE National'' before the word ''Inc.'' The Exchange proposes to replace two references in the Rule to ''National Stock Exchange'' with ''NYSE National'' before the word ''Inc.''
- The Exchange proposes to amend the heading and first sentence of the Schedule of Fees and Rebates to add ''NYSE'' before ''National'' and to delete ''Stock Exchange'' and the defined term ''NSX.'' The Exchange would also replace ''NSX'' before ''Depth of Book feed'' in the Market Data section of the price list with ''NYSE National''.

Amendment of ICE, ICE Holdings and NYSE Group Governing Documents

The Exchange proposes that, in connection with the Acquisition, the Commission approve the organizational documents of ICE and its wholly-owned subsidiaries ICE Holdings and NYSE Group and the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Independence Policy''), all of which are to be amended concurrently with the Acquisition to reflect ownership of the Exchange.

The current organizational documents of ICE and its wholly-owned subsidiaries provide certain protections to the NYSE Exchanges that are designed to protect and facilitate their self-regulatory functions, including certain restrictions on the ability to vote and own shares of ICE.[32] In general, the organizational documents of ICE and its wholly-owned subsidiaries are being amended to provide similar protections to the Exchange as are currently provided to the NYSE Exchanges under those documents.

In addition, obsolete references to NYSE Market (DE), Inc. (formerly NYSE Market, Inc.) (''NYSE Market (DE)''), and NYSE Regulation, Inc. (''NYSE Regulation'') found in various documents are proposed to be deleted.[33]

Proposed Seventh Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'')

The ICE Bylaws would be amended to reflect the Acquisition and incorporate the Exchange in the ICE Bylaws' existing voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries.

Specifically, the ICE Bylaws would be amended as follows:

- The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the New York Stock Exchange, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, and NYSE MKT, would be amended to include the Exchange. The obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.
- Article VIII (Confidential Information), Section 8.1, would be amended to extend to the Exchange the same protection regarding confidential information provided to the NYSE Exchanges and NYSE Arca Equities, and to remove the obsolete references to NYSE Market (DE) and NYSE Regulation.
- Article XI, Section 11.3, provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 11.3 would be amended to include the Exchange, and to delete the obsolete references to NYSE Market (DE) and NYSE Regulation.

The ICE Bylaws would be further amended to add a new Article XII (Voting and Ownership Limitations). New Section 12.1.a of Article XII would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls the Exchange (or its successor), the board of directors of ICE shall not adopt any resolution pursuant to clause (b) of Section A.2 of Article V of the certificate of incorporation of ICE (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%), unless the board of directors of ICE shall have determined that:

- In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such person nor any of its related persons is an ETP Holder of the Exchange;
- in the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of ICE that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article V of the Certificate of Incorporation of ICE, either alone or together with its related persons, to vote, possess the right to vote or cause the voting of shares of stock of ICE that would exceed 20% of the then outstanding votes entitled to be cast on such matter neither such person nor any of its related persons is, with respect to the Exchange, an ETP Holder.

New Section 12.1.b would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls the Exchange (or its successor), the Board of Directors of ICE shall not adopt any resolution pursuant to clause (b) of Section B(2) of Article V of ICE's Certificate of Incorporation, unless the Board of Directors shall have determined that neither such person nor any of its related persons is an ETP Holder.

New Section 12.2 would provide that, for so long as ICE shall control, directly

[31] The Exchange notes that the term ''At-Large Director'' is not used in the Bylaws, Certificate of Incorporation or rules of the Exchange.

[32] *See* Securities Exchange Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (approving rule changes related to NYSE Euronext becoming a wholly owned subsidiary of ICE (then called IntercontinentalExchange Group, Inc.)).

[33] NYSE Market (DE) and NYSE Regulation were previously parties to a Delegation Agreement whereby the NYSE delegated certain regulatory functions to NYSE Regulation and certain market functions to NYSE Market (DE). The Delegation Agreement was terminated when the NYSE re-integrated its regulatory and market functions. As a result, the two entities ceased being regulated subsidiaries. *See* Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015). NYSE Regulation has since been merged out of existence.

or indirectly, the Exchange (or its successor), the ICE board of directors shall not adopt any resolution to repeal or amend any provision of the certificate of incorporation of ICE unless such amendment or repeal shall either be (a) filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) submitted to the board of directors of the Exchange (or the board of directors of its successor), and if such board of directors determines that such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

Proposed Eighth Amended and Restated Certificate of Incorporation of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Certificate of Incorporation'')

The ICE Holdings Certificate of Incorporation is being amended as follows:

- On the first page, add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Certificate of Incorporation'' in the heading and update items (2)–(5) accordingly to reflect that this would be the eighth amendment and restatement, including replacing an incorrect reference to ''Sixth'' before ''Amended'' in item (3). The date would also be updated in the preamble on the first page.
- To distinguish between the ETP Holders of NYSE Arca Equities and those of the Exchange, subsection A.3.c.ii of Article V (Limitations on Voting and Ownership) would be amended to define an ETP Holder of NYSE Arca Equities as ''NYSE Arca Equities ETP Holder.'' Obsolete references to NYSE Market (DE) and NYSE Regulation, would also be deleted.[34]

Subsection A.3.c of Article V would be amended to add a new subsection (v), similar to those in place for the other NYSE Exchanges, which would provide that, for so long as the ICE Holdings directly or indirectly controls NYSE National (or its successor), no person nor any of its related persons (as those terms are defined therein) is an ETP Holder (as proposed to be defined in the bylaws of NYSE National, discussed above) of NYSE National.

- Subsection A.3.d of Article V would be amended to add ''NYSE Arca'' before ''ETP Holder'' in one place to distinguish between the NYSE Arca Equities ETP Holders of and those of the Exchange.

Subsection A.3.d would be further amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection would incorporate NYSE National into the existing restriction, such that the ICE Holdings Board of Directors would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

- Subsection B.3 of Article V would be amended to add a new subsection (g) similar to those in place for the other NYSE Exchanges, incorporating NYSE National into the restriction on the ICE Holdings board of directors adopting any resolution pursuant to clause (b) of Section B.2 of Article V of the ICE Holdings Certificate of Incorporation (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%) unless the NYSE Holdings board of directors determines that, for so long as ICE Holdings controls NYSE National, neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'')

The ICE Holdings Bylaws are being amended as follows:

- The cover page and heading on the first page would be amended to add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Bylaws'' to reflect that this would be the fifth amendment and restatement. The effective date on the cover page would also be updated.
- Similar to the ICE Bylaws discussed above, the ICE Holdings Bylaws would be amended to include ''NYSE National, Inc.'' in:
  - The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, and NYSE MKT LLC, and to provide that the term ''U.S. Regulated Subsidiaries'' includes those entities listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation in that section would also be deleted;[35]
  - Article VIII (Confidential Information), Section 8.1, which would be amended to extend the same protection to confidential information relating to the self-regulatory function of the Exchange or its successor;[36] and
  - Article XI (Amendment to the Bylaws), Section 11.3, which provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted from Article VXI, Section 11.3.[37]

Proposed Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Director Independence Policy'')

The ICE Director Independence Policy would be amended to add NYSE National to the section describing ''Independence Qualifications.'' In particular, NYSE National would be added to categories (1)(b) and (c) that refer to ''members,'' as defined in section 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act.[38] The clause ''and 'Person Associated with an ETP Holder' (as defined in Rule 1.5 of NYSE National, Inc.)'' would also be added to category (1)(b) in reference to ''allied persons.'' NYSE National would also be added to subsections (4) and (5) of the ''Independence Qualifications'' section.[39] Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.[40]

[34] *See* note 33, *supra.*

[35] *See* note 33, *supra.*

[36] Article VIII, Section 8.1 would also be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation.

[37] *See* note 33, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

[38] *See* 15 U.S.C. 78c(a)(3)(a).

[39] Conforming changes would also be made to delete and replace connectors. The link in footnote 2 to the NYSE Listed Company Manual and commentary would also be updated.

[40] *See* note 33, *supra.*

Proposed Eighth Amended and Restated Limited Liability Company Agreement of NYSE Holdings LLC (''NYSE Holdings LLC Operating Agreement'')

The NYSE Holdings LLC Operating Agreement would be amended as follows:

• The heading and preamble would be amended to add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Limited Liability Agreement'' to reflect that this would be the eighth amendment and restatement. The effective date would also be updated. After ''This Agreement amends and restates in its entirety that'' in the second full sentence would be added the clause ''certain Seventh Amended and Restated Limited Liability Company Agreement, dated as of May 22, 2015, which amended and restated in its entirety that.''

• The current penultimate whereas clause would be amended by adding ''in May 2015'' before ''the Company'' and ''now desires to amend and restate'' immediately following would be replaced with ''amended and restated.'' ''Have'' and ''are'' would be changed to the past tense ''had'' and ''were'' in the final sentence.

• The following new whereas clause would be added immediately above the current last whereas clause: ''WHEREAS, the Company now desires to amend and restate the Seventh Amended and Restated Agreement to reflect the acquisition of NYSE National, Inc. by the Company's wholly-owned subsidiary NYSE Group, Inc.;''.

• The definition of ETP Holder in Article I (Interpretation), Section 1.1 would be deleted and new definitions of an NYSE Arca ETP Holder and NYSE National ETP Holder would be added. The obsolete definition of NYSE Market (DE) would be deleted.[41]

• Article IX (Voting and Ownership Limitations), Section 9.1(a)(3)(C) would be amended to add ''NYSE Arca'' before ''ETP Holder'' and the defined term ''NYSE Arca ETP Holder'' to distinguish between the ETP Holders of NYSE Arca Equities and those of the Exchange. An obsolete reference to NYSE Market (DE) would also be deleted from Section 9.1(a)(3)(C).[42]

Section 9.1(a)(3)(C) would be amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection (v) would incorporate NYSE National into the existing restriction, such that the ICE Holdings board of directors would be restricted from adopting a resolution pursuant to clause (b) of Section 9.1(a)(2) unless the NYSE Holdings board of directors determines that, for so long as NYSE Holdings directly or indirectly controls NYSE National, Inc. (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the bylaws of NYSE National, as such bylaws may be in effect from time to time) of NYSE National (''NYSE National ETP Holder''). The clause would also provide that any such person that is a related person of an ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the agreement, as the context may require.

• Article IX, Section 9.1(a)(3)(D) would be amended to add ''NYSE Arca'' before ''ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Further, a new clause (v) would be added to Section 9.1(a)(3)(D) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter for so long as NYSE Holdings controls NYSE National. The clause would provide that ''for so long as the Corporation directly or indirectly controls NYSE National, neither such person nor any of its Related Persons is an NYSE National ETP Holder.''

• Article IX, Section 9.1(b)(3) would be amended to add a new subpart (G) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, so that it would provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Holdings directly or indirectly controls NYSE National (or its successor), the board of directors of NYSE Holdings shall not adopt any resolution pursuant to (b) of Section 9.1(b)(2) of the NYSE Holdings LLC Operating Agreement, unless the board of directors of NYSE Holdings shall have determined that neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Certificate of Incorporation of NYSE Group, Inc. (''NYSE Group Certificate of Incorporation'')

The NYSE Group Certificate of Incorporation is being amended as follows:

• On the first page, add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Certificate of Incorporation'' in the heading. The Recitations would be amended to reflect that this would be the fifth amendment and restatement. First, the Fifth Recitation would be updated to reflect that a Fourth Amended and Restated Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on December 29, 2014. A new Sixth Recitation would be updated to reflect that the Fifth Amended and Restated Certificate of Incorporation has been duly adopted. The current Sixth Recitation would become the Seventh and would reflect that the Fourth Amended and Restated Certificate of Incorporation is amended and restated in its entirety.

• The Exchange would be added to the list of ''Regulated Subsidiaries'' in Article 4 (Stock), Section 4(b)(1), which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca Equities, and NYSE MKT, and the obsolete references to NYSE Market (DE) and NYSE Regulation would be deleted.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of the Exchange, Section 4(b)(1)(y) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Section 4(b)(1)(y) would also be amended to add a provision to similar to those in place for the other NYSE Exchanges providing that, for so long as NYSE Group directly or indirectly controls NYSE National (or its successor), neither such Person nor any of its related persons is an ETP Holder (as defined in the rules of NYSE National, as such rules may be in effect from time to time) of NYSE National (defined as an ''NYSE National NYSE National ETP Holder'') and that any such person that is a related person of an NYSE National ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the certificate of incorporation, as the context may require.

• Further, subsection 4(b)(1)(z) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder'' and delete an outdated reference to NYSE Market (DE).

Subsection 4(b)(1)(z) would also be amended to incorporate NYSE National into the existing restriction on the ICE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be

[41] *See* note 33, *supra.*

[42] *See* note 33, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• A new subpart (vii) would be added to subsection 4(b)(2)(C) of Article IV to incorporate NYSE National into the existing restriction on the NYSE Group Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.[43]

• Article X (Confidential Information) would be amended to extend the same protection to confidential information relating to the self-regulatory function of the Exchange or its successor and delete obsolete references to NYSE Market (DE) and NYSE Regulation.

• Article XII (Amendments to Certificate of Incorporation) provides that, for so long as NYSE Group controls the Regulated Subsidiaries, before any amendment or repeal of any provision of the Certificate of Incorporation shall be effective, such amendment or repeal shall either (a) be filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) be submitted to the boards of directors of NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE MKT or the boards of directors of their successors. Article XII would be amended to add NYSE National to subsection (b) and delete references to NYSE Market (DE) and NYSE Regulation.

Proposed Third Amended and Restated Bylaws of NYSE Group, Inc. (''NYSE Group Bylaws'')

The NYSE Group Bylaws are being amended as follows:

• Add ''Third'' and delete ''Second'' before ''Amended and Restated Bylaws'' in the heading to reflect that this would be the third amendment and restatement.

• Article VII (Miscellaneous), Section 7.9(A)(b) currently provides that, for so long as NYSE Group controls any of the NYSE Exchanges, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE Alternext US LLC or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 7.9(A)(b) would be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation, replace the outdated reference to ''NYSE Alternext US LLC'' with ''NYSE MKT LLC,'' and add NYSE National.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act[44] in general, and with Section 6(b)(1)[45] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. Following the Acquisition, the Commission will continue to have the same plenary regulatory authority over NYSE National as it currently has over the Exchange. NYSE National would continue to be registered as a national securities exchange and would continue to be a separate SRO with separate rules, membership rosters, and listings distinct from its affiliates. The proposed rule change is consistent with and will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to NYSE National and its directors, officers, employees and agents to the extent they are involved in its activities.

The proposed change would continue the requirement in the Bylaws that an independent board committee oversee the adequacy and effectiveness of the performance of the Exchange's self-regulatory responsibilities. As proposed, the ROC would be similar in composition and functions to the approved ROCs of other SROs, would be similarly designed to ensure the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities; to assess the Exchange's regulatory performance; and to assist the Board and any other committees of the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions. Accordingly, the Exchange believes that the proposed amendment would contribute to the orderly operation of the Exchange and would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply and enforce compliance with the provisions of the Exchange Act by its members and persons associated with its members. The Exchange therefore believes that approval of the amendment to the Bylaws is consistent with Section 6(b)(1) and not inconsistent with the 2005 Order.[46]

The Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act[47] in that it would create a governance and regulatory structure of NYSE National that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. As described above, following the Acquisition, NYSE National would continue to be registered as a national securities exchange and as a separate SRO and, as such, would continue to have separate rules, membership rosters, and listings. Further, NYSE National's regulatory functions would be carried out by the NYSE's regulatory department under the oversight of the proposed ROC. The proposed changes are intended to protect and maintain the self-regulatory functions of NYSE National and to allow it to carry out its regulatory responsibilities under the Act. The Exchange also believes that the proposed rule change provides transparency and clarity, and promotes efficiency, with respect to the governance and corporate structure of NYSE National. In so doing, the proposed rule change promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

As discussed above, the Exchange believes that its proposal that the ROC be comprised of independent directors would align the Exchange's corporate governance practices with other SROs that have adopted a ROC to monitor the adequacy and effectiveness of the

[43] An obsolete reference to NYSE Market (DE) would also be deleted from Article IV, 4(b)(2)(C)(v).

[44] 15 U.S.C. 78f(b).

[45] 15 U.S.C. 78f(b)(1).

[46] *See* Securities Exchange Act Release No. 51714 (May 19, 2005).

[47] 15 U.S.C. 78f(b)(5).

regulatory program, assessing regulatory performance, and assisting the board of directors in reviewing the regulatory plan and the overall effectiveness of the regulatory function. Moreover, the Exchange believes that the proposed ROC structure would also sufficiently insulate the regulatory functions from the Exchange's market and other commercial interests in order for the Exchange to carry out its regulatory obligations. The Exchange believes that the proposed rule change is therefore consistent with and facilitates a governance and regulatory structure that furthers the objectives of Section 6(b)(5) of the Exchange Act. The independent oversight of the Exchange's regulatory functions by the proposed ROC is also designed to protect investors as well as the public interest.

The Exchange further believes that making non-substantive technical and conforming changes throughout its Certificate of Incorporation and Bylaws to reflect the Exchange's proposed new ownership, including updating corporate names, as well as the replacement of outdated or obsolete references in the corporate documents of the NYSE Group and its intermediary and ultimate parent entities, including the ICE bylaws and director independence policy, ICE Holdings bylaws and certificate of incorporation, NYSE Holdings operating agreement, and the NYSE Group bylaws and certificate of incorporation, removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having these references in the governing documents following the Acquisition. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that eliminating obsolete references would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

Finally, the proposal to retain, as modified, an Appeals Committee which, among other things, would be charged with hearing appeals of disciplinary determinations, complies with Section 6(b)(7) of the Exchange Act,[48] which, among other things, requires that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members. The Exchange proposes that the Appeals Committee shall be made up of at least one Public Director and at least one Non-Affiliated Director. The Exchange believes that continued member participation on the proposed Appeals Committee would be sufficient to provide for the fair representation of members in the administration of the affairs of the Exchange, including rulemaking and the disciplinary process, consistent with Section 6(b)(3) of the Exchange Act.

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. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the Acquisition. Indeed, the Exchange believes that providing a new corporate and governance structure, the Exchange will be in a better position to improve its technology and engage in value-enhancing transactions that will enable the Exchange to more effectively participate and compete in the marketplace.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

[48] *See* 15 U.S.C. 78f(b)(7).

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–NSX–2016–16 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2016–16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2016–16 and should be submitted on or before January 20, 2017.

[49] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[49]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31676 Filed 12–29–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 9835]

In the Matter of the Amendment of the Designation of Lashkar-e-Tayyiba (and Other Aliases) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act

Based upon a review of the administrative record assembled in this matter pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189 (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I have concluded that there is a sufficient factual basis to find that Lashkar-e-Tayyiba uses the additional aliases Al-Muhammadia Students, AMS, and Al-Muhammadia Students Pakistan. Therefore, pursuant to Section 219(b) of the INA, as amended (8 U.S.C. 1189(b)), I hereby amend the designation of Lashkar-e-Tayyiba as a Foreign Terrorist Organization to include Al-Muhammadia Students, AMS, and Al-Muhammadia Students Pakistan as aliases.

This determination shall be published in the **Federal Register**.

Dated: November 28, 2016.

John F. Kerry,

Secretary of State.

[FR Doc. 2016–31730 Filed 12–28–16; 11:15 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0293]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Financial Responsibility—Motor Carriers, Freight Forwarders, and Brokers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The FMCSA requests approval to extend an ICR titled, ''Financial Responsibility—Motor Carriers, Freight Forwarders, and Brokers,'' which is used to provide registered motor carriers, property brokers, and freight forwarders a means of meeting financial responsibility filing requirements. This ICR sets forth the financial responsibility documentation requirements for motor carriers, freight forwarders, and brokers that arise as a result of the Agency's jurisdictional statutes at 49 U.S.C. 13501 and 13531. The Agency is revising this ICR due to the implementation of a Final Rule entitled ''Unified Registration System'' (78 FR 52608, August 23, 2013) that extended the financial responsibility filing requirement to exempt for-hire motor carriers and private interstate motor carriers of hazardous materials.

DATES: We must receive your comments on or before February 28, 2017.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2016–0293 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC, 20590–0001 between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdfE8-794.pdf.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Ms. Tura Gatling, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone Number: (202) 385–2412; Email Address: *tura.gatling@dot.gov.* Office hours are from 8:00 a.m. to 5:00 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The Secretary of Transportation (Secretary) is authorized to register for-hire motor carriers of property and passengers under the provisions of 49 U.S.C. 13902, surface freight forwarders under the provisions of 49 U.S.C. 13903, and property brokers under the provisions of 49 U.S.C. 13904. These persons may conduct transportation services only if they are registered pursuant to 49 U.S.C. 13901. The Secretary has delegated authority pertaining to these registration requirements to the FMCSA. The registration remains valid only as long as these transportation entities maintain, on file with the FMCSA, evidence of the required levels of financial responsibility pursuant to 49 U.S.C. 13906. FMCSA regulations governing the financial responsibility requirements for these entities are found at 49 CFR part 387. The information collected from these forms are summarized and displayed in the Licensing and Information system.

Forms for Endorsements, Certificates of Insurance and Other Evidence of Bodily Injury and Property Damage (BI&PD) Liability and Cargo Liability Financial Responsibility

Forms BMC–91 and BMC–91X, entitled ''Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance,'' and Form BMC–82, entitled ''Motor Carrier Bodily Injury Liability and Property Damage Liability Surety Bond Under 49 U.S.C. 13906,'' provide evidence of the required coverage for bodily injury and property damage (BI & PD) liability. A Form BMC–91X filing is required when a carrier's insurance is provided by multiple companies instead of just one. Form BMC–34, entitled ''Household Goods Motor Carrier Cargo Liability Certificate of Insurance,'' and Form BMC–83, entitled ''Household Goods Motor Carrier Cargo Liability Surety Bond Under 49 U.S.C. 13906,'' establish a carrier's compliance with the Agency's cargo liability requirements. Only household goods (HHG) motor carriers are required to file evidence of cargo insurance with FMCSA. 49 CFR 387.303(c). Form BMC–90, entitled ''Endorsement for Motor Carrier Policies of Insurance for Automobile Bodily Injury and Property Damage Liability Under Section 13906, Title 49 of the United States Code,'' and Form BMC–32, entitled ''Endorsement for Motor Common Carrier Policies of Insurance for Cargo Liability Under 49 U.S.C. 13906,'' are executed by the insurance company, attached to BI & PD or cargo liability insurance policy, respectively, and forwarded to the motor carrier or freight forwarder.

Requirement To Obtain Surety Bond or Trust Fund Agreement

Form BMC–84, entitled ''Broker's or Freight Forwarder's Surety Bond Under 49 U.S.C. 13906,'' and Form BMC–85, entitled ''Broker's or Freight Forwarder's Trust Fund Agreement Under 49 U.S.C. 13906 or Notice of Cancellation of the Agreement,'' are filed by brokers or freight forwarders to comply with the requirement that they must have a $75,000 surety bond or trust fund agreement in effect before FMCSA will issue property broker or freight forwarder operating authority registration.

Cancellation of Prior Filings

Form BMC–35, entitled ''Notice of Cancellation Motor Carrier Insurance under 49 U.S.C. 13906,'' Form BMC–36, entitled ''Motor Carrier and Broker's Surety Bonds under 49 U.S.C. 13906 Notice of Cancellation,'' and Form BMC–85, entitled ''Broker's or Freight Forwarder's Trust Fund Agreement Under 49 U.S.C. 13906 or Notice of Cancellation of the Agreement,'' can be used to cancel prior filings.

Self-Insurance

Motor carriers can also apply to FMCSA to self-insure BI & PD and/or cargo liability in lieu of filing certificates of insurance with the FMCSA, as long as the carrier maintains a satisfactory safety rating (see 49 CFR 387.309.) Form BMC–40 is the application used by carriers to apply for self-insurance authority.

Title: Financial Responsibility—Motor Carriers, Freight Forwarders, and Brokers.

OMB Control Number: 2126–0017.

Type of Request: Renewal of a currently approved information collection.

Respondents: Motor carriers, freight forwarders, and brokers.

Estimated Number of Respondents: 183,340.

Estimated Time per Response: The estimated average burden per response for Form BMC–40 is 40 hours. The estimated average burden per response for the remaining insurance forms (BMC–34, 35, 36, 82, 83, 84, 85, 91, and 91X) is 10 minutes per form.

Expiration Date: February 28, 2017.

Frequency of Response: Certificates of insurance, surety bonds, and trust fund agreements are required when the transportation entity first registers with FMCSA and then when such coverages are changed or replaced by these entities. Notices of cancellation are required only when such certificates of insurance, surety bonds, and trust fund agreements are cancelled. The BMC–40 is filed only when a carrier seeks approval from FMCSA to self-insure its bodily injury and property damage (BI & PD) and/or cargo liability coverage.

Estimated Total Annual Burden: 45,168 hours [2 BMC–40 filings per year × 40 hours to complete + 270,525 filings per year for all the other forms × 10 minutes/60 minutes to complete = 45,168].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: December 23, 2016.

G. Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2016–31701 Filed 12–29–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request

AGENCY: Departmental Offices, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on revisions for 2017 of a currently approved information collection that is proposed for approval by the Office of Management and Budget. The Office of International Affairs within the Department of the Treasury is soliciting comments concerning the revision of the Treasury International Capital (TIC) Form SHL/SHLA.

DATES: Written comments should be received on or before February 28, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Dwight Wolkow, International Portfolio Investment Data Systems, Department of the Treasury, Room 5422 MT, 1500 Pennsylvania Avenue NW., Washington, DC 20220. In view of possible delays in mail delivery, you may also wish to send a copy to Mr. Wolkow by email (*comments2TIC@do.treas.gov*) or FAX (202–622–2009). Mr. Wolkow can also be reached by telephone (202–622–1276).

FOR FURTHER INFORMATION CONTACT: Copies of the proposed form and instructions are available at Part II of the Treasury International Capital (TIC) Forms Web page ''Forms SHL/SHLA & SHC/SHCA'', at: *http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-sh.aspx.* Requests for additional information should be directed to Mr. Wolkow.

SUPPLEMENTARY INFORMATION:

Title: Treasury International Capital (TIC) Form SHL/SHLA, ''Foreign-Residents' Holdings of U.S. Securities, including Selected Money Market Instruments''.

OMB Control Number: 1505–0123.

Abstract: This form collects foreign-residents' holdings of U.S. securities.

These data are used by the U.S. Government in the formulation of international financial and monetary policies, and for the computation of the U.S. balance of payments accounts and of the U.S. international investment position. These data are also used to provide information to the public and to meet international reporting commitments. The data collection includes large benchmark surveys conducted every five years, and smaller annual surveys conducted in the non-benchmark years. The data collected under an annual survey are used in conjunction with the results of the preceding benchmark survey to make economy-wide estimates for that non-benchmark year. Currently, the determination of who must report in the annual surveys is based primarily on the data submitted during the preceding benchmark survey. The data requested in the annual survey will generally be the same as requested in the preceding benchmark report. Form SHL is used for the benchmark survey of all significant U.S.-resident custodians and U.S.-resident issuers of securities regarding foreign-residents' holdings of U.S. securities. In non-benchmark years, Form SHLA is used for the annual surveys of primarily the largest U.S.-resident custodians and issuers.

Current Actions: No changes in the forms/schedules will be made from the previous survey that was conducted as of June 30, 2016. The proposed changes in the instructions are:

(1) In ''Consolidation Rules'' (section II.B in the instructions) the first sentence is expanded to list out separately ''Intermediate Holding Companies'' (IHCs), which are defined by Regulation YY, 12 CFR 252, to clarify that IHCs should follow the same consolidation rules that are applicable to Bank Holding Companies (BHCs), Financial Holding Companies (FHCs), and Savings and Loan Holding Companies.

(2) In ''Funds and Related Equity Ownership'' (section III.E in the instructions) the illustrative list of fund types in the second paragraph is expanded to list out separately ''private funds'', where ''private funds'' refers to the same class of financial entities that must report to the Securities and Exchange Commission as private funds on Form PF.

(3) In ''Funds and Related Equity Ownership'' (section III.E in the instructions) the last section, ''Direct Investment exception for private funds'', is new, to explain that in TIC reports as of 01 January 2017 and afterwards, investments in private funds, or between the entities of a private fund, are included in TIC surveys regardless of ownership share if they meet BOTH of the following two criteria: (i) The private fund does not own, directly or indirectly through another business enterprise, an ''operating company''—*i.e.,* a business enterprise that is not a private fund or a holding company—in which the foreign parent owns at least 10 percent of the voting interest; and (ii) If the private fund is owned indirectly (through one or more other U.S. business enterprises), so there are no ''operating companies'' between the foreign parent and the indirectly owned private fund.

(4) In ''Stripped Securities'' (section III.G in the instructions) the next to last sentence in the second paragraph is revised and reads ''In addition, all 'teddy bears' (TBRs), 'tigers' (TIGRs), 'cats' (CATS) and 'cougars' (COUGRs) should also be classified as U.S. Treasury securities.''

(5) In ''DIRECT INVESTMENT'' (section III.I in the instructions) the next to last sentence is new, refers to proposed change (3) above, and reads ''Also, certain cross-border investments by or into private funds where these investments do not involve operating companies (companies that are not other private funds or holding companies) should be reported as portfolio investment on TIC reports rather than on BEA reports as direct Investment (see section III.F).''

(6) In the ''Line-by-Line Instructions for Schedule 1'' (section IV in the instructions), the reporter type 5 in line 8 is expanded, refers to proposed change (1) above, and reads ''5 = Other Financial Organizations (including BHC, FHC & IHC)''.

(7) In the ''Line-by-Line Instructions for Schedule 1'' (section IV in the instructions), the phrase in parentheses in line 20 is clarified and reads ''(records with Schedule 2, Item 18 = security types 1, 2, 3, or 4)''.

(8) In the ''Line-by-Line Instructions for Schedule 1'' (section IV in the instructions), the phrase in parentheses in line 21 is clarified and reads ''(records with Schedule 2, Item 19 = security types 5, 6, 7, 8, 9, 10, or 11)''.

(9) In the ''Line-by-Line Instructions for Schedule 1'' (section IV in the instructions), the phrase in parentheses in line 22 is clarified and reads ''(records with Schedule 2, Item 19 = security type 5, 6, 7, 8, 9, 10, or 11)''.

(10) In the ''Line-by-Line Instructions for Schedule 1'' (section IV in the instructions), the phrase in parentheses in line 23 is clarified and reads ''(records with Schedule 2, Item 20 = security type 12)''.

(11) In the ''Line-by-Line Instructions for Schedule 2'' (section V in the instructions), the fifth type of issuer in line 11 is expanded, refers to proposed change (1) above, and reads ''Enter ''5'' if the security was issued by all other financial organizations (including BHC, FHC and IHC).''.

(12) In the ''Line-by-Line Instructions for Schedule 2'' (section V in the instructions), the note for ''Type 11'' in line 12 is expanded, refers to proposed change (4) above, and reads ''Type 11 should include all debt other than asset-backed securities that is not covered in types 5–10, including U.S. Treasury bills, TBRs, TIGRs, CATS and COUGRs.''

(13) In ''Appendix E: List of Currency Codes'', some names and/or symbols have been changed/updated, for example Romania, Serbia, Sudan, Turkey, Turkmenistan, Venezuela, and Zambia.

(14) In ''Funds and Related Equity Ownership'' (section III.E in the instructions), under the subsection ''Reporting guidelines for Hedge Funds and other alternative investments'', the list of legal entities is expanded to include fund ''administrators''.

(15) The exemption level (the threshold for reporting) for filing schedules 2 and 3 for a benchmark survey is increased from $100 million to $200 million.

(16) Some clarifications may be made in other parts of the instructions.

The changes will improve overall survey reporting.

Type of Review: Revision of a currently approved data collections.

Affected Public: Business/Financial Institutions.

Form: TIC SHL/SHLA, Schedules 1 and 2 (1505–0123).

Estimated Number of Respondents: An annual average (over five years) of 206, but this varies widely from about 590 in benchmark years (once every five years) to about 110 in other years (four out of every five years).

Estimated Average Time per Respondent: An annual average (over five years) of about 168 hours, but this will vary widely from respondent to respondent. (a) In the year of a benchmark survey, which is conducted once every five years, it is estimated that exempt respondents will require an average of 17 hours; for custodians of securities, the estimate is a total of 321 hours on average, but this figure will vary widely for individual custodians; and for issuers of securities that have data to report and are not custodians, the estimate is 61 hours on average. (b) In a non-benchmark year, which occurs four years out of every five years, it is estimated that the largest custodians of securities will require a total of 486 hours on average; and for the largest issuers of securities that have data to report and are not custodians, the estimate is 110 hours on average. The exemption level for custodians and for end-investors is the holding of less than $200 million in reportable U.S. securities owned by foreign residents. The exemption level applies only in benchmark years.

Estimated Total Annual Burden Hours: An annual average (over five years) of 33,720 hours.

Frequency of Response: Annual.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit written comments concerning: (a) Whether the Survey is necessary for the proper performance of the functions of the Office of International Affairs within the Department of the Treasury, including whether the information collected will have practical uses; (b) the accuracy of the above estimate of the burdens; (c) ways to enhance the quality, usefulness and clarity of the information to be collected; (d) ways to minimize the reporting and/or record keeping burdens on respondents, including the use of information technologies to automate the collection of the data requested; and (e) estimates of capital or start-up costs of operation, maintenance and purchase of services to provide the information requested.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Systems.

[FR Doc. 2016–31651 Filed 12–29–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 27, 2016.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before January 30, 2017 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimates, or any other aspect of the information collections, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained by emailing *PRA@treasury.gov,* calling (202) 622–0934, or viewing the entire information collection request at *www.reginfo.gov.*

Internal Revenue Service (IRS)

OMB Control Number: 1545–0008.

Type of Review: Revision of a currently approved collection.

Title: Wage and Tax Statements W–2/W–3 Series.

Abstract: Section 6051 of the Internal Revenue Code requires employers to furnish income and withholding statements to employees and to the IRS. Employers report income and withholding information on Form W–2. Forms W–2AS, W–2GU, and W–2VI are variations of the W–2 for use in U.S. possessions. The W–3 series forms transmit W–2 series forms to SSA for processing. The W–2C and W–3C series are used to correct previously filed forms.

Forms: W–2VI, W–3, W–3C, W–3CPR, W–3PR, W–2GU, W–2, W–2C, W–2AS, W–3SS.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 1.

OMB Control Number: 1545–0754.

Type of Review: Extension without change of a currently approved collection.

Title: Form Substantiation of Charitable Contributions- TD 8002.

Abstract: Congress intended that the IRS prescribe rules and requirements to assure substantiation and verification of charitable contributions. The regulations serve these purposes.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 2,158,000.

OMB Control Number: 1545–1212.

Type of Review: Extension without change of a currently approved collection.

Title: Form 706–QDT—U.S. Estate Tax Return for Qualified Domestic Trusts.

Form: 706–QDT.

Abstract: Form 706–QDT is used by the trustee or the designated filer to compute and report the Federal estate tax imposed on qualified domestic trusts by C section 2056A. IRS uses the information to enforce this tax and to verify that the tax has been properly computed.

Affected Public: Individuals or Households.

Estimated Total Annual Burden Hours: 357.

OMB Control Number: 1545–1578.

Type of Review: Extension without change of a currently approved collection.

Title: REG–106542–98 (TD 9032) (Final), Election to Treat Trust as Part of an Estate.

Abstract: REG–106542–98 (TD 9032) and Rev. Proc. 98–13 relate to an election to have certain revocable trusts treated and taxed as part of an estate, and provides the procedures and requirements for making the section 645 election.

Affected Public: Individual or Households.

Estimated Total Annual Burden Hours: 5,000.

OMB Control Number: 1545–1748.

Type of Review: Extension without a change of a currently approved collection.

Title: Changes in Accounting Periods—REG–106917–99 (TD 8669/Final).

Abstract: Section 1.441–2(b)(1) requires certain taxpayers to file statements on their federal income tax returns to notify the Commissioner of the taxpayers' election to adopt a 52–53 week taxable year. Section 1.442–1(b)(4) provides that certain taxpayers must establish books and records that clearly reflect income for the short period involved when changing their taxable year to a fiscal taxable year. Section 1.442–1(d) requires a newly married husband or wife to file a statement with their short period return when changing to the other spouse's taxable year.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 500.

OMB Control Number: 1545–1877.

Type of Review: Extension without change of a currently approved collection.

Title: Average Area Purchase Price Safe Harbors and Nationwide Purchase Prices under section 143—Revenue Procedure 2004–18.

Abstract: Revenue Procedure 2004–18 provides issuers of qualified mortgage bonds, as defined in section 143(a) of the Internal Revenue Code, and issuers of mortgage credit certificates, as defined in section 25(c), with (1) nationwide average purchase prices for residences located in the United States, and (2) average area purchase price safe harbors for residences located in statistical areas in each state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the Virgin Islands, and Guam.

Affected Public: State, Local, and Tribal Governments.

Estimated Total Annual Burden Hours: 15.

OMB Control Number: 1545–1979.

Type of Review: Extension without change of a currently approved collection.

Title: Form 8908—Energy Efficient Home Credit.

Form: 8908.

Abstract: Eligible contractors will use Form 8908 to claim the credit for new energy efficient homes that are acquired by sale or lease by an individual from that contractor during the tax year for use as a residence.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 512,820.

OMB Control Number: 1545–2050.

Type of Review: Extension without change of a currently approved collection.

Title: Notice 2006–109—Interim Guidance Regarding Supporting Organizations and Donor Advised Funds.

Abstract: Notice 2006–109 provides interim guidance regarding application of new or revised requirements under sections 1231 and 1241–1244 of the Pension Protection Act of 2006. It also provides interim relief from application of new excise taxes on private foundation grants to supporting organizations and on sponsoring organizations of donor advised funds.

Affected Public: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 612,294.

OMB Control Number: 1545–2147.

Type of Review: Extension without change of a currently approved collection.

Title: Internal Revenue Code Section 108(i) Election.

Abstract: Public Law 111–5 (American Recovery and Reinvestment Act), Section 1231 requires taxpayers to attach an election statement to the taxpayer's tax return to obtain a tax benefit. Information on how to make the election and what the statement must include must be published as early as possible to allow taxpayers sufficient time to determine whether to make the election and timely prepare and file their tax returns.

Affected Public: Businesses or other for-profits.

Estimated Total Annual Burden Hours: 300,000.

Bob Faber,

Treasury PRA Clearance Officer.

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Part II

Department of Transportation

Federal Aviation Administration

14 CFR Parts 21, 23, 35, et al.

Revision of Airworthiness Standards for Normal, Utility, Acrobatic, and Commuter Category Airplanes; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 23, 35, 43, 91, 121, and 135

[Docket No.: FAA–2015–1621; Amdt. Nos. 21–100, 23–64, 35–10, 43–49, 91–346, 121–378, and 135–136]

RIN 2120–AK65

Revision of Airworthiness Standards for Normal, Utility, Acrobatic, and Commuter Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA amends its airworthiness standards for normal, utility, acrobatic, and commuter category airplanes by replacing current prescriptive design requirements with performance-based airworthiness standards. These standards also replace the current weight and propulsion divisions in small airplane regulations with performance- and risk-based divisions for airplanes with a maximum seating capacity of 19 passengers or less and a maximum takeoff weight of 19,000 pounds or less. These airworthiness standards are based on, and will maintain, the level of safety of the current small airplane regulations, except for areas addressing loss of control and icing, for which the safety level has been increased. The FAA adopts additional airworthiness standards to address certification for flight in icing conditions, enhanced stall characteristics, and minimum control speed to prevent departure from controlled flight for multiengine airplanes. This rulemaking is in response to the Congressional mandate set forth in the Small Airplane Revitalization Act of 2013.

DATES: Effective August 30, 2017.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Lowell Foster, Regulations and Policy, ACE–111, Federal Aviation Administration, 901 Locust St., Kansas City, MO 64106; telephone (816) 329–4125; email *lowell.foster@faa.gov*.

SUPPLEMENTARY INFORMATION: All sections of part 23 contain revisions, except the FAA did not make any changes to the following sections: 23.1457, Cockpit Voice Recorders, 23.1459, Flight Data Recorders, and 23.1529, Instructions for Continued Airworthiness. Sections 23.1459 and 23.1529 were changed to align the cross references with the rest of part 23. The three sections otherwise remain unchanged relative to the former regulations.

Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701. Under that section, the FAA is charged with promoting safe flight of civil airplanes in air commerce by prescribing minimum standards required in the interest of safety for the design and performance of airplanes. This regulation is within the scope of that authority because it prescribes new performance-based safety standards for the design of normal, utility, acrobatic, and commuter category airplanes.

Additionally, this rulemaking addresses the Congressional mandate set forth in the Small Airplane Revitalization Act of 2013 (Pub. L. 113–53; 49 U.S.C. 44704 note) (SARA). Section 3 of SARA requires the Administrator to issue a final rule to advance the safety and continued development of small airplanes by reorganizing the certification requirements for such airplanes under part 23 to streamline the approval of safety advancements. SARA directs that the rule address specific recommendations of the 2013 Part 23 Reorganization Aviation Rulemaking Committee (Part 23 ARC).

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I. Overview of Final Rule

This rule amends Title 14, Code of Federal Regulations (14 CFR) part 23 by replacing current prescriptive design requirements with performance-based airworthiness standards. It maintains the level of safety associated with current part 23 except for areas addressing loss of control and icing where a higher level of safety is established, provides greater flexibility to applicants seeking certification of their airplane designs, and facilitates faster adoption of safety enhancing technology in type-certificated products while reducing regulatory time and cost burdens for the aviation industry and FAA. This final rule also reflects the FAA's safety continuum philosophy,[1] which balances an acceptable level of safety with the societal burden of achieving that level of safety, across the broad range of airplane types certificated under part 23.

This final rule allows the use of consensus standards accepted by the Administrator as a means of compliance to part 23's performance-based regulations. The use of these FAA-accepted consensus standards as a means of compliance will streamline the certification process. However, consensus standards are one means, but not the only means, of showing compliance to the performance-based standards of part 23. Applicants, individuals, or organizations also have the option to propose their own means of compliance as they do today.

In this final rule, the FAA adopts additional airworthiness standards to address certification for flight in icing conditions and enhanced stall characteristics to prevent inadvertent departure from controlled flight. Manufacturers that choose to certify an airplane for flight in Supercooled Large Drops (SLD)[2] must demonstrate safe operations in SLD conditions. For those manufacturers who choose instead to certify an airplane with a prohibition against flight in SLD conditions, this final rule will require a means for detecting SLD conditions and showing the airplane can safely avoid or exit such conditions.

This final rule adopts additional airworthiness standards to address enhanced stall characteristics to prevent loss of control (LOC). This final rule requires applicants to use new design approaches and technologies to improve airplane stall characteristics and pilot situational awareness to prevent LOC accidents.

Additionally, this final rule also streamlines the process for design approval holders applying for a type design change, or for a third party modifier applying for a supplemental type certificate (STC), to incorporate new and improved equipment in part 23 airplanes. The revised part 23 standards are much less prescriptive; therefore, the certification process for modifications is simplified. Certification of an amended type certificate (TC) or STC under this final rule requires fewer special conditions or exemptions, lowering costs and causing fewer project delays.

This final rule also revises 14 CFR part 21, ''Certification Procedures for Products and Articles,'' to simplify the approval process for low-risk articles. Specifically, it amends § 21.9 to allow FAA-approved production of replacement and modification articles for airplanes certificated under part 23, using methods not listed in § 21.9(a). This will reduce constraints on the use of non-required, low-risk articles, such as carbon monoxide detectors and weather display systems.

Lastly, this final rule removes Special Federal Regulation No. 23 (SFAR No. 23) and contains conforming amendments to 14 CFR parts 21, 35, 43, 91, and 135. These conforming amendments align part 23 references to the part 23 rules contained in this final rule.

The FAA has analyzed the benefits and costs associated with this rule. This rule responds to the Small Airplane Revitalization Act of 2013 (SARA) and to industry recommendations for performance-based standards. This rule reduces new certification processing by streamlining new certification processing. In addition, this rule improves safety by adding stall characteristic, stall warnings, and icing requirements. The following table summarizes the benefit and cost analysis, showing the estimated cost is substantially less than the benefits resulting from the combined value of the safety benefits and the cost savings. The following table shows these results.

ESTIMATED BENEFITS AND COSTS

[2015 $ Millions]

	Stall & spin + other costs	Safety benefits + cost savings = total benefits
Total	$0.8 + $3.1 = $3.9	$17.9 + $9.9 = $27.8.
Present value at 7%	$0.8 + $3.1 = $3.9	$6.1 + $4.9 = $11.0.
Present value at 3%	$0.8 + $3.1 = $3.9	$11.1 + $7.1 = $18.3.

* These numbers are subject to rounding error.

Accordingly, the FAA has determined that the rule will be cost beneficial.

II. Background

A. Statement of the Problem

The range of airplanes certificated under part 23 is diverse in terms of performance capability, number of passengers, design complexity, technology, and intended use. Currently, certification requirements of part 23 airplanes are determined by reference to a combination of factors, including weight, number of passengers, and propulsion type. The resulting divisions (*i.e.,* normal, utility, acrobatic, and commuter categories) historically were appropriate because there was a clear relationship between the propulsion and weight of the airplane and its associated performance and complexity.

Technological developments have altered the dynamics of that relationship. For example, high-performance and complex airplanes now exist within the weight range that historically was occupied only by light and simple airplanes. The introduction of high-performance, lightweight airplanes required subsequent amendments of part 23 to include more stringent and demanding standards—often based on the part 25 requirements for larger transport category airplanes—to ensure an adequate level of safety for airplanes under part 23. The unintended result is that some of the more stringent and demanding standards for high-performance airplanes now apply to the certification of simple and low-performance airplanes. Because of this increased complexity, it takes excessive time and resources to certify new part 23 airplanes.

B. History

In 2008, the FAA initiated the Part 23 Certification Process Study (CPS)[3] to review part 23. Collaborating with industry, the CPS team's challenge was

[1] The FAA's safety continuum philosophy is that one level of safety is not appropriate for all aviation.

[2] SLD conditions include freezing drizzle and freezing rain, which contain drops larger than those specified in appendix C to part 25, and can accrete aft of leading edge ice protection systems.

[3] See docket number FAA–2015–1621.

to determine the future of part 23, given products at the time and anticipated future products. The team identified opportunities for improvements by examining the entire life cycle of a part 23 airplane, including operations and maintenance. The CPS recommended reorganizing part 23 using criteria focused on performance and design complexity. The CPS also recommended the FAA implement general airworthiness requirements, with the means of compliance defined in industry consensus standards.

In 2010, following the publication of the CPS, the FAA held a series of public meetings to seek feedback concerning the findings and recommendations. Overall, the feedback was supportive of, and in some cases augmented, the CPS recommendations.

One notable difference between the CPS findings and the public feedback was the public's request that the FAA revise part 23 certification requirements for simple, entry-level airplanes. Over the past two decades, part 23 standards have become more complex as industry has generally shifted towards correspondingly complex, high-performance airplanes. This transition has placed an increased burden on applicants seeking to certificate smaller, simpler airplanes. Public comments requested that the FAA focus on reducing the costs and time burden associated with certificating small airplanes by restructuring the requirements based on risk. The risk exposure for most simple airplane designs is typically low, because of the small number of occupants.

On August 15, 2011, the Administrator chartered the Part 23 ARC to consider the following CPS recommendations:

- Recommendation 1.1.1—Reorganize part 23 based on airplane performance and complexity, rather than the existing weight and propulsion divisions.
- Recommendation 1.1.2—Certification requirements for part 23 airplanes should be written on a broad, general, and progressive level, segmented into tiers based on complexity and performance.

The ARC's recommendations took into account the Federal Aviation Modernization and Reform Act of 2012 (Pub. L. 112–95) (FAMRA), which requires the Administrator, in consultation with the aviation industry, to assess the airplane certification and approval process. The purpose of the ARC's assessment was to develop recommendations for streamlining and reengineering the certification process to improve efficiency, reduce costs, and ensure the Administrator can conduct certifications and approvals in a manner that supports and enables the development of new products and technologies and the global competitiveness of the United States aviation industry.[4] FAMRA also directed the Administrator to consider the recommendations from the CPS.[5]

ARC membership represented a broad range of stakeholder perspectives, including U.S. and international manufacturers, trade associations, and foreign civil aviation authorities (FCAAs).

The ARC noted the prevailing view within industry was that the only way to reduce the program risk, or business risk, associated with the certification of new airplane designs was to avoid novel design approaches and testing methodologies. Under existing part 23, the certification of new and innovative products frequently requires the FAA's use of equivalent level of safety (ELOS) findings, special conditions, and exemptions. These take time, resulting in uncertainty and high project costs. The ARC emphasized that although industry needs to develop new airplanes designed to use new technology, current certification costs inhibit the introduction of new technology. The ARC identified prescriptive certification requirements as a major barrier to installing safety-enhancing modifications in the existing fleet and to producing newer, safer airplanes.

The ARC also examined the harmonization of certification requirements between the FAA and FCAAs, and the potential for such harmonization to improve safety while reducing costs. Adopting performance-based safety regulations that facilitate international harmonization, coupled with internationally accepted means of compliance, could result in both significant cost savings and the enabling of safety-enhancing equipment installations. The ARC recommended that internationally accepted means of compliance should be reviewed and voluntarily accepted by the appropriate aviation authorities, in accordance with a process established by those authorities. Although each FCAA would be capable of rejecting all or part of any particular means of compliance, the intent would be to have FCAA participation in the creation of the means of compliance to ease acceptance of the means of compliance.

Based on the ARC recommendations and in response to FAMRA, the FAA initiated rulemaking on September 24, 2013. Subsequently, on November 27, 2013, Congress passed the SARA, which requires the FAA to issue a final rule revising the certification requirements for small airplanes by—

- Creating a regulatory regime that will improve safety and decrease certification costs;
- Setting safety objectives that will spur innovation and technology adoption;
- Replacing prescriptive rules with performance-based regulations; and
- Using consensus standards to clarify how safety objectives may be met by specific designs and technologies.

The FAA has determined that the performance-based-standards component of this final rule complies with the FAMRA and the SARA because it will improve safety, reduce regulatory compliance costs, and spur innovation and the adoption of new technology. This final rule will replace the weight- and propulsion-based prescriptive airworthiness standards in part 23 with performance- and risk-based airworthiness standards for airplanes with a maximum seating capacity of 19 passengers or less and a maximum takeoff weight of 19,000 pounds or less. The standards will maintain or increase the level of safety associated with the current part 23, while also facilitating the adoption of new and innovative technology in general aviation (GA) airplanes.

C. Summary of the NPRM

On March 7, 2016, the FAA issued a notice of proposed rulemaking (NPRM) proposing to revise part 23 in response to the SARA.[6] In the NPRM, the FAA proposed to—

- Establish a performance-based regulatory regime; and
- Add new certification standards for LOC and icing.

On May 3–4, 2016, the FAA held a public meeting to discuss the NPRM, hear the public's questions, address any confusion, and obtain information relevant to the final rule under consideration.[7] The meeting notice and the transcripts are both in the docket. The FAA considered comments made at the public meeting along with comments submitted by the public to docket number FAA–2015–1621.

The comment period closed on May 13, 2016.

III. Discussion of the Public Comments and Final Rule

A. Delayed Effective Date

The FAA has decided it is necessary to delay the effective date of this final

[4] Public Law 112–95, section 312(c).

[5] Public Law 112–95, section 312(b)(6).

[6] *See* 81 FR 13452.

[7] *See* 81 FR 20264.

rule for 8 months, until August 30, 2017.

This final rule establishes a new performance-based system that will require additional training for both FAA and industry engineers, as noted in the NPRM regulatory evaluation summary. Several commenters expressed concern with the need for additional training and guidance in order to implement the new performance-based standards. The FAA finds that a delayed effective date will alleviate these concerns.

Delaying the effective date will provide the FAA time to conduct the training necessary to implement this rule in a consistent manner. Additionally, the delayed effective date provides the FAA with sufficient time to develop guidance materials to ensure the FAA and industry have sufficient information to implement the new performance-based standards consistently and correctly. Furthermore, while compliance with part 23, amendment 23–62 will remain a means of compliance with this final rule, a delayed effective date will allow industry time to develop new means of compliance and will facilitate the development of harmonized means of compliance among the FAA, industry, FCAAs.

B. Overview of Comments

The FAA received 692 comments. Of the 692 comments, individuals submitted approximately 30 comments and industry and other foreign authorities submitted the remaining comments. The General Aviation Manufacturers Association (GAMA); Aircraft Electronics Association (AEA); Experimental Aircraft Association (EAA); and Aircraft Owners & Pilots Association (AOPA) (hereafter ‘‘the Associations’’) collected comments from their membership and presented these jointly. The vast majority of commenters overwhelmingly supported the proposed changes and provided constructive feedback so the FAA could clarify the safety intent in various sections of this rule.

The FAA did not receive comments on the proposed changes to the following sections. These sections are adopted as proposed, and the explanations for the changes from the former regulations are contained in the NPRM.

- § 23.1515, ‘‘Instructions for continued airworthiness’’
- § 35.1, ‘‘Applicability’’
- § 35.37, ‘‘Fatigue limits and evaluation’’
- § 91.205, ‘‘Powered civil aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements’’
- § 91.313, ‘‘Restricted category civil aircraft: Operating limitations’’
- § 91.531, ‘‘Second in command requirements’’
- § 121.310, ‘‘Additional Emergency equipment’’
- § 135.169, ‘‘Additional airworthiness requirements’’

C. General Public Comments

1. Rule Organization and Numbering

In the NPRM, the FAA proposed a new organization and numbering scheme for part 23. Appendix 1 to the NPRM preamble contains a cross-reference table detailing how the current regulations are addressed in the proposed part 23 regulations.

The FAA received several comments suggesting the FAA change the regulation numbering scheme for proposed part 23. Commenters expressed concern that confusion or undue complexity would result because the proposed part 23 regulations do not correlate by section number to the former part 23 regulations. Commenters also noted that certain sections of the proposed rule would have shared the same section numbers as former part 23 regulations but would have contained completely different content.

To avoid confusion, EASA proposed a new numbering system for Certification Specification 23 (CS 23) [8] and part 23, where the new regulations would not share numbers with the former regulations to emphasize the difference in content between these two sets of regulations. EASA suggested the numbering for subpart A begin at § 23.2000, for subpart B at § 23.2100, and so on, with the regulations numbers increasing by incremental steps of 5, *i.e.,* §§ 23.2005, 23.2010, and so on.

The FAA agrees that the proposed numbering scheme would have caused confusion and undue complexity. The FAA has considered EASA's recommended new numbering scheme for part 23 and adopts it in the final rule. This recommendation harmonizes the numbering of part 23 and CS 23 and provides new part 23 with a unique numbering scheme to avoid any confusion with former part 23. The FAA has determined the new numbering scheme also alleviates concerns about situations in which a certification basis would contain a former part 23 rule and a new part 23 rule sharing the same section number, but different subject-matter.

The FAA did not propose to change or renumber §§ 23.1457, 23.1459, and 23.1529; therefore, these sections remain as legacy rules in the new part 23.[9]

Air Tractor, Inc. (Air Tractor) suggested that the FAA retain former part 23, amendment 23–62, and create a new part (*e.g.,* part 22) for the proposed performance-based regulations. It also suggested that proposed appendix A should remain appendix G to avoid over-writing existing appendix A.

The FAA notes Air Tractor's recommendation to retain former part 23 and to create a new 14 CFR part for the proposed regulations. However, this regulation is a rewrite of part 23 by replacing the prescriptive design requirements with performance-based airworthiness requirements, and the creation of an additional part would result in unnecessary confusion and overlap. However, the FAA will accept the use of the prescriptive means of compliance contained in former part 23 as one way to show compliance with new part 23. This will not apply to the sections containing new requirements, such as §§ 23.2135, 23.2150, and 23.2165 (proposed in the NPRM as §§ 23.200, 23.215, and 23.230). In addition, the FAA is issuing a policy statement identifying the means by which the FAA has addressed errors, findings of ELOS to various provisions of former part 23, and special conditions. This policy should be considered in defining means of compliance based on former part 23.

The FAA also considered Air Tractor's recommendation to not rename appendix G. As proposed in the NPRM, the FAA removed appendixes A through F. However, the FAA is renaming former appendix G to part 23, as appendix A to part 23—Instructions for Continued Airworthiness, because this final rule is a complete rewrite and beginning the appendices at G instead of A may cause confusion.

The following table identifies each requirement, its previously-proposed section in the NPRM, and its corresponding section in this final rule.

[8] EASA published an Advance Notice of Proposed Amendment (A–NPA) 2015–06 on March 27, 2015, which set forth EASA's concept for its proposed reorganization of Certification Specification 23 (CS–23). EASA also published a Notice of Proposed Amendment (NPA) 2016–05 on June 27, 2016.

[9] The prescriptive requirements of §§ 23.1457, 23.1459, and 23.1529 are consistent in substance and numbering across parts 23, 25, 27, and 29.

NPRM	Title	Final rule
	Subpart A—General	
§ 23.1	Applicability and definitions	§ 23.2000.
§ 23.5	Certification of normal category airplanes	§ 23.2005.
§ 23.10	Accepted means of compliance	§ 23.2010.
	Subpart B—Flight	
	Performance	
§ 23.100	Weight and center of gravity	§ 23.2100.
§ 23.105	Performance data	§ 23.2105.
§ 23.110	Stall speed	§ 23.2110.
§ 23.115	Takeoff performance	§ 23.2115.
§ 23.120	Climb requirements	§ 23.2120.
§ 23.125	Climb information	§ 23.2125.
§ 23.130	Landing	§ 23.2130.
	Flight Characteristics	
§ 23.200	Controllability	§ 23.2135.
§ 23.205	Trim	§ 23.2140.
§ 23.210	Stability	§ 23.2145.
§ 23.215	Stall characteristics, stall warning, and spins	§ 23.2150.
§ 23.220	Ground and watering handling characteristics	§ 23.2155.
§ 23.225	Vibration, buffeting, and high-speed characteristics	§ 23.2160.
§ 23.230	Performance and flight characteristics requirements for flight in icing conditions	§ 23.2165.
	Subpart C—Structures	
§ 23.300	Structural design envelope	§ 23.2200.
§ 23.305	Interaction of systems and structures	§ 23.2205.
	Structural Loads	
§ 23.310	Structural design loads	§ 23.2210.
§ 23.315	Flight load conditions	§ 23.2215.
§ 23.320	Ground and water load conditions	§ 23.2220.
§ 23.325	Component loading conditions	§ 23.2225.
§ 23.330	Limit and ultimate loads	§ 23.2230.
	Structural Performance	
§ 23.400	Structural strength	§ 23.2235.
§ 23.405	Structural durability	§ 23.2240.
§ 23.410	Aeroelasticity	§ 23.2245.
	Design	
§ 23.500	Structural design	§ 23.2250.
§ 23.505	Protection of structure	§ 23.2255.
§ 23.510	Materials and processes	§ 23.2260.
§ 23.515	Special factors of safety	§ 23.2265.
	Structural Occupant Protection	
§ 23.600	Emergency conditions	§ 23.2270.
	Subpart D—Design and Construction	
§ 23.700	Flight control systems	§ 23.2300.
§ 23.705	Landing gear systems	§ 23.2305.
§ 23.710	Buoyancy for seaplanes and amphibians	§ 23.2310.
	Occupant System Design and Protection	
§ 23.750	Means of egress and emergency exits	§ 23.2315.
§ 23.755	Occupant physical environment	§ 23.2320.
	Fire and High-Energy Protection	
§ 23.800	Fire protection	§ 23.2325.
§ 23.805	Fire protection in designated fire zones and adjacent areas	§ 23.2330.
§ 23.810	Lightning protection	§ 23.2335.

NPRM	Title	Final rule
	Subpart E—Powerplant	
§ 23.900	Powerplant installation	§ 23.2400.
§ 23.905	Propeller installation	not adopted.
§ 23.910	Powerplant installation hazard assessment	§ 23.2410.
§ 23.915	Automatic power or thrust control systems	§ 23.2405.
§ 23.920	Reversing systems	§ 23.2420.
§ 23.925	Powerplant operational characteristics	§ 23.2425.
§ 23.930	Fuel system	§ 23.2430.
§ 23.935	Powerplant induction and exhaust systems	§ 23.2435.
§ 23.940	Powerplant ice protection	§ 23.2415.
§ 23.1000	Powerplant fire protection	§ 23.2440.
	Subpart F—Equipment	
§ 23.1300	Airplane level systems requirements	§ 23.2500.
§ 23.1305(a)(1)	Function and installation	§ 23.2505
§ 23.1305(a)(3),(b),(c)	Installation and operation	§ 23.2605.
§ 23.1310	Flight, navigation, and powerplant instruments	§ 23.2615.
§ 23.1315	Equipment, systems, and installations	§ 23.2510.
§ 23.1320	Electrical and electronic system lightning protection	§ 23.2515.
§ 23.1325	High-intensity Radiated Fields (HIRF) protection	§ 23.2520.
§ 23.1330	System power generation, storage, and distribution	§ 23.2525.
§ 23.1335	External and cockpit lighting	§ 23.2530.
§ 23.1400	Safety equipment	§ 23.2535.
§ 23.1405	Flight in icing conditions	§ 23.2540.
§ 23.1410	Pressurized system elements	§ 23.2545.
§ 23.755(a)(3)	Equipment containing high-energy rotors	§ 23.2550.
§ 23.1457	Cockpit voice recorders	§ 23.1457.
§ 23.1459	Flight data recorders	§ 23.1459.
	Subpart G—Flightcrew Interface and Other Information	
§ 23.1500	Flightcrew interface	§ 23.2600.
New	Installation and operation	§ 23.2605.
§ 23.1505	Instrument markings, control markings and placards	§ 23.2610.
New	Flight, navigation, and powerplant instruments	§ 23.2615.
§ 23.1510	Airplane flight manual	§ 23.2620.
§ 23.1515	Instructions for continued airworthiness	§ 23.1529.
	Appendices	
Appendix A to Part 23	Instructions for Continued Airworthiness	Appendix A to Part 23.

2. Level of Safety

In the NPRM, the FAA proposed amendments to part 23 to create an adaptive regulatory environment that could quickly embrace new safety-enhancing technologies and potentially increase the level of safety.

Wipaire, Inc. (Wipaire) viewed the proposal as allowing new and emerging technologies an effective means of certification, but one which offered little economic and certification relief to currently-established methods and technologies.

An individual commenter noted that the proposal would allow industry to push new techniques, materials, procedures, and targets without being hindered by the prescriptive requirements of former part 23. However, the commenter stated that the proposal could allow subpar designs to exist before the data suggests a failure in compliance.

The National Transportation Safety Board (NTSB), while recognizing consensus standards provide ''a collaborative framework for standards development,'' commented on a situation where, in its view, consensus standards did not provide adequate protection from catastrophic aerodynamic flutter. The NTSB expressed concern that design standards important for safety consideration may be overlooked, and it encouraged the FAA to refine its methodology.

The FAA understands the concerns over the level of safety required by the performance standards. However, by leveraging the expertise of consensus standards organizations and FAA specialists in determining whether those standards are acceptable, those means of compliance should provide at least the same level of safety as under the former process.

The FAA will continue to be responsible for determining that proposed airplane designs meet the applicable standards and ensuring that the proposed standards provide at least the same level of safety as did the former standards. Under new part 23, the first time an applicant presents a new proposal for a means of compliance, the FAA will require sufficient time and resources to determine whether it does, in fact, meet the objectives of those standards. This is the same process as under the former prescriptive standards. However, once the proposed means of compliance is determined to meet these standards, the approval process becomes more efficient. The FAA will no longer be required to issue special conditions (or other formal processes) to approve the means of compliance each time it is proposed, but can accept those means of compliance immediately as it is proposed.

3. Accommodating Hybrid and Electric Propulsion

In the NPRM, the FAA recognized that historical general design and performance assumptions may not be valid today. The FAA noted that former part 23 did not account for airplanes equipped with new technologies, such as electric propulsion systems, which may have features entirely different from piston and turbine engines. The FAA therefore proposed new regulations based on airplane performance and potential risk.

With respect to allowing new technologies, the Associations and Zee.Aero Inc. (Zee) were particularly concerned with the accommodation of alternative engines. The Associations stated that hybrid and electric propulsion is one of the near-term significant technological developments which absolutely must be accommodated into the new part 23 regulations structure.

Zee also commented on the advancements in hybrid and electric propulsion. Zee noted that new hybrid propulsion, control, and airframe configurations are already beginning to blur the lines between the traditional airplane categories. Zee questioned whether the FAA intends to continue to maintain strict airplane categories and create a new ''category'' every time a new unique category configuration emerges. Lastly, Zee noted that § 21.17(b) currently captures such airplane and wondered whether that section would become the norm for those cases.

The regulations adopted in this final rule do allow for alternative types of propulsion. The FAA does not intend to continue to use § 21.17(b) for unique category airplanes. The FAA plans to shift these unique airplanes from § 21.17(b) to part 23. Unique airplane that more closely resemble rotorcraft may be treated differently.

4. Impact of Rule on FAA Engineers and Designated Engineering Representatives (DERs)

In the NPRM, the FAA proposed changes to part 23 that would eliminate the workload of exemptions, special conditions, and ELOS findings necessary to certificate new part 23 airplanes. The NPRM did not specifically address the role of Designated Engineering Representatives (DERs) in the proposed process.

Several commenters addressed the impacts of the proposed rule changes on FAA engineers and DERs.

NetJets Association of Shared Aircraft Pilots (NJASAP) and Kestrel Aircraft Company (Kestrel) expressed concern that the process intended to streamline technological adoption may significantly increase the FAA's workload. Kestrel contended the increased workload for FAA engineers will create certification bottlenecks at the Aircraft Certification Offices (ACOs) as their staff work to understand and implement the changes.

The FAA recognizes workload during the transition to the new system may increase temporarily for industry and the FAA. Under the former part 23, the FAA had a workload of exemptions, special conditions, and ELOS findings necessary to certificate new part 23 airplanes. However, the FAA has determined in the long term, the workload for industry and the FAA will be less than the workload under former part 23. As estimated in the NPRM's regulatory evaluation summary, there will be savings resulting from streamlining the certification process by reducing the issuance special conditions, exemptions, and ELOS findings. The NPRM and final rule regulatory evaluation provides details for these cost savings and the methodology the FAA employed to estimate the cost savings.

Other commenters expressed concerns about how the DER process will fit in with the new regulations. Air Tractor questioned whether DERs will find compliance with accepted means of compliance. The National Air Traffic Controls Association (NATCA) asked whether DERs will issue acceptance statements or approvals. NATCA asked how the FAA will change the designee policy and asked whether the FAA intends to accept or approve the standards. Textron Aviation (Textron) requested clarification of the FAA's transition plan regarding Organization Designation Authorization (ODA) and DER delegations, in particular regarding continuity of authority from the old amendments to the new.

In response to concerns regarding the role of the DERs and ODA engineers, the FAA is developing transition training for the FAA engineers, ODA engineers, and the DERs. The FAA is also reviewing the relevant orders and policies for needed changes, but does not expect changes to the basic certification process as the FAA engineers and industry designees will still be responsible for finding compliance to the requirements in part 23. Furthermore, the FAA is developing a change management plan that will include formal training for both FAA engineers and staff and industry designees. Under existing policies and processes, designees must demonstrate the capability to make correct determinations of compliance with particular regulations before they are authorized to do so. This is unchanged by this rule. To the extent an applicant uses previously-accepted methods of compliance for which the designee has demonstrated such capability, the FAA may delegate compliance findings. If an applicant is proposing a new method of compliance, the designee's authority may be limited to only recommending a finding of compliance.

Kestrel contended standardization among ACOs would likely decrease due to lack of clearly-defined criteria and that divergent certification expectations would exacerbate existing issues of inconsistent application and interpretation of requirements.

While this final rule adopts high-level performance standards, the FAA intends to ensure consistent application through the process for determining the acceptability of their means of compliance. The FAA's certification standards staff will determine whether proposed consensus standards are acceptable and, if so, will publish a notice of availability of those standards in the **Federal Register**. The FAA will also maintain a publicly-available list of consensus standards that have been found to be acceptable as methods of compliance.[10] For methods of compliance submitted by individual applicants, the FAA will continue to use the existing issue paper process, which includes full coordination with the standards staff to ensure standardization. The FAA recognizes the importance of having an internationally accepted means of compliance for part 23 airplanes. The FAA believes once there are internationally accepted means of compliance available, manufacturers may be reluctant to bypass these harmonized means to develop their own, unless they have an innovative process or new technology not already addressed. In either case, the FAA's processes should ensure flexibility and transparency to the extent permitted without violating proprietary interests of entities developing methods of compliance. Allowing for innovation and new technology is a major goal of this rule.

In response to NTSB's concerns about new technology, the FAA finds that shifting compliance emphasis to industry consensus standards is critical to ensuring the safety of new

[10] As discussed in the NPRM, the FAA will have a similar process for determining whether a previous acceptance of a method of compliance should be rescinded, based on new information or service experience.

technology. This shift will allow the FAA to leverage technical experts from across the aerospace industry and from outside the traditional aerospace industry to develop standards for new technologies.[11]

5. Necessity of Training

In the NPRM's regulatory evaluation, the FAA assumed that FAA and industry part 23 certification engineers would require additional training as a result of this rule.

Some commenters expressed concern with training needs required by a new system. Kestrel noted the proposed rule would increase the workload of DERs, primarily because they will require additional training and FAA coordination to ensure proper understanding and implementation of the new certification process. NATCA noted the significant changes to part 23 will necessitate training of all FAA engineers, DERs, and ODA engineers. In particular, NATCA said designees and ODAs cannot be authorized to find compliance to part 23 until trained or demonstrated competence. NATCA recommended the FAA amend its delegation and ODA policy documents to reflect the changes to part 23 and implement training as soon as possible.

The NTSB expressed concern about increased demand on FAA engineers to evaluate new technologies as a result of the proposed changes to part 23. It suggested the FAA may face challenges similar to those encountered with the certification of the lithium-ion batteries in the Boeing 787, including insufficient guidance and education to ensure compliance with applicable requirements. The NTSB pointed to several safety recommendations it issued to the FAA in the wake of a lithium-ion battery incident in a Boeing 787 in 2013, which centered around developing and providing adequate written guidance and training to certification engineers.

The FAA agrees guidance and training are necessary and has delayed the effective date of this rule in order to complete the training development and implementation for ACOs, DERs, and industry. The FAA will continue to review orders and policies for needed changes.

6. Need for Revised or New Agency Guidance and Directives

The FAA proposed Advisory Circular (AC) 23.10,[12] Accepted Means of Compliance, to provide applicants guidance on the process of submitting proposed means of compliance to the FAA for consideration by the Administrator. The FAA also indicated in the NPRM that it would provide guidance as it determines what satisfies the performance-based standards.

NATCA requested the FAA publish new or revised Orders and policy documents for public review and comment prior to the issuance of the final rule. For example, how would a certification engineer recognize what is a ''good compliance showing'' to a new part 23 requirement and how would that engineer explain the compliance showing to an authorized representative of the Administrator. Also, how would a certification engineer minimize or avoid allegations from an applicant that the engineer is being inequitable in the application of the new part 23 requirement compared to how the requirements have been applied to other applicants.

NATCA noted applicants often use legal processes for approval of type design changes to obtain less expensive or extensive certification requirements for a design proposal, and that the ''number of seats'' has been used previously to finesse operating requirements applicability. NATCA questioned whether the FAA will permit this under new part 23 as established by the airplane certification levels and whether there will be any check or limitation or safety judgment made on this potential use of new part 23. NATCA requested the FAA publish an Order or policy addressing this issue.

One commenter was concerned the FAA will eventually leave the task of developing ACs for means of compliance to consensus bodies and individual applicants and opposed a system where public domain guidance must be purchased from a private entity. The commenter suggested that even if the FAA decides to discontinue updating its guidance, it should retain control and continue to permit the use of its existing guidance as well as provide a list of guidance with its status.

The FAA agrees with NATCA that updated guidance is needed and is in the process of reviewing current orders and policies and will use existing processes to implement those changes. The FAA also recognizes the potential that some applicants will attempt to ''finesse'' the applicability of requirements for higher airplane certification levels by limiting the maximum passenger capacity of their proposed designs. This potential is inherent in any attempt to establish different levels of safety based on the concept of the ''safety continuum.'' The disincentive for such finessing is the reduction of functionality, and therefore profitability, of the resulting design.

The FAA will continue to use all applicable ACs associated with part 23. Applicants will need to use the cross-reference table in this final rule preamble because the ACs will continue to reference the former section numbers. The FAA will expand the guidance in these ACs to better address the range of part 23 airplanes identified in industry consensus standard documents. The FAA has no plans to cancel the current ACs because they are still needed for older airplane modifications; therefore, the applicable ACs will still be available to applicants. Consensus standards bodies will develop means of compliance with the new regulations. The FAA will continue to develop ACs, as needed, to provide guidance to the public on what means of compliance would be acceptable. These functions are distinct, but complementary.

7. Inconsistent Language

In the NPRM, the FAA proposed to remove prescriptive design requirements and replace them with performance-based airworthiness standards.

Some commenters expressed concern with the lack of concreteness in the proposed regulations. Transport Canada stated the standards required the definition of a safety objective to clarify the meaning of some terms. The National Agricultural Aircraft Association (NAAA) was concerned the proposed regulations could result in inconsistent interpretations. NATCA viewed the rules as too ''stripped down'' for non-experienced people and commented that the use of ''vague'' terms would make it difficult to apply the new rules. Air Tractor contended the proposed rules consolidated existing requirements into fewer ''general'' or ''vaguely'' worded rules.

Other commenters addressed perceived inconsistencies in the language of the proposed revisions to part 23. The Associations noted some of the proposed rules focused on the applicant while others focused on the airplane.[13] These commenters observed

[11] National Transportation Safety Board, *Auxiliary Power Unit Battery Fire, Japan Airlines Boeing 787–8, JA829J, Boston, Massachusetts, January 7, 2013,* AIR–14/01 (Washington, DC: NTSB, 2014).

[12] See docket number FAA–2015–1621.

[13] For example, some of the proposed rules stated ''the applicant must show'' or ''the applicant must

Continued

it is important that the language of part 23 does not contradict part 21, which establishes the procedures for obtaining design approvals. The commenters recommended the FAA adopt the regulatory language used elsewhere in the airworthiness standards, which impose requirements on the airplane design.

The FAA recognizes the final rule uses high-level performance standards, and in some cases, the requirements are not tightly specified. However, the FAA finds that tight specification is not needed as this final rule is consistent with the safety objectives of the former prescriptive standards. The cross-reference table in this final rule identifies what sections of this final rule are intended to meet the safety objectives of the former regulations. Because this final rule is intended to achieve at least the same level of safety as the former regulations, this comparison may be used as a guide to the various levels of acceptable risk associated with each section.

In response to the comment raised by GAMA and others, part 21 imposes obligations on applicants for design approvals; therefore, the references to the applicant in this final rule are consistent.

8. Need for Additional Provisions in Part 23

NATCA recommended the FAA add several provisions to part 23, including a requirement about loss of propeller or propeller control, provisions defining the levels of software certification needed, requirements that address impact protection from unmanned aircraft systems (UAS), and provisions about the introduction of new technologies.

The FAA considered NATCA's comments; however, the FAA declines to adopt NATCA's recommendations at this time. The FAA is not adding requirements about loss of propeller or propeller control and provisions defining the levels of software needed because these are more appropriately addressed in means of compliance. The FAA also finds it unnecessary to include specific provisions about the introduction of new technologies because all the regulations in new part 23 are intended to allow the introduction of new technologies. Furthermore, it would be outside the scope of this rulemaking to add requirements addressing impact protection from UAS.

demonstrate,'' while others stated ''the airplane must.''

9. Development of Standards

In the NPRM, the FAA described how industry groups associated with the Part 23 ARC discussed the development of consensus standards and how the ARC selected ASTM as the appropriate organization to initiate this effort.

NATCA expressed concerns the FAA was relinquishing standardization and stated the FAA needed to articulate an expected minimum technology maturity level.

The FAA's process for reviewing applicant's submissions to verify compliance with the safety standards will address NATCA's concern regarding technology. This review process will not change from the way the FAA currently reviews an applicant's regulatory compliance. One of the purposes of this rule is to provide greater flexibility to applicants in showing they meet the objectives of the safety standards, and thus ''standardization'' in the strictest sense goes against this purpose. Similarly, with respect to minimum technology level, another purpose of this rule is to spur innovation and technology adoption. Therefore, requiring a certain technology maturity level would contradict that purpose.

10. Restricted Category Agricultural Airplanes

In the NPRM, the FAA did not specifically address single-engine agricultural airplanes.

The NAAA commented that AC 21.25–1, Issuance of Type Certificate: Restricted Category Agricultural Airplanes, is currently used by the FAA to determine which part 23 certification requirements should not be part of an airplane's TC under § 21.25. NAAA questioned how the requirements found inappropriate for single-engine agricultural airplanes in AC 21.25–1 will influence the certification process.

The FAA notes the cross reference table located in this final rule correlates the sections referenced in AC 21.25–1 with the new regulations and associated means of compliance. Long term, the FAA recommends NAAA work with the FAA to develop means of compliance specific to restricted category agricultural airplanes.

11. International Cooperation Efforts

In the NPRM, the FAA indicated the part 23 rulemaking was a harmonization project between the FAA and EASA. EASA published an Advance Notice of Proposed Amendment (A–NPA) 2015–06 on March 27, 2015, which set forth EASA's concept for its proposed reorganization of CS 23. The FAA received several comments on harmonization.

Garmin International (Garmin) and Agencia Nacional De Aviacao Civil Brazil (ANAC) commented on the significant differences between the NPRM and EASA's A–NPA. Garmin encouraged the FAA and EASA to resolve all differences before publishing their final regulations. Textron stressed the importance of harmonizing rule language with other major global certification authorities because a lack of harmonization would call into question whether one set of consensus standards would be adequate to achieve certifications worldwide. Textron expressed disappointment that the FAA's NPRM and EASA's A–NPA were not better aligned prior to publication. Textron explained the goal should be 100 percent harmonization with no exceptions. Garmin and Textron both commented on the significant costs that non-harmonized regulations would have on the industry.

EASA commented on the importance of using, as much as possible, the same text in CS 23 and part 23. EASA explained, however, that CS 23 was more of a technical standard, while proposed part 23 addressed the applicant's responsibility. To better align with CS 23, EASA suggested that the FAA require ''the applicant's design'' to meet certain requirements rather than ''the applicant.''

Optimal Aerodynamics Ltd (Optimal) recognized the harmonization efforts that have taken place, but sought reassurance from the FAA that revisions to part 23 would not lead to greater differences with other CAA's certification standards. Assuming CS 23 aligns with part 23, Optimal asked if it would be possible to base compliance on EASA's revised CS 23 when applying to the FAA for certification under new part 23.

The FAA agrees that harmonization with EASA's standards is important. While identical language is not the goal, the FAA has worked closely with EASA to ensure the same basic requirements for part 23 and CS 23 in order that both authorities can accept the same set of industry means of compliance. For example, as discussed previously, references to the applicant's obligations (''the applicant must'') are consistent with part 21 and with EASA's counterpart requirement that applicants ''show'' compliance. To further this effort, the FAA has met with EASA,[14] received comments from EASA, and submitted comments on EASA's A–NPA. EASA incorporated many of the

[14] See docket number FAA–2015–1621–0062.

FAA's comments on its A–NPA into its Notice of Proposed Amendment (NPA), published on June 23, 2016. In addition, the FAA incorporated many of EASA's comments to the NPRM into this final rule, such as including two new sections in Subpart G.

12. Part 23 ARC Recommendations and the Existing Fleet

As previously discussed in more detail, the FAA chartered the Part 23 ARC in 2011 to consider the reorganization of part 23 based on airplane performance and complexity and to investigate the use of consensus standards. The Part 23 ARC's recommendations were published in 2013 and are available in the docket.

Textron, Garmin, and several individuals commented on those ARC recommendations that were not proposed in the NPRM. In particular, these commenters requested the FAA adopt changes to 14 CFR part 21, ''Certification Procedures for Products and Articles''; part 43, ''Maintenance, Preventive Maintenance, Rebuilding, and Alteration''; and part 91, ''General Operating and Flight Rules''; as recommended by the ARC. These comments related to type certification procedures and airplane maintenance and operations. Similarly, several commenters requested the FAA adopt the ARC's recommendation to establish a ''Primary Non-Commercial Category'' (PNC), which also would have required revisions to part 21.

Several individual commenters noted that regulations applicable to existing airplanes make it difficult and expensive to implement safety improvements on those airplanes. These commenters questioned whether this rulemaking will address those issues.

While the FAA recognizes the commenters' concerns regarding the need to minimize the certification process burden, the FAA is not making additional changes to parts 21 or 43 because they are outside the scope of this rulemaking. The intent of this rulemaking is to remove the prescriptive design requirements from part 23 and replace them with performance-based airworthiness requirements. The FAA is, however, contemplating a future rulemaking that would make additional changes to part 21.[15]

The FAA also considers the commenters' recommendations to create a PNC category for aging General Aviation (GA) airplanes to be outside the scope of the NPRM. The FAA did not propose to create a PNC category for aging GA airplanes, as the ARC recommended, because it is also out of scope of this rulemaking. However, the FAA is working to address the ARC recommendations that focused on the existing fleet and part 21 processes.

With respect to the existing fleet, the FAA does not expect the revisions to part 23 to provide immediate benefits to older airplanes. However, when an owner of an older airplane applies for a change to the airplane's TC in accordance with § 21.101, the applicant may choose to use the more flexible performance-based standards. In addition, as discussed later, the revision to § 21.9 will enable expedited approval of certain parts that will benefit the existing fleet.

13. Impacts of the Proposed Rule on the Existing Fleet and on Open/Active Projects

The FAA received several comments on impacts to the existing fleet and on open/active projects.

Kestrel and Garmin asked how, under the proposed rule, the FAA will address active projects, derivative airplanes and changes to existing models. Kestrel noted § 21.101 requires regulatory compliance with the latest amendment while permitting certification on a case-by-case basis to an earlier amendment for changes to existing models and derivative airplanes. Kestrel noted it is common for applicants to receive significant compliance credit on the basis of ''similarity/identicality.'' Kestrel asked how the FAA would grant permission for an applicant for a derivative airplane to certify entirely to a previous amendment.

As discussed in the NPRM, the applicant has the option of using former part 23, amendment 23–62, as a means of compliance with new part 23 (except in the areas where this final rule raises the level of safety, as discussed previously). Since the new rule, combined with this accepted means of compliance, is identical to the former part 23 requirements (with exceptions noted in this preamble), methods of showing compliance—including ''similarity/identicality''—are not affected for changes to existing airplane models. Furthermore, § 21.101 only requires regulatory compliance with the latest amendment for airplanes weighing more than 6,000 pounds. Section 21.101 also provides relief for airplanes weighing more than 6,000 pounds when the change is not significant or when compliance with a later amendment would not contribute materially to the level of safety or would be impractical

Garmin requested more details on the changes the FAA believes would streamline the process for design approval and lower costs and project delays. Garmin also asked the FAA to clarify how existing special conditions, ELOS findings, and exemptions would be handled if an applicant wants to ''step up'' to the new amendment.

The FAA has determined the cost and time savings will result from the greater flexibility afforded by this final rule to both applicants and the FAA to find compliance for innovative new technologies. For traditional designs, the FAA expects applicants will be able to use the new part 23 in the same way older Civil Air Regulation, part 3 (CAR 3) airplanes are modified using former part 23 regulations. The FAA will still find compliance with the regulations, and since the new regulations allow greater flexibility by relying on accepted means of compliance, there should be little need for special conditions, ELOS findings, or exemptions, all of which require additional cost and time.

An individual and Air Tractor expressed concern over third-party modifiers of airplanes who were not part of the original certification process. The commenters suggested a third-party modifier could propose its own means of compliance and regard it as proprietary, which may conflict with the means of compliance used in the original basis of certification. The commenters were concerned an STC or field approval could become more difficult and create more work for the FAA.

The FAA notes the situation raised by the commenters currently exists with proprietary means of compliance, and this will not change with the new performance-based regulations. As under the former regulations, STC applicants will continue to be required to demonstrate that their changes, and areas affected by the changes, comply with the applicable regulations. The FAA anticipates no increased potential for conflict with the original design.

NATCA recommended the FAA make changes to the general definitions of 14 CFR 1.1 concurrently with the part 23 rewrite, including revising the definition of ''consensus standard'' because it applies to more than Light-Sport Aircraft (LSA), adding the definition of ''proprietary standard,'' and reconciling the differences between the International Civil Aviation Organization (ICAO) airplane categories and the new definitions in part 23.

The FAA has determined there is no need to define the terms, ''consensus

[15] The Part 21 SMS ARC published its recommendation reports (appendix A–G and appendix H–P) on January 14, 2015. Copies can be downloaded from the FAA Advisory and Committee site at *http://www.faa.gov/regulations_policies/rulemaking/committees/documents/.*

standard'' and ''proprietary standard'' in this final rule. The current definition of ''consensus standard,'' by its terms, applies only to LSA. For purposes of this final rule, ''consensus standard'' has the meaning established in SARA, as discussed previously. The FAA does not use the term ''proprietary standard'' in the regulations adopted by this final rule. Finally, the FAA notes the definitions of the categories need to remain the same because this final rule does not change their applicability to the existing fleet of airplanes. Also, the difference between the ICAO airplane standards and part 23 categories is based on weight and this rule does not affect that difference.

While NJASAP supported the LOC In-Flight and SLD safety enhancements, it stated runway excursions are another significant risk. NJASAP supported requiring secondary or emergency braking systems and recommended a requirement for powerplant reversing systems to be installed on all level 3 and 4 high-speed airplanes to help reduce the top three accident types. For the goal of reducing loss-of-control accidents, NJASAP supported—along with other aerodynamic improvements—the FAA requiring a device that gives a trained pilot immediate feedback on the status of the airplane's wing. NJASAP recommended level 3 high-speed airplanes be included in the safety enhancements required for level 4 airplanes because they will be flying similar missions, and Original Equipment Manufacturers (OEMs) will target the level 3 certification category and stop certifying as many level 4 airplanes.

The FAA finds that requiring emergency braking systems and powerplant reversing systems is beyond the scope of this rulemaking and would add additional costs. Requiring a device that gives a trained pilot immediate feedback on the status of the wing is also beyond the scope of this rulemaking, but a device like this could be used (and the FAA encourages its use) as part of the low-speed stall protection. Furthermore, the design specific nature of these recommendations is inconsistent with the FAA's goal of performance-based requirements in this rule revision. The new rule structure will allow for these alternative devices.

The FAA considered NJASAP's recommendation that level 3 airplanes be included in the level 4 safety enhancements because of levels 3 and 4 airplanes' similar missions. In this final rulemaking, the FAA retains the traditional approach of drawing safety distinctions based on airplane capacity and operational risk.

The NTSB commented on the proposed rule's focus on qualitative design methodologies, but recommends the use of both quantitative and qualitative design methodologies as the FAA has done historically. The NTSB pointed to proposed §§ 23.305 and 23.1315 and the continued reliance on the requirements of former § 23.1309, which only addresses the effects of single failures. The NTSB contended that the consideration of multiple failures should be required in the revised part 23 when active systems may potentially be used in commercial operations and the airplane may be more complex.

The FAA's intent in this rule is to maintain the current level of safety. The FAA is currently engaged in rulemaking for transport airplanes to address the NTSB's concerns. Depending on the outcome of that rulemaking, the FAA may consider similar rulemaking for part 23 in the future.

14. Legal Issues

In the NPRM, the FAA proposed to accept consensus standards as a means of compliance with the new part 23 performance-based regulations. Abbott Aerospace SEZC, Ltd. (Abbott) and Kestrel questioned the legality of using ASTM as a means of compliance.

Abbott stated the proposed change is illegal as the new ASTM standards constitute de facto law despite being labelled ''advisory'' and are the only realistic path to certify an airplane. Abbott claimed this mislabeling will lead to confusion and cause industry to incur the cost of purchasing the ASTM standards under the belief that they constitute law and that compliance is mandatory.

Kestrel also questioned the legality of relinquishing FAA guidance to a private entity and of using ASTM as the single standards body. Kestrel opposed handing over public domain guidance to a private entity for creation of its own standards, which will be provided back to the industry for a fee. Kestrel suggested the FAA retain control and continue to permit the use of its existing guidance.

In light of the comments, the FAA reviewed its approach to use consensus standards as means of compliance with this rule. On November 27, 2013, the President of the United States signed SARA whereby Congress mandated the FAA use consensus standards to clarify how safety objectives may be met by specific designs and technologies. SARA also requires the FAA to comply with the ''National Technology Transfer and Advancement Act of 1995'' (NTTAA), which directs Federal agencies to use voluntary consensus standards in lieu of government-mandated standards when practicable. This rulemaking also complies with the Office of Management and Budget (OMB) Circular A–119, ''Voluntary Consensus Standards,'' which provides guidance on how to comply with NTTAA. OMB Circular A–119 specifically addresses the issues raised by the commenters and establishes the policy that agencies should consider cost to regulated entities of using consensus standards as one factor in determining whether those standards are ''reasonably available.'' The FAA has considered the cost of ASTM standards and determined, for purposes of this rulemaking, ASTM standards are reasonably available because the interested parties have access to them through their normal course of business and the price is low enough that interested parties can easily purchase them.

In addition, ASTM will not create de facto law nor be the single standard-setting body, or custodian of public domain documents. The FAA expects to accept means of compliance from individuals, companies, and other standards bodies, including ASTM. While the use of a previously accepted means of compliance will likely expedite the certification process, no applicant will be required to use ASTM or any other means of compliance. Instead, an applicant may propose its own means of compliance for acceptance, or demonstrate compliance to the new rule by using the prescriptive provisions in former part 23 and supporting guidance—all of which will remain publically available. As discussed in the NPRM, the long-term benefit and cost reduction provided by this rule is that it will allow the introduction of new technologies without the formal processes that currently increase certification costs and inhibit innovation.

The American Association of Justice (AAJ) commented that the new part 23 performance standards should not preempt state tort law because state tort law functions as a necessary adjunct to federal regulations that impose only minimum standards of care. AAJ urged the FAA to avoid any language that could allow the new standards to be construed as preempting state law for defectively designed or produced airplane, or characterizing the standards beyond what is authorized by the Federal Aviation Act.

AAJ's comment regarding preemption of state tort law in aviation cases was not a topic of this rulemaking. Rather, it is the subject of current litigation in federal court regarding interpretation of the FAA's enabling legislation. The outcome of that litigation is neither the subject of this rulemaking, nor will this rulemaking affect that outcome. However, as noted by the Supreme Court in previous litigation, it is the applicant's obligation to comply with airworthiness standards; the FAA cannot guarantee such compliance.

15. Regulatory Evaluation

The FAA received comments from five commenters (four companies and one individual) on the summary of the regulatory evaluation published as part of the NPRM. In the NPRM regulatory evaluation, the FAA requested that commenters include data supporting their comments, but no commenter submitted any cost or benefit data with its comments.

a. General

Kestrel stated that all applicants will benefit from decreased certification costs and hopes the cost savings are tangible and can be realized in a short time frame; however, Kestrel anticipates an increased workload after the rule is adopted to train its personnel on the new standards. Abbott, Air Tractor, and one individual commenter characterized the cost benefit analysis as incomplete.

In the NPRM, the FAA stated that if the proposed rule saves only one human life—for example, by improving stall characteristics and stall warning—that alone would result in the benefits outweighing the costs of the rule change. Air Tractor characterized this statement as ''vacuous.'' Air Tractor went on to comment that its industry places a high value on protecting human life and expends enormous energy, talent, and resources to protect it.

The FAA intended this statement as a simplified break-even analysis of the likely benefits of the proposed rule. It was not intended to replace the costs and benefits detailed in the regulatory evaluation. The complete regulatory evaluation, located in the docket, is more comprehensive than the summary that appears in the NPRM preamble and contains the estimates provided to the agency by industry.[16]

Abbott stated there was no clear indication of how the proposed change would reduce net cost or expedite the certification process. Abbott concluded there were ''potential significant additional'' costs created by the proposed rule, but no obvious or defined cost reduction. Abbott characterized the proposed regulations as having an unknown cost impact and stated these unknown costs represent a yet-unassessed and unavoidable cost for airplane developers. Abbott also stated that any additional cost the proposed rule places on industry that is not offset by cost reduction elsewhere does harm to the industry.

The FAA notes that under the proposed rule, applicants may choose to use an industry consensus standard, the former part 23 standards (available at no cost), or its own means of compliance accepted by the Administrator. The FAA presumes an applicant will use these options to make the best economic choices given the circumstances of design and development for its product. Such choices are an inherent strength of a performance-based standard, but cannot effectively be analyzed for costs or benefits, especially if a design encompasses new technology that was never subject to the former regulation. Similarly, the FAA cannot predict the viability of the products or the financial health of an unknown start-up company under a regulation that allows for, but does not require, its products be used in any airplane design.

b. Impact on Small Entities

Air Tractor commented the FAA's analysis of the proposed rule impact on small entities did not include Air Tractor and Thrush Aircraft (Thrush).

Air Tractor was concerned that data from only 5 entities was used in the regulatory flexibility analysis. It noted the FAA should have included every company that has active manufacturing activities and the data used were non-representative of the overall industry. Air Tractor also indicated the inclusion of Thrush and itself would have doubled the number of employees and annual revenues represented in the analysis. Additionally, Air Tractor believed the FAA should have also included the TC holders of small airplanes that are no longer being manufactured but require TC support and STC holders that certificate products to the part 23 standards.

Finally, Air Tractor concluded that the omission of non U.S.-owned entities that ''operate'' in the United States presented a ''distorted view of the true impact'' of the proposed rule on the general aviation industry in the United States.

The FAA conducted its analysis in accordance with the ''Small Business Regulatory Flexibility Act.'' For each regulatory flexibility analysis, an agency is required to provide a description of and, where feasible, an estimate of the number of small entities to which its proposed rule would apply. Many, if not most, small entities do not provide publically available information such as employment data that would allow an agency to determine if a business qualifies as a small entity under the guidelines of the Small Business Administration (SBA). Nor is there publicly available revenue data for these entities that make it possible to determine the burden of a proposed or final rule on these entities. The FAA does not have the authority or the means to require any entity to report its employment or revenue data. Accordingly, the FAA does not have the requisite knowledge of every company that still has active manufacturing activities that might be subject to the proposed rule.

The small business entities the FAA used in its analysis had provided data on their employment and revenue either through the regulations of U.S. DOT Form 41, the Securities and Exchange Commission, or through news releases that the entities made public. Neither Air Tractor nor Thrush have such data on record, and Air Tractor did not provide employment or revenue data for itself as part of its comment.

The five entities examined as part of the FAA's analysis qualified as small entities under the SBA criteria and were either actively manufacturing airplane or were under new ownership and had publically announced they were working toward setting up an airplane manufacturing line that would be subject to part 23. Airplanes previously certificated under part 23 will not be affected by the regulations affecting new certifications, so TC holders of operating airplanes who are not actively seeking some certification are not appropriately excluded from the analysis. The same holds true for STC holders that used the part 23 standards in effect at the time of these airplane original certifications.

The regulatory flexibility analysis conducted for the proposed rule did not include any non-U.S. entities because, similar to the domestic firms referenced above, the employment and revenue information required for the analysis was not publicly available.

c. Icing

Textron stated that although the FAA identified a need for improved certification standards for operation in severe icing conditions, it did not provide a cost benefit analysis to show that part 23 airplanes would benefit from them.

The FAA did conduct a cost benefit analysis of the icing requirement. Flying into icing is risky and the ARC identified part 23 airplane icing

[16] See Docket Number FAA–2015–1621.

accidents. The FAA contacted industry, and some Part 23 ARC members indicated to the FAA that the new rule and standards reflect current industry practices for detecting and exiting icing conditions. Additionally, the rule to certify that the airplane can operate safely in SLD is voluntary. When compliance is voluntary, or no change in industry practice will occur from a new regulation, the FAA determines the rule to be minimal cost. This determination was made in the initial regulatory impact analysis and is made in the final regulatory impact analysis.

In the NPRM, the FAA proposed that for a part 23 airplane to be certificated to fly in known icing conditions, an applicant would have to demonstrate operation in the icing conditions defined in part 25 appendix C. This requirement did not change from the former part 23 requirements. As a safety matter, for many years airplanes currently certificated under part 23 have demonstrated the ability to detect and safely exit from freezing rain and freezing drizzle conditions.

The standards and requirements for the various icing certification levels were discussed extensively with the Part 23 Icing ARC (Icing ARC) and the Part 23 ARC. The new rule and standards for detecting and exiting freezing drizzle and freezing rain are consistent with and include significant parts of the Icing ARC's recommendations.

d. Part 23 Limitation

Textron recommended the FAA change the limitation on part 23 airplanes from its proposed gross takeoff weight limit of 19,000 pounds (maintaining the current part 23 limit) to a maximum payload limitation of 6,000 pounds. Textron stated the change would have a dramatic positive impact on the potential costs and benefits of the proposed change.

This change is beyond the scope of this rulemaking for the FAA to consider. This change was not proposed by the FAA and would be a fundamental change to part 23 that could potentially affect certification of airplanes under part 25.

e. Reporting and Recordkeeping Requirements

The FAA stated it expected minimal new reporting and recordkeeping requirements would result from the proposed rule and requested comments on this finding. The FAA received no comments on reporting or recordkeeping requirements.

Therefore, the FAA adopts the regulations as proposed, and will make no change to the regulatory evaluation regarding the reporting and recordkeeping requirements.

16. Out of Scope Statement

Several commenters requested changes to regulations or to existing FAA processes and guidance materials that are not directly related to this rulemaking. The FAA is not addressing these comments specifically because they are beyond the scope of this rulemaking.

D. Part 23, Airworthiness Standards

1. Legacy Rules

a. Cockpit Voice Recorders (§ 23.1457)/ Flight Data Recorders (§ 23.1459)

In the NPRM, the FAA proposed to use the same cockpit voice recorder (CVR) and flight data recorder (FDR) standards that exist in former §§ 23.1457 and 23.1459. The proposed rule included revised references to other sections of proposed part 23, but no substantive changes to those standards.

The NTSB stated it is pleased the NPRM retained the needed prescriptive design standards in proposed §§ 23.1457 and 23.1459. The NTSB added it would be appropriate for the FAA to include a requirement for image recorders, which it described in its Safety Recommendation A–13–12, dated May 6, 2013.

The FAA considered the NTSB's request to add requirements for image recorders. No functional or operational requirements to record images has ever been proposed or evaluated for costs and benefits. Any such requirements would constitute significant rulemaking and require public participation, and therefore exceeds the scope of this rule.

EASA and the Associations stated the CVR and FDR requirements stem from ICAO annex 6 requirements, which are already based upon EUROCAE industry standards ED–155; ED–112A, ''MOPS for Crash Protected Airborne Recorder System;'' and ED–155, ''MOPS Lightweight Flight Recording Systems.'' They suggested the FAA redraft the regulations to be more performance-based and number the regulations in accordance with any new numbering scheme, and change the references from the operating regulations as soon as practical.

The interplay between operation and certification regulations remains the reason for carrying the current standards unchanged into the new part 23. Redrafting them to objective standards, as suggested by EASA and the Associations could result in varying data sets between operators without any discernible benefit for such variation. Changing the standards only for part 23 airplanes certificated after a particular date would also require significant changes to the regulations under which the airplanes operate, adding complication without any noted benefit.

NJASAP supported the FAA's decision to maintain the current standards for cockpit voice recorders (§ 23.1457), noting that removing the current prescriptive requirements could hinder the conduct of future accident investigations. NJASAP did not comment on § 23.1459, ''Flight data recorders''.

Commenters opposed to retaining the standards generally characterized them as too prescriptive. While accepting the need to maintain the numbering system to align with other regulations, EASA found the unchanged content to be detailed, design specific, and not providing the safety intent. The EASA-suggested language referenced recorder systems with more generalized statements regarding installation and technical specifications. BendixKing stated that it ''seems binary'' that the ''specifics are invoked'' only ''if recording is required.'' It also noted that the standards use approximately 1,000 words when 100 would be adequate in stating the safety intent. It concluded the requirement as written will hurt safety in the future by either retarding the technology or creating an environment where manufacturers will avoid recording. BendixKing included the identical comment for both recorder sections.

The primary use of both CVRs and FDRs is for accident investigation. Over the past 30 years, the FAA has worked with the NTSB to adopt and refine the specific requirements that document both flightcrew communication and the functions of airplane that form the basis for airplane accident and incident investigation. The FAA adopted the first significant flight data recorder upgrades in 1997 and made a concerted effort to standardize the operational and certification requirements across the operating and certification parts. The primary requirements for recording voice and data are not contained in the certification regulations, but in the operating regulations. When an airplane is required by an operating rule to record voice or flight data, the operating rule references back to the standards for the equipment in the certification part that applies to the airplane. This is true for large and small airplanes and for helicopters.

Airplane certification requirements do not align perfectly with operating regulations. A part 23 airplane may be operated under part 91 or 135; therefore, the requirement to have and use CVRs and FDRs may differ depending on how the airplane is operated. But the standards for the equipment—when required—do not differ, and are intended to function the same way regardless of the airplane's certification basis. This consistency is central to the needs of the NTSB and all investigative bodies. It makes the design, certification, and function of the equipment standard for the industry as a whole. The FAA last amended the recorder regulations in 2008 to reflect investigative experience with the functions of newer recorder and flight management tools.

Therefore, the FAA finds it appropriate to retain these well-known requirements. The current integration of the operating and certification regulations is well established and functioning as intended. The need for investigative data following accidents and incidents is not forecasted to change. The commenters did not specify which of the current requirements were inappropriate or unnecessary, but merely expressed general concerns that the standards might inhibit safety in future designs. The FAA has long acknowledged the safety intent of flight recorders in providing investigators with the tools to recognize trends and malfunctions following accident and incidents. Consistency in the equipment and data that come from the equipment remains the goal.

BendixKing's observation that the certification rules are invoked only when ''recording is required'' is accurate. As explained, the certification requirements for installation and use of this equipment are only effective when required by an operating rule. Once required, all the equipment must function to the same standards. The fact that recording is required under different operating regulations, and the certification regulations referenced in those operating regulations, is the reason for not changing them for one certification part. If an airplane is not required by operational rule to record voice or data, then the specificity of the certification regulations is not an issue. The commenters did not include proposed design or functional changes for new airplane that might affect the requirements as stated. If a novel design is proposed in the future that affects recorder function, before approval, the FAA would coordinate with the applicant to ensure such design features meet the needs of accident and incident investigation.

Textron commented on proposed § 23.1457(c), which retains the current language requiring each CVR to be installed so that specified communications are recorded on a separate channel. The regulation currently and as proposed specifies four separate channels—the first channel for the first pilot, the second channel for the second pilot, the third channel at the cockpit-mounted area microphone, and the fourth channel for the third and fourth crewmembers. Textron commented that these CVR channel assignments are a ''legacy'' from magnetic tape recorders and there is no physical effect of such assignment on current solid-state recorders. Textron stated the current channel assignments are different and, therefore, paragraph (c) language should be revised to allow for flexibility in channel assignment or be aligned with the assignments manufacturers currently use. In addition, Textron noted that a proposed rule of EASA does not specify channels, but instead references the more detailed requirement of an ASTM standard.

Textron's comment—that the requirement for separate channels does not reflect the reality of currently-manufactured equipment—is limited in its view. While the regulation does require separated recording of different voice communication channels, the rule is flexible enough to avoid the issue raised by Textron. Regardless of an applicant's CVR channel numbering scheme, the regulation is satisfied if the CVR is designed to record audio sources on dedicated channels. This remains the FAA's policy on this regulation, which includes Textron's products already installed in airplanes that meet the former regulation.

An individual commenter noted the proposed rule seemed to anticipate an onboard storage system that must withstand a crash.[17] The commenter suggested that because recordings may not be stored onboard in the future, but rather wirelessly transmitted to the ground or a satellite, the FAA should revise the provision to reflect this possibility rather than ''locking in old technology.''

The FAA is aware that, at some point in the future, recordings may no longer need to be stored on board airplane. The FAA participates in international working groups that monitor these technology trends. There are many technical and legal issues attached to wireless transmission of voice and data communications. A change to allow such transmission and storage would affect several parts of the CFR and the functions of the NTSB, which were not proposed or discussed as part of this rulemaking.

[17] See docket number FAA–2015–1621–0083. The comment was referenced as ''23.1457 Flight Data recorder.'' Section 23.1457 covers cockpit voice recorders, while 23.1459 addresses flight data recorders. It is unclear if the comment addressed one or both sections, but the FAA's response would not change since both require crash protected recording devices.

b. Instructions for Continued Airworthiness (§ 23.1529)

In the NPRM, the FAA proposed to relocate the requirements for Instructions for Continued Airworthiness from § 23.1529 to proposed § 23.1515. The FAA also proposed to remove appendixes A through F, and rename Appendix G to Part 23—Instructions for Continued Airworthiness, as Appendix A to Part 23—Instructions for Continued Airworthiness.

Upon further consideration, the FAA has decided to retain the requirements for Instructions for Continued Airworthiness in § 23.1529. A change to § 23.1529 would affect many other parts and guidance documents, which reference the section. Because of the new numbering scheme in part 23, § 23.1529 is located in the ''Legacy Regulations'' section of the final rule. The appendix for Instructions for Continued Airworthiness is now located in Appendix A to Part 23, as proposed.

2. Subpart A—General

a. Applicability and Definitions (Proposed § 23.1/Now § 23.2000)

In the NPRM, proposed § 23.1 (now § 23.2000) would have prescribed airworthiness standards for issuance of type certificates, and changes to those certificates, for airplanes in the normal category. It also would have deleted references to utility, acrobatic, commuter category airplanes. Proposed § 23.1 also would have included definitions for the following terms specific to part 23: Continued safe flight and landing, designated fire zone, and empty weight.

Air Tractor asked why it was necessary to use the term ''category'' if there is only one ''normal'' category.

The FAA notes that there is a need to retain the concept of different categories because other parts of the FAA's regulations, including the certification and operating rules, set certain requirements based on an airplane's category.

An individual commenter opposed the elimination of the utility category as related to spin training for existing airplanes. The commenter would support elimination of the utility category if there would be a reevaluation of the airplanes allowed to be used for spin training. This commenter also questioned whether the proposed change would result in a revision and reformatting of the current Type Certificate Data Sheet (TCDS) and whether the airplane would be considered not airworthy until re-placarded to conform to the new standards.

This rule does not affect the category of existing airplanes, nor does it require the TCDS be revised or reformatted. Airplanes currently certified in the utility category for spin training retain that capability under this new rule. Furthermore, the airworthiness of the existing fleet will not be affected by this rule.

An individual commenter recommended the FAA clarify whether the term ''continued safe flight and landing'' would not consider weather, environmental, or surface conditions in the event of a forced landing.

The FAA agrees that it should clarify that in the event of a forced landing, the definition of ''continued safe flight and landing'' does not include consideration of weather, environmental, or surface conditions beyond those already taken into account by the FAA's operating rules. The FAA expects that a pilot will conduct his or her flight within the FAA's operating rules and the airplane's normal operating envelope, and finds doing so will help ensure the pilot has safe landing options. The FAA's intent was to maintain the existing level of safety for small airplanes. Historically, single-engine and light twin-engine airplanes have been required to have characteristics that minimized the resulting hazards when a loss of engine forced an off-airport landing. The requirements for larger, multiengine part 23 airplanes are based on the requirement to continue flight back to an airport after the loss of an engine. This rule retains this requirement as it applies to part 23 airplanes that cannot maintain altitude after a critical loss of thrust. The FAA will provide additional clarification in guidance. It is not appropriate for the FAA to establish airworthiness standards for ''continued safe flight and landing'' that would require all airplane designs to account for extreme conditions—such as mountainous terrain—and extreme weather, because pilots who decide to fly over dangerous terrain or in weather have chosen to greatly reduce their options for safe landing.

The FAA proposed including a definition of ''designated fire zone'' that was flexible enough to capture both the historical understanding of fire zones and those areas in airplanes that incorporate novel design concepts that merit the increased safety measures. However, the FAA finds including a definition of ''designated fire zone'' will cause confusion and result in less flexibility. Rather than include a definition, the FAA will maintain the same understanding as the historical use of the term ''fire zone,'' a well-understood term that has been in use for decades and generally includes the areas of an airplane in which a powerplant, or some portion thereof, resides. Accordingly, the FAA will remove the definition from the rule and will determine which areas are designated fire zones in the specific means of compliance. Furthermore, specific sections of the new rule have added the term ''fire zone'' back into the rule so there is a clear link to means of compliance.

EASA commented the proposed definition of ''empty weight'' is too design specific and should be eliminated. EASA noted future technological developments would necessitate changes and future rulemakings, which is at odds with the objective to make objective rules change resistant for the next 20 years.

The FAA agrees the definition of ''empty weight'' is too design specific because the list of traditional features included may not apply to all airplanes in the future. Accordingly, the FAA deletes the definition from the final rule and will rely on means of compliance to address the requirements for each airplane. This will allow the FAA to capture the appropriate features for new propulsion systems and configurations without losing the means of compliance for traditional airplanes.

Air Tractor recommended the FAA provide a definition for ''minimum flying weight'' that would include the weight of the necessary crew and the minimum fuel required for legal operation for the lightest equipped airplane that complies with type design requirements. It asserted there is no point in the FAA certifying an airplane as safe for operation below the minimum weight at which the airplane can be operated.

The FAA finds Air Tractor's recommended definition of ''minimum flying weight'' is not an appropriate substitute for empty weight. Empty weight is used to provide a baseline for an airplane; establishing a ''minimum flying weight'' would not work for that purpose.

Embraer suggested the FAA include definitions for ''Aircraft Power Unit,'' ''Fuel,'' ''Critical lightning strike,'' and ''Fuel system'' in proposed § 23.1(b).

The FAA notes Embraer's suggestion to add definitions to proposed § 23.1(b); however, these definitions are addressed in their respective subparts. The terms ''Aircraft Power Unit,'' ''Fuel,'' and ''Fuel System'' are addressed in subpart E, and the term ''Critical lightning strike'' is addressed in subpart D. Furthermore, adding these definitions could lead to more confusion than clarification.

b. Certification of Normal Category Airplanes (Proposed § 23.5/Now § 23.2005)

In the NPRM, proposed § 23.5 (now § 23.2005) would have applied certification in the normal category to airplanes with a passenger-seating configuration of 19 or less and a maximum certificated takeoff weight of 19,000 pounds or less. Proposed § 23.5 would have also established certification levels based on the passenger seating configuration and airplane performance levels based on speed. Proposed § 23.5 also would have established a ''simple'' airplane classification.

Normal Category

Air Tractor and Textron questioned the imposition of a weight-based limitation for certification in the ''normal'' category in proposed § 23.5(a). Both commenters indicated that tying the applicability of part 23 to a maximum takeoff weight of 19,000 pounds would not meet the FAA's objective of replacing the current weight and propulsion divisions in small airplane regulations with performance- and risk-based divisions. Air Tractor also commented there was no basis for weight differentiation between normal and transport category airplanes on the FAA's safety continuum and suggested it would be more consistent to only use certification levels and speed categories. Air Tractor further suggested that applicants should be free to decide between certification under part 23 and certification under ''the greater rigor'' of part 25. Textron recommended the FAA replace the 19,000-pound maximum takeoff weight limit with a 6,000-pound maximum payload limit.

The FAA notes Air Tractor's and Textron's comments to extend the scope of the normal category. However, these comments are beyond the scope of this rulemaking. The NPRM proposed to replace the prescriptive airworthiness standards of part 23 with performance-based standards, not to change the scope of applicability of part 23.

Textron recommended the FAA include considerations for airplane functional or system complexity as a determining factor in certification requirements.

The FAA notes this rule already considers system complexity during certification. The requirements applicable to an airplane depend on reliable indicators of complexity—the airplane's designed cruising speed or maximum operating limit speed, and the maximum number of passengers. The airworthiness standards accommodate all degrees of complexity, which will specifically be addressed in accepted means of compliance.

Airplane Certification and Performance Levels

NATCA opposed the FAA's proposal to create certification and performance levels based on passenger capacity and airspeed in proposed § 23.5(b) and (c). NATCA noted that this approach was not consistent with how some foreign authorities with whom the United States has bilateral agreements ''bucket'' airplane classifications, including EASA, which classifies certification levels based on weight.

The FAA is not required to use the same metrics to classify airplanes as its bilateral partners. For example, Article 15 of the Agreement between the United States of America and the European Union on Cooperation in the Regulation of Civil Aviation Safety expressly reserves the authority for the United States to determine the level of protection it considers appropriate for civil aviation safety and to make changes to its regulations, procedures, and standards. Additionally, foreign authorities, including EASA, have been involved in the FAA's part 23 rulemaking effort since its inception with the Part 23 ARC. All foreign authorities involved in the part 23 reorganization effort agreed on the need to eliminate the divisions in part 23 based on weight and propulsion. Furthermore, the FAA's actions are consistent with EASA's actions.

NATCA also contended the FAA should retain a weight criterion because it relates to crash energy.

The FAA notes the risk associated with operating a 19,000-pound, level 1, low-speed airplane is accounted for in this rule by directly addressing the technologies installed on the airplane. For example, an airplane approved for instrument flight rules (IFR) has to meet the reliability requirements for IFR, regardless of level. Also, the FAA's operating rules mitigate the airplane's operational risk.

NATCA also asked the FAA to clarify that an applicant would not qualify for a lower certification level simply by removing seats and to publish guidance on determining certification levels.

The FAA notes, as set forth in § 23.5 (now § 23.2005), an airplane's certification level depends only on its maximum passenger seating configuration. This number does not include flightcrew. The maximum passenger seating capacity is known during the certification process; therefore, the airplane must comply with the standards applicable to that certification level. An airplane operator's decision to remove a passenger seat after certification does not affect the standards applicable to that airplane.

NATCA also recommended the FAA review the proposed part 23 certification levels to incorporate LSA and primary category airplane and create equivalent regulations as necessary.

The FAA notes that NATCA's suggestion is beyond the scope of this rulemaking. This rulemaking's purpose is to replace prescriptive design requirements of part 23 with performance-based standards, not expand the scope of part 23's applicability. The LSA and primary category certification processes exist as separate certification paths for airplane that qualify as either a LSA or primary airplane.

NATCA further commented by asking—

• Whether the intent is for airplane models with multiple configurations to have each configuration listed on the TCDS;
• Whether there can be dual or more categories on one TC; and
• Whether an airplane can be moved between levels and speed definitions during operational usage and, if so, whether this needs to be captured as different options on the TCDS.

In response to NATCA's question regarding multiple configurations, the FAA notes that if an airplane model has multiple configurations, the applicant will have to accept as the certification basis the requirements of the most stringent certification and performance levels available in the configuration list. If the applicant chooses not to comply with the most stringent requirements applicable to the configurations, the applicant will have to address each model individually on the TCDS. With respect to the number of categories on a TC, the FAA is eliminating the commuter, utility, and acrobatic airplane categories in part 23 for the reasons explained in the NPRM. Therefore, airplanes certified under new part 23 have only one category: normal.

Lastly, with respect to NATCA's question regarding airplanes moving between certification levels and speed definitions, an applicant either accepts the most stringent certification basis or addresses each model individually on the TCDS or by an STC. In order to move to a higher level, it will be necessary to recertify the airplane to the higher-level standard.

NJASAP supported the proposal to use passenger capacity and airspeed to establish airplane certification and performance levels, but expressed concerns the methodology may go too far in generalizing a very diverse group of airplanes.

The FAA understands NJASAP's concern, but notes the certification and performance levels are used to replace the weight and propulsion divisions in the former requirements. The levels are general to allow the accepted means of compliance to more accurately address the various technical differences.

Kestrel supported the FAA's proposed airplane certification levels, but expressed concern with the impact of migrating the Airplane Classes in former § 23.1309 (I, II, III, IV) [18] to the proposed combined airplane certification and performance levels. Kestrel noted that Airplane Classes were currently used in the System Safety Analysis process to establish allowable quantitative probabilities. Kestrel asked the FAA to specify what the expected allowable quantitative probabilities would be for each of the eight possible combinations of certification and performance levels (*i.e.,* low-speed levels 1–4 and high-speed levels 1–4).

The FAA notes that there is no direct connection between the systems-based airplane classes from AC 23.1309–1E [19] and the airplane certification and performance levels in § 23.2005, which apply to all subparts. The airplane classes reflect the safety continuum concept in that it may be acceptable for simpler airplanes or airplanes at lower certification levels to have a higher probability of failure for equipment. The airplane's certification level is strictly based on the number of passenger seats. The different means of compliance will address the safety continuum.

Air Tractor commented generally that it does not see a big difference in the certification effort required by the different certification and performance levels. Air Tractor suggested there could be a difference in required levels of safety for equipment, but indicated it was impossible to tell because the FAA had not yet defined the levels of

[18] These Classes are described in AC 23.1309–1E, paragraph 15.

[19] The Airplane Class Levels from former § 23.1309 are still addressed in subpart F of this rule.

safety.[20] Air Tractor suggested the FAA codify the required levels of safety because the rule preamble would not be given the weight of law.

The FAA acknowledges that Air Tractor is correct in that there could be a difference in the required levels of safety between two airplanes based on the FAA's safety continuum philosophy. Differences in products and their associated risks justifies using different levels of safety. While the high-level performance requirements are the same for all products, the required level of safety is best addressed using means of compliance so that each project is assigned the appropriate level of safety. Although language in the preamble does not supersede the language of the regulation itself, the preamble is evidence of the FAA's contemporaneous understanding of its proposed rules, and may serve as a source of evidence concerning contemporaneous agency intent.[21]

Several commenters questioned the meaning of ''passengers'' as used in the descriptions of certification levels in proposed § 23.5(b), particularly for airplanes that may require 1 or 2 crew depending on operating regulations.

The FAA elects to use the term ''passenger'' to align with the operating rules, and because passenger count has historically correlated to risk tolerance. The term ''passenger'' excludes ''flightcrew'' members. The FAA recognizes the concerns over confusion because the ARC discussed this issue at length and it was again discussed within the FAA. Based on these discussions, the FAA finds ''passenger'' is the most appropriate term. As one of the commenters noted, the ''crew'' could include one or more ''occupants.'' Part 23 airplanes can include special use airplanes that may require multiple flightcrew members, but have no provisions for passengers. Part 23 is also used for airplanes that carry no ''flightcrew'' or ''passengers'' today (*i.e.,* unmanned aircraft systems), and may also address airplanes with passengers and no flightcrew in the future. For airplanes that require different numbers of flightcrew for different operations, the applicant must use the smallest number of flightcrew required for any operation, which is typically one, the most conservative number. The FAA finds the approach proposed § 23.5 (now § 23.2005) will allow the most flexibility, least confusion, and focus on risk tolerance, which aligns part 23 with the operating rules.

[20] Air Tractor pointed out proposed § 23.1300.

[21] *Wyoming Outdoor Council* v. *U.S. Forest Service,* 165 F.3d 43, 53 (D.C. Cir. 1999).

Several organizations commented specifically on the proposed airspeed limits for the low-speed and high-speed performance levels established in proposed § 23.5(c). NATCA suggested the use of design cruising speed (V_C) and maximum operating limit speed (V_{MO}/M_{MO}) may not be appropriate for untrained persons, and recommended the FAA either define those terms or use more common measurements. NATCA also commented that the FAA needs to clarify what ''speed'' means (*i.e.,* cruise speed versus some other speed standard). NATCA expressed concerns over the use of ''common'' terms versus speeds used for certification, which are also used in operations.

The FAA notes both V_C and V_{MO} are defined in 14 CFR 1.2. V_C means design cruising speed and V_{MO}/M_{MO} means maximum operating limit speed. The FAA finds that V_C, V_{MO}, and M_{MO} are appropriate for engineering determinations as they relate to structural speeds as well as flight-testing speeds. Furthermore, the FAA clearly states these are calibrated speeds, which typically are used in certification.

Transport Canada commented specifically on the parameters for the low-speed performance level in proposed § 23.5(c)(1). In particular, Transport Canada said V_C and V_{MO} should both be less than 250 Knots Calibrated Airspeed (KCAS) for an airplane to qualify as low speed. Therefore, Transport Canada concluded the phrase ''V_C or V_{MO}'' in this provision should actually read ''V_C *and* V_{MO}''.

The FAA agrees with Transport Canada concerning the use of ''and'' versus ''or'' and revises the rule accordingly.

Air Tractor contended that the parenthetical references to M_{MO} limits in proposed § 23.5(c)(1) and (c)(2) are confusing because they are not clear if these values represent either new absolute constraints, or if they are intended to provide an approximate context for what 250 KCAS might mean at some higher altitude. Air Tractor noted that Mach 0.6 corresponds to 250 KCAS at about 23,400 feet in a standard atmosphere, but wondered what performance level would be assigned to an airplane with a V_C of 250 KCAS and an M_{MO} of 0.65.

Garmin commented that some airplanes do not have a M_{MO}, but have a maximum speed of more than Mach 0.6. For example, Garmin noted an airplane with a V_{MO} of 240 KCAS up to its certified ceiling of 35,000 feet and no M_{MO} would be classified as a low-speed airplane but will actually be going Mach 0.71 at 35,000 feet. Garmin recommended the FAA revise the low-speed and high-speed performance levels to remove M_{MO} from parentheticals, clarify that a low-speed airplane must have a V_C or V_{MO} equal to or less than 250 KCAS and a M_{MO} less than or equal to Mach 0.6, and that a high-speed airplane is anything that does not qualify as low speed.

The FAA agrees that the proposed rule was unclear and revises the final rule to clarify that M_{MO} is one of the criteria, not an approximation of the KCAS cutoff. Accordingly, an airplane must satisfy all of the V_C, V_{MO}, and M_{MO} requirements to qualify as low speed. If an airplane does not satisfy all three, then it is considered a high-speed airplane. After further review, the FAA determined that V_C and V_{MO} are not directly parallel because V_C is a structural speed and V_{MO} is a performance speed. For this reason, the FAA replaces V_C with V_{NO}. V_{MO} historically was a performance value used by turbine-powered airplanes while V_{NO} historically was a performance value used by piston-powered airplanes. By replacing V_C with V_{NO}, the values now reflect parallel operational speeds.

ANAC commented that the FAA should use stall speed instead of V_{MO} and M_{MO} to define performance levels because it would help address loss of control and prevent an applicant from arbitrarily limiting an airplane's V_{MO} and M_{MO} below the airplane's capabilities to avoid more stringent certification standards. ANAC asked the FAA to elaborate on the connection between an airplane's V_{MO} and M_{MO} and takeoff risk.

The FAA does not agree that stall speed is the best parameter to use for determining performance levels. Although an airplane's top speed generally has been aerodynamically limited to a multiple of stall speed that varied depending on propulsion, this is not true for all airplanes and does not provide the necessary flexibility to address airplanes that incorporate new technology. For example, there are airplanes in development that have very low-stall speeds—the airplane can land and takeoff in very little space, or even vertically—but may have V_{NO} or V_{MO} greater than 250 KCAS, making them a high-performance airplane.

Simple Airplane Classification

The FAA proposed to define ''simple'' airplanes to recognize the entry-level airplane. Simple airplanes would have been limited to airplane designs that allow no more than one passenger, are limited to VFR operations, and have a low top speed and a low stall speed.

The FAA asked for comments concerning the value of creating a simple airplane sublevel given that a simple airplane would have characteristics very similar to a certification level 1, low-speed airplane.

ICON, Transport Canada, BendixKing, NATCA, and two individual commenters supported the inclusion of a separate ''simple'' airplane classification. However, Zee and the Associations commented that the FAA should not create a ''simple'' airplane classification, and that each of the proposed certification and performance levels should stand on its own based solely on performance and complexity of operations. The commenters against inclusion of a ''simple'' category contended that it was more appropriate to address this sort of classification in the means of compliance.

The FAA has decided not to adopt a ''simple'' airplane classification. The FAA finds the addition of a simple category does not produce benefits over those already provided by the new rule. The FAA finds it is more appropriate to address the requirements for a level 1, low-speed airplanes. Additionally, in the NPRM, the FAA proposed allowing simple airplanes to use non-type-certificated engines and propellers to allow those airplanes to use electric propulsion. The FAA can achieve the same flexibility by approving electronic propulsion as part of an airframe for a level 1, low-speed airplane; therefore, the FAA revises the propulsion requirements in this rule to provide that flexibility.

Airplanes Certified for Aerobatics

The FAA proposed to eliminate the acrobatic airplane category in part 23, but still allow a normal category airplane to be approved for aerobatics provided the airplane was certified to address the factors affecting safety for the defined limits for that kind of operation.

Velica S.A.S. (Velica) recommended the FAA define ''aerobatic category'' in proposed § 23.5 to include airplanes without any maneuver restrictions, other than those shown to be necessary as a result of required flight tests.

For the reasons explained in the NPRM, the FAA removed the acrobatic category from part 23. The FAA agrees with Velica that the limitations for an airplane certified for aerobatics should be based on flight tests, but believes more specificity is warranted. Therefore, the FAA will require airplanes certified for aerobatics to comply with the limitations established under subpart G of part 23 in this rule.

c. Accepted Means of Compliance (Proposed § 23.10/Now § 23.2010)

In the NPRM, proposed § 23.10 (now § 23.2010) would have required an applicant to show the FAA how it would demonstrate compliance with this part using a means of compliance, which may include consensus standards accepted by the Administrator. Proposed § 23.10 would have also required a person requesting acceptance of a means of compliance to provide the means of compliance to the FAA in a form and manner specified by the Administrator. Proposed § 23.10 would have created flexibility for applicants in developing means of compliance and also specifically identify consensus standards as a means of compliance the Administrator may find acceptable.

General Comments

The Associations recommended the FAA revise paragraph (a) to require an applicant to ''comply'' with part 23, rather than ''show the FAA how it will demonstrate compliance'' with part 23, using a means of compliance. The Associations also recommended revising paragraph (b) to require an acceptable means of compliance to be in a form and manner specified by the Administrator.

The Associations also argued that, without these changes, the proposed rule could have been interpreted as requiring each applicant to come to agreement with the FAA on acceptable means of compliance for each certification project, when it appears the FAA intends to issue acceptance of methods of compliance in, for example, standards that are already deemed acceptable. The commenters also noted that part 21 does not currently require a showing of compliance in all cases. The commenters stated that today, and potentially more so in the future, the FAA may accept compliance through demonstration or even a statement of compliance. The commenters contended the above-referenced revisions to proposed § 23.10 are necessary to ensure the designs meeting part 23 can continue to fully utilize part 21.

The FAA agrees with the commenters that proposed § 23.10(a) (now § 23.2010(a)) may have had the unintended result of requiring applicants to get approval from the FAA for each means of compliance even when the FAA had already accepted a means of compliance. This would have been counter to the FAA's intention that a means of compliance, once accepted by the FAA, may be used for future applications for certification unless formally rescinded. The FAA adopts the commenters' recommendation for paragraph (a).

The FAA does not adopt recommendation for paragraph (b) however, because it would not meet the intent of the requirement. Paragraph (b) addresses the situation in which an applicant proposes its own means of compliance, either as an alternative to an accepted means of compliance or as a new means of compliance for new technology. The FAA intended paragraph (b) to require applicants requesting acceptance of a means of compliance to do so in a form and manner specified by the FAA, not to require already-accepted means of compliance to be documented in a form and manner specified by the FAA. In light of the comment, the FAA revises the proposed rule language to clarify that paragraph (b) applies to applicants who are requesting FAA review and acceptance of a proposed means of compliance.

Air Tractor questioned the need for a new rule specifying that all means of compliance must be accepted by the FAA and asked whether an applicant would need to obtain FAA approval for each means of compliance at the beginning of the process or any time prior to showing compliance.

This final rule is necessary because Congress directed the FAA to issue a rule that replaces the prescriptive requirements of part 23 with performance-based regulations.[22] This change means that applicants for a TC may use any number of unique design elements to attempt to comply with the performance-based requirements but only the FAA can accept these as means of compliance because the FAA is responsible for finding that an airplane satisfies the performance-based requirements in part 23 before issuing a TC. Although the means of compliance process is not new, the FAA adopts § 23.2010 to make the process clear to all applicants and to highlight that applicants have the opportunity to develop alternative approaches to complying with the part 23 performance-based requirements. While an applicant is not required to obtain FAA acceptance of means of compliance at the beginning of the certification process, it is advisable to seek acceptance as soon as possible, or preferably before, to mitigate the risk of having to redesign the airplane should the FAA not accept the means of compliance.

NATCA commented the FAA should require the accepted means of

[22] Small Airplane Revitalization Act of 2013 (Pub. L. 113–53, 49 U.S.C. 44704 note).

compliance be included on the published certification basis so products can be standardized and post-TC modifiers can know the certification basis used for the underlying product. NATCA also commented that maintenance personnel returning an airplane back to service will need access to adequate documentation on how an airplane is compliant with the rule so they can verify the airplane remains compliant. Assuming the standards are listed, NATCA asked the FAA to clarify how they would be listed in the airplane certification basis.

The FAA partially agrees with NATCA's concerns. Because many of the detailed requirements are no longer in part 23 and will move to means of compliance, it may be hard to know how an applicant showed compliance. That said, many means of compliance today are proprietary, and modifiers and maintenance personnel have no way of knowing what the original manufacturer did to show compliance. The FAA is working with its project support personnel to determine how much of the means of compliance information needs to be listed on the FAA TCDS to address concerns relating to post-TC modifiers and maintenance personnel. This information will be included in the training currently being developed for the ACO engineers and industry designees.

NATCA also recommended the FAA permit design change applicants to use their own alternate means of compliance to gain approval rather than relying on the original means of compliance used for the underlying TC. NATCA suggested this would be in line with the FAA's statements that it is open to a means of compliance without preferring one over the other.

This option is currently permitted and will continue to be permitted under the new part 23. Applicants requesting a change to type design may propose their own means of compliance rather than using the original means of compliance. However, the FAA will review the request depending on the complexity of the design change or the alternative means of compliance. While this is the current process, AC 23.2010 provides guidance on how to submit a proposed means of compliance to part 23 for FAA acceptance.

NATCA asked the FAA to clarify how the certification basis would be handled for industry consensus standards. NATCA also asked whether an applicant must at least partially use industry consensus standards, or whether an applicant may choose not to use consensus standards at all. Finally, NATCA asked if an applicant could get a part 23 TC by only using the standards in ACs. Air Tractor suggested the FAA revise proposed § 23.10 to mention that the standards included in ACs are an accepted means of compliance.

The FAA notes that the certification basis will be the same as it is today: Applicants must show compliance with part 23. An applicant may choose not to use any consensus standards, or a combination of consensus standards and other means of compliance, as long as the applicant's proposed means of compliance complies with part 23 and is accepted by the Administrator. The FAA finds it unnecessary to revise the proposed rule language as Air Tractor suggested. An applicant may already use ACs as means of compliance to part 23, where applicable, under § 23.2010.

Use of Applicant-Proposed Means of Compliance

Air Tractor contended the use of applicant-proposed means of compliance standards would lead to a significant loss in transparency of the certification process, as individual applicants may choose to make both the results and the process of showing compliance a matter of proprietary intellectual property. ANAC commented that the FAA should establish a method to publicize information about approved means of compliance that are not part of a consensus standard. To preserve proprietary information, ANAC recommended the FAA only publish summaries as it currently does for exemptions, special conditions, and ELOS findings. NATCA questioned how the FAA will handle proprietary specifications within a certification basis, arguing it is not in the public interest to have ''secret'' certification requirements. NATCA recommended the certification basis be published in the **Federal Register** for public comment. NATCA also recommended the certification basis for proprietary information be ''explicitly identified'' on the TCDS or STC. Finally, NATCA asked the FAA to clarify whether the FAA will publish FAA issue papers when an applicant uses an applicant-proposed means of compliance and, if so, noted that several FAA orders and policies would need to be revised.

The FAA has a responsibility to protect an applicant's proprietary information, including a proprietary means of compliance. As such, the FAA will not make the proprietary portions of applicant-proposed means of compliance publicly available. The FAA plans to address applicant-proposed means of compliance as it does today, by summarizing the information. The FAA will identify the certification basis (*i.e.,* the applicable airworthiness standards) on the TCDS or STC as is done today. The FAA has not published, and does not plan to publish, the certification basis or FAA issue papers in the **Federal Register** for public comment. Each applicant's certification basis is based on part 23 and is agreed to between the applicant and the FAA. The FAA is not required to elicit public comment on proposed means of compliance.

Garmin asked whether the FAA will accept portions of a previously accepted means of compliance, or whether an applicant must use that entire means of compliance. Garmin recommended the FAA revise proposed § 23.10 (now § 23.2010) to permit whole or partial implementation of a previously-accepted means of compliance or, alternatively, ensure AC 23.10 permits this.

The FAA agrees with Garmin and points out that this is acceptable today. The FAA can be flexible in accepting mixed, partial, or entire means of compliance from industry consensus standards as applicable to the specific product. The FAA recognizes that new product innovations will make this flexibility more important in the future. An industry consensus standard can state that, for credit in meeting that standard, the applicant has to meet the entire set of requirements. But the FAA may tailor acceptable consensus standards based on what is appropriate for the intended function.

Use of Current Part 23 as Means of Compliance

Embraer recommended the FAA revise proposed § 23.10(a) (now § 23.2010(a)) to acknowledge that an applicant may use the prescriptive requirements in former part 23 as an alternate means of compliance. Kestrel asked whether the FAA will require issue papers to permit the use of these former prescriptive requirements.

In the NPRM, the FAA noted it will accept the use of the prescriptive means of compliance contained in former part 23 as alternate means of compliance, except for those sections where the level of safety has increased specifically for stall characteristics and icing protection. The FAA does not need to codify this decision to retain this flexibility and is therefore not revising the proposed language for § 23.10. For applicants relying on satisfaction of the prescriptive requirements in former part 23, amendment 23–62, as a means of compliance, the FAA will only require the G–1 certification basis issue paper to list the means of compliance as ''amendment 23–62''.

NATCA asked whether the FAA will permit an applicant to use older prescriptive regulations, such as Aeronautics Bulletin, amendment 7a, ''Airworthiness Requirements for Aircraft''; CAR 3; and previous versions of part 23, as a means of compliance. If not, NATCA asked the FAA to clarify why those regulations are not appropriate and acceptable for the proposed design.

The FAA will consider the use of the older, prescriptive regulations in cases where it is appropriate for the airplane in question. There have been instances where applicants have approached the FAA with projects to ''remake'' new versions of vintage airplanes. The FAA has allowed and will continue to allow the use of appropriately-selected design standards on vintage airplanes. However, applicants wanting to use this approach should expect to use newer industry practices where the old standards and practices have, over time, not proven to meet the minimum acceptable safety standard for that class of airplane in part 23.

Manner in Which Applicant Must Present Means of Compliance

Textron asked how the FAA will document the acceptance of a non-industry standard means of compliance and whether acceptance of a Project-Specific Certification Plan (PSCP) is adequate proof of the FAA's acceptance of the means of compliance.

The FAA plans to include information on the acceptance of non-consensus standards on its Small Airplane Directorate Web site. The G–1 issue paper and agreement on the certification basis and compliance checklist will suffice. PSCP acceptance is adequate proof of FAA acceptance of a means of compliance if a G–1 issue paper is not used.

Textron also asked whether there would be a system set-up similar to repair specifications where an applicant could have pre-defined methods for making certain changes to its products, and whether there would be a method for the FAA to accept deviations to the accepted standards.

The Part 23 ARC did not consider and the NPRM did not propose repair specification; therefore, it is beyond the scope of this rulemaking effort.

Air Tractor and Kestrel contended the process proposed by draft AC 23.10—which states that an applicant should list the means of compliance and consensus standards they intend to use to show compliance with part 23 in a certification plan or compliance checklist—is premature and would slow the certification process. The details of an airplane's design are often incomplete when an application is submitted and it can take years to obtain FAA acceptance of a PSCP. Air Tractor suggested that establishing a means of compliance during the process of negotiating the PSCP should be limited to picking one or more of the following: Analysis, tests, design review, physical inspection, etc. Air Tractor also commented that a requirement for the FAA to review and approve of particular methods before the analysis can be presented would be new for most regulations. It would also require a new level of required response from the FAA that would drastically slow the process of either establishing the certification plan or showing compliance. Air Tractor also questioned how this requirement compares with the FAA and Industry Guide to Product Certification.

The FAA finds that including the means of compliance in the PSCP or the compliance checklist will not alter the current practice for new technology because some of the compliance requirements may not be known at the time of application. This initial uncertainty means the agreed compliance may remain as a draft during the development and certification process until the specific means of compliance are determined and agreed upon. This may be a common issue with new technology during the first few years after the new part 23 is implemented. It will take some time to get accepted means of compliance into consensus standards, resulting in these means of compliance being developed during the project. In the long term, the new approach should shorten the time needed for an applicant to get FAA agreement on its means of compliance.

Finally, the FAA clarified the intent of the form and manner of the means of compliance. The FAA does not intend to ''specify'' the form and manner of means of compliance; the form and manner only need to be ''acceptable.''

3. Subpart B—Flight

a. Weight and Center of Gravity (Proposed § 23.100/Now § 23.2100)

In the NPRM, proposed § 23.100 (now § 23.2100) would have required an applicant to determine weights and centers of gravity that provide limits for the safe operation of the airplane. Additionally, it would have required an applicant to show compliance with each requirement of this subpart at each combination of weight and center of gravity within the airplane's range of loading conditions using tolerances acceptable to the Administrator. Proposed § 23.100 would have also required the condition of the airplane at the time of determining its empty weight and center of gravity be well defined and easily repeatable.

The Associations recommended a clarifying change to proposed § 23.100(a) that would require the applicant to determine limits for weights and centers of gravity that provide for the safe operation of the airplane, rather than determine weights and centers of gravity that provide limits.

The FAA adopts the Associations clarifying change. Accordingly, § 23.2100(a) now requires the applicant to determine limits for weights and centers of gravity that provide for the safe operation of the airplane.

Additionally, the Associations recommended changing proposed § 23.100(b) to require the applicant to comply with each requirement of subpart B at critical combinations of weight and center of gravity. The commenters explained that it is appropriate to demonstrate compliance at critical combinations of weight and center of gravity, but showing compliance at each combination ''would present an infinite matrix of test points.''

The FAA also adopts the Associations recommended change to proposed § 23.100(b) (now § 23.2100(b)). While proposed § 23.100(b) could have been interpreted to require an infinite matrix of test points, this was not the FAA's intent. Accordingly, § 23.2100(b) now requires the applicant to comply with each requirement of subpart B at critical combinations of weight and center of gravity within the airplane's range of loading conditions using tolerances acceptable to the Administrator.

The Associations also stated that the determination of empty weight and center of gravity in proposed § 23.100(c) is ''somewhat confusing and potentially unnecessary.'' The commenters suggested clarifying changes that would replace ''empty weight'' with ''weight'' and delete ''well'' and ''easily repeatable,'' thereby requiring the condition of the airplane at the time of determining its weight and center of gravity to be defined. Similarly, Textron recommended deleting the terms ''well'' and ''easily'' from proposed § 23.100(c) because they are vague and subject to interpretation.

The FAA is retaining the terms ''well defined'' and ''easily repeatable'' in § 23.2100(c). In the NPRM, the FAA explained proposed § 23.100 would capture the safety intent of § 23.29. Section 23.29 has contained the terms ''well defined'' and ''easily repeated'' since it was published in amendment 23–0 [23] with no challenges. Furthermore, ''easily'' is an important modifier for ''repeatable'' because it ensures that the condition of the airplane at the time of determining its empty weight and center of gravity is not hard for a mechanic to reproduce.

The FAA also retains the term ''empty weight'' in § 23.2100(c). Determining empty weight is fundamental to baselining an airplane. Removing this term would leave the weight value for baseline open to any weight between empty to gross weight. The ambiguity of not defining the baseline weight would create confusion and problems.

b. Performance Data (Proposed § 23.105/ Now § 23.2105)

In the NPRM, proposed § 23.105 (now § 23.2105) would have required—

- An airplane to meet the performance requirements of this subpart in various conditions based on the airplane's certification and performance levels for which certification is requested;
- An applicant to develop the performance data required by this subpart at various altitudes and at high temperatures, while also accounting for losses due to atmospheric conditions, cooling needs, and other demands on power sources; and
- The procedures used for determining takeoff and landing distances to be executed consistently by pilots of average skill in atmospheric conditions expected to be encountered in service.

EASA and the Associations stated that some designs may have performance limitations at low temperatures rather than high temperatures, such as batteries in electric propulsion systems. The commenters recommended revising the proposed language to require performance data for low temperatures that can be expected during operation, if those low temperatures could have a negative effect on performance.

The FAA agrees proposed § 23.105(b) (now § 23.2105(b)) should account for possible performance degradation due to the effect of cold temperatures on electric propulsion systems. Proposed § 23.105 was intended to capture the safety intent of former § 23.45, which required the determination of performance data in various conditions that could negatively affect performance. Historically, propulsion systems were gas powered and negatively affected by high temperatures, which resulted in a corresponding negative effect on performance. This explains why former § 23.45 required the determination of performance data at a temperature from standard to 30 degrees Celsius above standard, as performance degradations historically resulted from operation at high temperatures.

As stated in the NPRM, the FAA intended the proposal to account for airplanes equipped with new technologies, such as electric propulsion systems. Additionally, the FAA intended proposed § 23.105(b) to account for various conditions that could affect airplane performance. However, proposed § 23.105(b) would only have accounted for performance degradations that could result from the operation of systems at high temperatures, as the proposed language reflected former § 23.45. Because cold temperatures, rather than high temperatures, may have a negative performance effect on an electric propulsion system or a hybrid system, the FAA revises the proposed language to account for performance degradations at low temperatures. The FAA also removes the prescriptive language that would have required the determination of performance data at a temperature from standard to 30 degrees Celsius.

Section 23.2105(b)(2) now requires the applicant to develop performance data at temperatures above and below standard day temperature that are within the range of operating limitations, if those temperatures could have a negative effect on performance. This requirement is consistent with the NPRM as it replaces the prescriptive design requirements from the regulation with performance-based airworthiness standards that accommodate new technologies, such as electric and hybrid propulsion systems. Additionally, § 23.2105(b)(2) more accurately reflects the safety intent of former § 23.45 because it requires the development of performance data in conditions that could negatively affect performance, including conditions that account for new technologies.

As a general matter, under § 23.2105(b)(2), an applicant seeking certification of a gas-powered propulsion system must develop performance data at temperatures above standard that are within the airplane's operating limitations, because high temperatures could have a negative effect on the airplane's performance. Alternatively, an applicant seeking certification of an electric or hybrid propulsion system must develop performance data at temperatures both above and below standard that are within the airplane's operating limitations, if these temperatures could have a negative effect on performance.

Garmin pointed out that limited airflow in a climb configuration may cause non-propulsion systems to overheat during long hot climbs, requiring a different climb speed or configuration for system cooling than addressed in proposed § 23.105(b). Garmin recommended the FAA include the phrase ''other essential equipment'' in addition to propulsion cooling in paragraph (b)(2).

The Associations similarly suggested that there may be some cases where the performance of equipment other than the propulsion system may drive cooling requirements for hot conditions. The commenters recommended revising the proposed language to include cooling requirements for these equipment, in situations other than climb.

The FAA understands the concerns of Garmin and the Associations, for paragraph (b)(2) to address cooling requirements for more than the propulsion system. However, subpart B—including § 23.2105—is intended to address airplane performance. Therefore, § 23.2105 should only address systems that affect airplane performance. For example, § 23.2105 may apply to avionics that also control propulsion, or flight controls and lift systems needed to develop repeatable airplane performance. Traditional avionics that do not affect performance are addressed in subpart F, which contains requirements for equipment. Therefore, the FAA is not adopting the phrase ''other essential equipment'' because it may be interpreted to include systems that do not affect performance, such as oxygen or navigation systems. This would be a new requirement that has not been identified as a safety need, increasing the scope and possibly the cost of this rule. For the same reasons, the FAA is not expanding the scope of the rule to include cooling requirements for equipment other than propulsion systems, in situations other than climb.

Nevertheless, in light of the comments, the FAA acknowledges there may be systems associated with propulsion that are necessary for consistent performance, such as batteries or engine controllers, that could be affected by temperature. Section 23.2105 should address these types of systems. Therefore, § 23.2105(b)(2) will apply to systems associated with electric or other propulsion systems if those systems could negatively affect performance at temperatures above or below standard.

[23] 29 FR 17955, December 18, 1964.

c. Stall Speed (Proposed § 23.110/Now § 23.2110)

In the NPRM, proposed § 23.110 (now § 23.2110) would have required an applicant to determine the airplane stall speed or the minimum steady flight speed for each flight configuration used in normal operations, accounting for the most adverse conditions for each flight configuration, with power set at idle or zero thrust.

The Associations recommended removing the proposed requirement for power to be set at idle or zero thrust for each determination to enable the introduction of new technologies such as distributed propulsion with reliable electric power. The commenters explained that proposed § 23.110 must account for distributed lift systems because the concept of distributed lift along a wing may be used to facilitate low-speed handling, and reliable systems of this type may dictate operational stall speeds. The commenters asserted their recommended change would ensure that distributed propulsion, with an appropriate reliability level, could be used in a landing condition accounting for a lower stall speed based upon the effects of this equipment.

The FAA agrees that proposed § 23.110 (now § 23.2110) should account for distributed propulsion systems used for thrust, flight controls, and high lift systems. However, the rule must define a thrust level for standardization because stall speeds are important to the development of the performance-based speeds. The FAA finds it appropriate to require traditional designs to determine stall speeds and minimum steady flight speeds with power set at idle or zero thrust. Accordingly, § 23.2110(a) now requires the power to be set at idle or zero thrust for propulsion systems used primarily for thrust. To accommodate distributed propulsion systems, the FAA is adding new § 23.2110(b), which requires a nominal thrust for propulsion systems used for thrust, flight control, and/or high-lift systems. These changes will allow § 23.2110 to accommodate the new technologies identified by the commenters.

Additionally, the FAA revises the proposed rule language to clarify the ''stall speed or minimum steady flight speed determination'' must account for the most adverse conditions for each flight configuration. This change is consistent with the proposed rule, which would have required ''each determination'' to account for the most adverse conditions for each flight configuration, because ''each determination'' referred to the ''stall speed or minimum steady flight speed determination.''

d. Takeoff Performance (Proposed § 23.115/Now § 23.2115)

In the NPRM, proposed § 23.115 (now § 23.2115) would have required an applicant to determine airplane takeoff performance, which would have included the determination of ground roll and initial climb distance to 50 feet, accounting for stall speed safety margins, minimum control speeds, and climb gradients. Proposed § 23.115 would have also required the takeoff performance determination to include accelerate-stop, ground roll and initial climb to 50 feet, and net takeoff flight path, after a sudden critical loss of thrust for levels 1, 2, and 3 high-speed multiengine airplanes, multiengine airplanes with a maximum takeoff weight greater than 12,500 pounds, and level 4 multiengine airplanes.

The Associations suggested the FAA revise proposed § 23.115 to capture the performance-based standards at a ''higher objective based level'' because the proposed section was too detailed and prescriptive. Textron recommended the FAA adopt language similar to EASA's A–NPA 2015–06, which leaves determination of detailed standards appropriate to airplanes with different certification and performance levels to the means of compliance standards.

The FAA disagrees with the comment, because it is important to ensure the consistency of takeoff performance data across part 23 airplanes. This consistency aids private pilots, who often operate a variety of part 23 airplanes, in determining the airports from which they may operate.

Several commenters recommended the FAA remove the 12,500-pound cutoff in proposed § 23.115(c).

The FAA agrees and removes the weight discriminator from the rule language. Although the FAA proposed to remove the commuter category, along with weight- and propulsion-based certification divisions, and to replace them with divisions based on risk and performance, the FAA also proposed to require multiengine airplanes with a maximum takeoff weight of more than 12,500 pounds to comply with the increased takeoff performance requirements in paragraph (c). Proposed paragraph (c) was intended to ensure that larger business jets carrying fewer than 10 passengers, which would have been considered commuter category under the former rule, were captured under the takeoff performance requirements because these airplanes would not necessarily fall under level 4. The FAA recognizes that applying paragraph (c) to multiengine airplanes with a maximum takeoff weight of more than 12,500 pounds is redundant. Those airplanes, which are equivalent to airplanes under the former commuter category, are captured by applying paragraph (c) to levels 1, 2, and 3 high-speed multiengine airplanes and to all level 4, multiengine airplanes. Furthermore, while paragraph (c) does not apply to levels 1, 2 and 3 low-speed multiengine airplanes, the FAA may issue special conditions if there is a configuration that presents a higher-than-anticipated risk.

Several commenters objected to requiring the determination of takeoff performance for all airplanes to include the determination of initial climb distance to 50 feet above the takeoff surface. The commenters noted that under the former rule, takeoff distance for commuter category airplanes and multiengine jets weighing more than 6,000 pounds required the initial climb distance be calculated using 35 feet above the takeoff surface. Textron recommended the FAA revise proposed § 23.115(b) to apply the 50-feet-above-takeoff-surface requirement only to single-engine airplanes and levels 1, 2, and 3 low-speed multiengine airplanes rather than to all airplanes. Textron also recommended revising proposed § 23.115(c)(2) from ''50 feet'' to ''35 feet'' above the takeoff surface, noting the 35-foot standard has been demonstrated as safe for the classes of airplane to which it has been applied.

The FAA agrees with the commenters and revises proposed § 23.115(b) (now § 23.2115(b)) to require only single-engine airplanes and levels 1, 2, and 3 low-speed, multiengine airplanes to include the distance required to climb to a height above 50 feet when calculating takeoff performance. The FAA is also changing the altitude for the initial climb in § 23.2115(c)(2) to 35 feet. The service history of airplanes that would be classified as levels 1, 2, and 3 high-speed multiengine airplanes and level 4 multiengine airplanes under this rule, which were certified using a 35-feet-initial-climb requirement, has been sufficiently safe to support the proposition that the 35-feet requirement provides an adequate level of safety for high-speed multiengine airplanes and level 4 airplanes.

The Associations suggested revising proposed § 23.115(b) and (c) to require takeoff performance to include the determination of ''ground roll distance required to takeoff,'' rather than ''ground roll.''

The FAA notes using ''ground roll distance required to takeoff'' is not necessary for clarity. The term ''ground roll'' in the context of takeoff is well-understood.

Several commenters recommended revising proposed § 23.115(b) to include two subparagraphs in what the FAA interprets as an effort to clarify that the applicant must provide two distances, one for ground roll and another for the distance required for the initial climb to 50 feet.

The FAA finds it unnecessary to reorganize paragraph (b) as the commenters proposed. The format, as proposed and adopted, is sufficiently clear.

The Associations suggested the FAA revise the proposed rule language in proposed § 23.115(c)(1) to require the takeoff performance determination to include the distance determination of ''an aborted take-off at critical speed,'' rather than ''accelerate-stop.''

The FAA agrees that ''accelerate-stop'' is not as clear a description of the objective of the maneuver as ''aborted take-off at critical speed''. Therefore, the FAA revises paragraph § 23.2115(c)(1) to reflect the commenters' recommendation.

Embraer recommended the FAA provide special consideration—including freezing the certification bases—for previously-approved light jets with certification bases that include special conditions measuring the takeoff distance as the distance required to takeoff and climb to a height of 35 feet above the takeoff surface. Embraer feared the potential cost associated with an upgrade or modification.

The FAA finds a special consideration unnecessary. There is already a process, prescribed by § 21.101(b), that allows applicants for a change to a TC to show that the change complies with an earlier amendment of a regulation if the newer requirement would not contribute materially to the level of safety of the product or would be impractical.

ANAC recommended the FAA make it clear that takeoff airspeed and procedures must be determined. The FAA disagrees with ANAC's comment as such a change would be redundant with what we proposed for § 23.105 (now § 23.2105).

e. Climb Requirements (Proposed § 23.120/Now § 23.2120)

In the NPRM, proposed § 23.120 (now § 23.2120) would have required an applicant to demonstrate various minimum climb performances out of ground effect, depending on the airplane's certification level and performance capability.

In light of comments received, the FAA revises proposed § 23.120 (now § 23.2120) by withdrawing paragraphs (b)(4), (b)(5), and (c)(1), and renumbering paragraphs (c)(2) and (c)(3) as (c)(1) and (c)(2) respectively. This section discusses these changes in more detail.

Textron commented that regulations have historically applied to the airplane, not to the applicant, with demonstration of compliance through flight testing. Textron recommended the FAA offer alternative rule language that reflected its comment. The Associations similarly recommended the FAA change the opening of proposed § 23.120 to focus on the design rather than the applicant. These commenters also recommended re-designating the opening as paragraph (a).

The FAA notes that, historically, the airplane-specific requirements focused on the airplane, and the part 21 certification requirements were targeted more to the applicant. Many sections in this rulemaking effort tried to include applicant accountability, which was why the proposed rule focused on the ''applicant.'' However, based on the comments received, the FAA revises the proposed language throughout this rule by removing ''applicant'' where the requirement is more logically based on the airplane.

Textron commented on the proposal to apply discriminators based on weight divisions and detailed quantitative climb criteria conflicted with the stated intent of the rulemaking to remove weight-based divisions and develop standards reflecting the diversity of future airplane designs. Textron recommended the FAA adopt language similar to proposed CS 23.120, which leaves determination of detailed standards appropriate to airplanes with different certification and performance levels to means of compliance. The Associations recommended the FAA make the calculation of performances more general, to facilitate the use of standard means of compliance, which may exist in consensus-based standards. An individual commenter similarly stated the prescriptiveness of proposed § 23.120 was contrary to the stated objective of the proposal. The commenter stated the text of proposed § 23.120 would be more appropriate as a standard rather than a rule. The commenter recommended that the FAA use the language of proposed § 23.125, which would have required the determination of climb performance in certain conditions and configuration, in proposed § 23.120. The commenter also noted the current version of the ASTM standard for climb requirements already fully covers the language of proposed § 23.120.

In response to Textron's comment, the FAA revises proposed § 23.120 so it no longer contains weight divisions. Instead, the requirements of this section are based on certification levels, performance levels, and number of engines. Section 23.2120 does, however, contain quantitative climb criteria. On this topic, the FAA did not adopt the EASA proposed CS 23.120 language as recommended by Textron. While the idea of removing all climb gradient requirements was discussed in the Part 23 ARC, the FAA finds it is not in the best interest of safety to eliminate all required climb gradients. Therefore, the FAA is including the minimum climb gradients in this performance-based rule. But, the FAA consolidated the climb gradient requirements of former part 23 to simplify the requirement. The FAA finds doing so will maintain the former level of safety while reducing the certification burden. The FAA acknowledges the ASTM means of compliance contain the climb gradients in more detail than required from the requirements of this section. However, the ASTM means of compliance has not been accepted by the FAA as of the publication of this rule.

The FAA finds that, while removing as many prescriptive requirements as possible is important for creating a performance-based rule, some requirements should remain because they have been proven over decades of service and are already based on performance. The FAA finds the climb requirements are one such case.

In response to the comment that the FAA should use the language of proposed § 23.125 (now § 23.2125) in proposed § 23.120 (now § 23.2120), the FAA notes that § 23.2125 only requires the performance information be determined for the airplane flight manual (AFM). There is no minimum climb gradient in § 23.2125 as with § 23.2120. The Part 23 ARC discussed this issue at length with the objective of defining a clear, minimum performance-based metric that would allow the prescriptive climb gradients to move to means of compliance. The climb gradients in former §§ 23.65 through 23.77 came from early CAR 3 and have been in place for more than half a century, with the exception of some commuter category requirements, which came from early part 25. Since the FAA has established measureable gradients, any alternative approach would need to maintain the same gradients to provide an equivalent level of safety as the former climb requirements. The ARC considered numerous options, but in every case the proposed metric was subjective such that the FAA may be required to evaluate various other climb gradient schemes against the former climb gradients, when the intent was to maintain the former climb gradients. Finally, the FAA determined keeping the prescriptive climb gradients from the former rules remains the best approach. Furthermore, supporting this position, the FAA could not envision new and novel configurations that could not meet these climb gradients, but would offer the same level of safety. All the new and novel configurations that have been shared with the FAA have performance that will meet or exceed the minimum gradients proposed in the NPRM. For these reasons the FAA is retaining the proposed language.

Furthermore, it may not have been clear in the NPRM that the FAA intended proposed § 23.120 to address the required minimum climb gradients in former §§ 23.63, 23.65, 23.67, and 23.77, and proposed § 23.125 (now § 23.2125) to address the required publication of the measured performance in former §§ 23.66, 23.69, and 23.71. Therefore, the FAA is not including language similar to proposed § 23.125 (now § 23.2125) in § 23.2120, because § 23.2120 includes required climb gradients, not information requirements.

Textron stated that proposed § 23.120(a) would have applied to the all engines operating (AEO) takeoff climb and that a common terminology should be used. Textron recommended the FAA replace the undefined phrase ''initial climb configuration'' in proposed paragraph (a) with the unambiguous phrase ''takeoff configuration'', and remove the phrase ''at takeoff'' from proposed paragraph (a)(2). Textron also recommended the FAA remove the phrase ''at sea level'' from proposed paragraph (a)(1) because the FAA already proposed § 23.105 to require an airplane, unless otherwise prescribed, to meet the performance requirements of this subpart in still air and standard atmospheric conditions at sea level for all airplanes.

The FAA notes that replacing ''initial climb configuration'' with ''takeoff configuration'' would require the design to comply with the required minimum climb performance out of ground effect, with all engines operating and in the ''takeoff configuration''. The FAA finds that this change would be more stringent than the former regulations. Former § 23.65(a) allowed for the climb to be demonstrated with the landing gear retracted, and former § 23.65(b) allowed for the climb to be demonstrated with the landing gear retracted if it could be retracted in 7 seconds. While normalizing both former regulations might appear relieving for airplanes certified as complying with former § 23.65(b),[24] the FAA finds that most airplanes designed in the past 2 decades incorporated landing gear that retracted in less than seven seconds. Therefore, the FAA is retaining the phrase ''initial climb configuration'' in paragraph (a).

The FAA agrees with Textron's recommendation to delete ''at sea level'' from proposed § 23.120(a)(1). The FAA proposed the term because it was part of former § 23.65(a). As Textron noted, however, proposed § 23.105(a) (now § 23.2105(a)) would have already required an airplane to meet the performance data of subpart B, including § 23.2120, in still air and atmospheric conditions at sea level for all airplanes. It is therefore unnecessary for paragraph (a)(1) to require a climb gradient ''at sea level'' of 8.3 percent for landplanes and 6.7 percent for seaplanes and amphibians. However, the FAA is not deleting ''at takeoff'' as recommended by Textron. The agency is aligning the new rule with former § 23.65 by using ''after takeoff'' instead of ''at takeoff.'' This requirement is indirectly addressed in § 23.2105(b); however, as proposed, the language was not clear as to intent. By including the term ''after takeoff'', this requirement reinforces the meaning of ''ambient atmospheric conditions'' in § 23.2105(b).

The Associations and Transport Canada noted that proposed § 23.120(a) did not address climb performance for level 4 airplanes. Transport Canada stated the FAA should specify all engine operating climb gradient requirements for level 4 airplanes. The Associations stated the climb gradient requirements for level 4 airplanes should be the same as the requirement for high-speed level 1 and 2 airplanes and level 3 airplanes.

The FAA considered the comments and in response, revises proposed § 23.120(a) to include an all engines operating climb requirement for level 4 single-engine airplanes. The former climb requirements required all airplanes with 10 or more passengers to have multiple engines and meet the commuter category climb requirements, which were focused on the ability to climb after an engine failure. These one-engine-inoperative climb requirements were extensive. The philosophy was that if the airplane could meet the climb requirements after one engine failed, it would have more-than-adequate performance with all engines operating. This is why there were no all engine operating climb requirements for commuter category airplanes. The FAA agrees with and continues this philosophy in the new rule for multiengine airplanes designed for 10 or more passengers, which are level 4 airplanes under this rule. However, because the new rule eliminates the commuter category and allows for single-engine airplanes to carry 10 or more passengers, there is now a need for single-engine level 4 airplanes to have an all engines operating climb requirement.

The FAA agrees with the Associations that the climb gradient requirements for level 4 single-engines airplanes should be the same as the requirement for levels 1 and 2 high-speed airplanes and level 3 airplanes. This was an oversight in the NPRM and the FAA is correcting it in this final rule. Accordingly, § 23.2120(a)(2) now requires levels 1 and 2 high-speed airplanes, all level 3 airplanes, and level 4 single-engine airplanes to demonstrate, with all engines operating and in the initial climb configuration, a climb gradient at takeoff of 4 percent. This revision is a logical outgrowth of the notice because, as noted by the commenters, there is no basis for distinguishing between level 3 and level 4 airplanes for this requirement.

Transport Canada commented that the FAA should consider and validate whether a 4 percent climb gradient for high-performance airplanes with all engines operating is sufficient. For example, an airplane climbing at 100 knots (approximately 400 feet per minute) may be acceptable for a level 1 airplane, but not for anything larger. Transport Canada noted that proposed paragraph (a)(2) may govern more frequently, because the all-engine climb capability driven by the one-engine-inoperative requirements has been reduced in proposed paragraph (b)(3). Transport Canada also noted that, given the increasing probability of airplanes with more than 4 engines, it may be more effective to increase the all-engine climb gradient in proposed paragraph (a)(2).

The FAA considered Transport Canada's comments, but notes the intent with this section was to maintain the level of safety in former part 23. Section 23.2120(b) requires the same climb gradient—4 percent—as was required for similar airplanes by former part 23. The FAA notes that requiring more stringent climb requirements is beyond the scope of this rulemaking.

[24] Former § 23.65(b) applied to normal, utility, and acrobatic category reciprocating engine-powered airplane of more than 6,000 pounds maximum weight, single-engine turbine, and multiengine turbine airplanes of 6,000 pounds or less maximum weight in the normal, utility, and acrobatic category.

Textron made several comments to proposed § 23.120(b). Textron stated the word ''the'' should replace the word ''a'' when referring to critical loss of thrust. For proposed § 23.120(b)(1), Textron suggested referring to climb gradient the same way as in proposed § 23.120(a)(2). Textron also recommended changing ''configuration'' to ''configurations'' in proposed paragraph (b)(1) because one airplane may have multiple takeoff and approach configurations. Textron and Kestrel requested clarification regarding the single-engine crashworthiness requirements referred to in proposed § 23.120(b)(1). Kestrel asked whether those requirements will be established in the rule or based on an associated standard.

Regarding Textron's comment on the use of the word ''the'' in the phrase ''the critical loss of thrust,'' the term ''the'' would assume that everyone knows what that critical loss of thrust is. While that may be true for traditional configurations, it may not be true for future configurations. Therefore, the FAA is keeping the proposed phrase ''a critical loss of thrust.'' However, the FAA agrees with Textron concerning multiple configurations and revises the rule to align the reference to the climb gradient in §§ 23.2120(a)(2) and 23.2120(b)(1) for clarity.

In response to Kestrel and Textron, § 23.2120(b)(1) contains a requirement addressing airplanes that do not meet the single-engine crashworthiness requirements of proposed § 23.600, ''Emergency conditions'' (now § 23.2270). Section 23.2120(b)(1) is intended to capture the intent of former § 23.67(a)(1), which required airplanes with V_{SO} of more than 61 knots to maintain a steady climb gradient of at least 1.5 percent. Sixty-one knots was a historic stall speed limit for single-engine airplanes and for that reason, it was used as a division between multiengine airplanes that could climb after the loss of one engine and other multiengine airplanes that could not maintain altitude after the loss of one engine. These former requirements assumed that the airplane only had two engines. The FAA is not using the 61 knot stall speed division in this new rule the way it was used in former § 23.562, ''Emergency landing dynamic conditions'', for crashworthiness requirements. Instead, the FAA is basing these new regulations on actual stall speed. The new regulations should, over time, allow several alternatives to address occupant protection. For this reason, and because the FAA did not intend to increase the level of safety over the former requirements, the FAA is using the phrase ''single-engine crashworthiness.''

Textron asserted that to obtain the best takeoff performance in high and hot conditions, it can be advantageous to use lesser flap settings to improve climb capability after takeoff. However, the proposed climb requirements—defined only in terms of the approach configuration—would have eliminated this capability, and would not have reflected the former part 23 standards. Textron suggested the FAA revise the proposed rule language in paragraph (b)(3) to require multiengine level 3 high-speed airplanes and level 4 airplanes to determine the climb gradients for weight, altitude, and temperature combinations appropriate for takeoff in the takeoff configuration.

The FAA notes that the reason for using the ''approach configuration'' was not that it reflected an actual configuration, but that it was more conservative than using the ''takeoff configuration.'' The FAA elected to consolidate the climb requirements from four configurations into one configuration. To do so, the FAA had to make some assumptions. The major assumption used in consolidating the climb requirements was that if the airplane could meet the second segment climb gradient at 400 feet, then it should meet the other traditional requirements and would provide an acceptable level of safety. However, to provide a margin of safety in case one of the other conditions was slightly more critical, the FAA elected to apply the discontinued approach flap configuration, which is ''approach'' flaps, for this requirement.

Transport Canada commented it would be more conservative to require the four-engine climb gradient of 2.6 percent in proposed § 23.120(b)(3), rather than the two-engine climb gradient of 2 percent.

The FAA explained in the NPRM that the climb gradient associated with the loss of one engine for a two-engine airplane has provided an acceptable safety history for this class of airplane. The historical three- and four-engine climb gradients were based on part 25 regulations regarding gas engine technology, and may not be appropriate for distributed electric propulsion configurations or designs. For this reason, using those historical values may end up with a more conservative approach than intended. This would increase the requirements from the former part 23 regulations, which is outside the scope of this rulemaking.

Several commenters recommended the FAA either delete, clarify, or re-write proposed § 23.120(b)(4) and (5) because the intent of those paragraphs is unclear.

The FAA agrees that proposed § 23.120(b)(4) and (b)(5) are confusing. The FAA intended the conditions in paragraphs (b)(4) and (b)(5) to apply to the determinations required by paragraph (b). However, because § 23.2105(a) requires an airplane to meet the performance data of subpart B for these 2 conditions, paragraphs (b)(4) and (b)(5) are redundant and confusing. For this reason, the FAA withdraws paragraphs (b)(4) and (b)(5).

An individual commented that all multiengine airplanes should be able to climb after an engine failure. The commenter stated this performance is affordable and the FAA should not permit poor performance because a manufacturer wants to refurbish a decades-old design and produce it.

The FAA notes that adding the requirement for all-multiengine airplanes to be able to climb after an engine failure is beyond the scope of this rulemaking. The FAA finds that the current level of safety in former part 23 regarding climb performance for multiengine airplanes following an engine failure is adequate.

The Associations recommended the FAA revise the proposed rule language to require the applicant to demonstrate a climb gradient of 3 percent during balked landing ''without creating undue pilot workload.'' The commenters also recommended the FAA rewrite proposed § 23.120(c) to include a general requirement for the applicant to determine, as applicable, climb and descent performance for all engines operating; following a critical loss of thrust on take-off; and after a critical loss of thrust during the enroute phase of flight.

The FAA originally determined that adding the phrase ''without creating undue pilot workload'' in this requirement was redundant with proposed § 23.105(c); however, proposed § 23.105(c) only addressed takeoff and landing distances. The FAA also recognizes that many of the part 23 fatal accidents happen on go-arounds or balked landings and are attributable, at least in part, to high-pilot workload. For this reason, the FAA is adding ''without creating undue pilot workload'' to § 23.2120(c).

The FAA also addresses the commenters' recommendation to include a general requirement for the applicant to determine, as applicable, climb and descent performance for all engines operating; following a critical loss of thrust on take-off; and after a critical loss of thrust during the enroute phase of flight in § 23.2125(a)(2) and (a)(3).

Textron and Transport Canada also commented on proposed § 23.120(c). Textron stated that it is unclear why takeoff power is specified for the balked landing, but not for any other minimum climb performance requirements. Textron recommended changing the word ''configuration'' to ''configurations'' in proposed § 23.120(c)(3) because an airplane might have multiple landing configurations.

The FAA agrees with Textron that the reference to takeoff power was not needed. Therefore, the FAA deletes the reference from proposed § 23.120(c) (now § 23.2120(c)). The FAA also agrees with Textron's recommendation to change ''configuration'' to ''configurations'' and makes this change in § 23.2120(c).

Transport Canada asked that the FAA justify the reduction in the required landing climb gradients from 3.3 percent to 3 percent.

The FAA notes that former § 23.77, which governed balked landings, required a 3.3 percent gradient for piston airplanes weighing less than 6,000 pounds; a 2.5 percent gradient for piston engine and single-engine turbine-powered airplanes over 6,000 pounds and for multiengine turbine-powered airplanes weighing 6,000 pounds or less; and a 3.2 percent gradient for multiengine turbine-powered airplanes weighing over 6,000 pounds and commuter category airplanes. The FAA is simplifying the former requirement by taking the average of the three climb gradients. The FAA did not receive any negative comments concerning the decrease or increase in climb gradient requirements, so the FAA adopts the language as proposed.

f. Climb Information (Proposed § 23.125/Now § 23.2125)

In the NPRM, proposed § 23.125 (now § 23.2125) would have required an applicant to determine the climb performance for—

- All single-engine airplanes;
- Level 3 multiengine airplanes, after a critical loss of thrust on takeoff in the initial climb configuration; and
- All multiengine airplanes, during the enroute phase of flight with all engines operating and after a critical loss of thrust in the cruise configuration.

Proposed § 23.125 would have also required an applicant to determine the glide performance of the airplane after a complete loss of thrust for single-engine airplanes.

Transport Canada commented that proposed § 23.125(a) appears to lack the concept of determining climb performance at each approved weight, altitude, and temperature. Additionally, Transport Canada stated it is unclear why proposed § 23.125(a)(2) applies only to level 3 multiengine airplane. Transport Canada recommended the FAA require the determination of climb performance following a critical loss of thrust on take-off in the initial climb configuration for all multiengine airplanes at each weight, altitude, and temperature.

The FAA agrees with Transport Canada that proposed § 23.125(a) would not have expressly required the determination of climb performance at each approved weight, altitude, and temperature. The FAA intended proposed § 23.105(a)—which would have required levels 1 and 2 high-speed airplanes and level 3 airplanes to provide performance data in ambient atmospheric conditions within the operating envelope—to capture this requirement. To comply with the requirement in proposed § 23.105(a) to ''meet the performance requirements'' of subpart B, an applicant would have had to make these determinations anyway. However, after considering Transport Canada's comment, the FAA revises the proposed language to make clear that § 23.125(a)(2) (now § 23.2125(a)(2)) requires the determination of climb performance at each weight, altitude, and ambient temperature within the operating limitations. This change is consistent with the NPRM, which explained that proposed § 23.125 was intended to capture the safety intent of former §§ 23.66 and 23.69. Both of these sections required the determination to be made at each weight, altitude, and ambient temperature within the airplane operating limitations.

The FAA agrees that § 23.2125(a)(2) should apply to more than level 3 multiengine airplanes; however, it should not apply to all multiengine airplanes. Section 23.2125(a)(2) captures the safety intent of former § 23.66, which applied only to reciprocating engine-powered airplanes of more than 6,000 pounds maximum weight and turbine engine-powered airplanes. Under the new performance-based regulations, the equivalent airplanes—considering the intent of former § 23.66—are levels 1 and 2 high-speed multiengine airplanes and all level 3 airplanes. Therefore, the FAA revises the proposed rule language to include levels 1 and 2 high-speed multiengine airplanes in addition to level 3 multiengine airplanes, to maintain the same level of safety as former § 23.66. However, because former § 23.66 did not apply to commuter-category airplanes—which were considered the equivalent of level 4 multiengine airplanes—§ 23.2125(a)(2) should not apply to all multiengine airplanes as doing so would make the rule more stringent than former § 23.66.

Textron noted the continuous reference to ''a critical loss of thrust'' in proposed § 23.125 and recommended the FAA refer to it as ''the critical loss of thrust.'' The FAA understands Textron's comment; however, the term ''the critical loss of thrust'' assumes there is a critical loss of thrust and that it is a known, finite condition for all multiengine airplanes. This may not be the case. The phrase ''a critical loss of thrust'' allows for the possibility that there is no critical loss of thrust or that different airplane configurations would have different critical loss of thrust conditions based on a specific configuration.

Textron recommended deleting the undefined phrase ''initial climb configuration'' from proposed § 23.125. Textron also recommended the FAA not require multiengine airplanes to be in the cruise configuration during the determination of climb performance in the enroute phase of flight. Textron explained that while the enroute phase of flight is typically associated with a ''clean'' airplane configuration, the applicant should be free to define this configuration.

The FAA agrees with Textron's intent, but does not accept Textron's recommendations. The FAA is requiring the airplane to be in the ''initial climb configuration'' in § 23.2125(a)(2) and the ''cruise configuration'' in § 23.2125(a)(3). However, the FAA is not defining ''initial climb configuration'' because a definition would be prescriptive and inflexible for new configurations, which would be contrary to this performance-based regulation. Paragraphs (a)(2) and (a)(3) capture the safety intent of former §§ 23.66 and 23.69, respectively. Former §§ 23.66 and 23.69 contained prescriptive requirements pertaining to the takeoff and enroute configurations, which were based on airplane designs over the past half-century. The FAA finds the new rules should include traditional configurations, but be flexible enough for new configurations in the future. These new configurations may be different from what was traditionally required in part 23 due to a unique propulsion, high lift, and/or flight control configuration. Therefore, § 23.2125(a)(2) and (a)(3) specify the configuration conditions in a performance-based manner that allows flexibility for the applicant to define what the configuration is in means of compliance.

Furthermore, based on another comment from Textron, the FAA deletes unnecessary text in paragraph (b) and moves the phrase ''single engine airplanes'' in the same paragraph to make the rule language of § 23.2125(b) read consistently with § 23.2125(a).

g. Landing (Proposed § 23.130/Now § 23.2130)

In the NPRM, proposed § 23.130 (now § 23.2130) would have required an applicant to determine the landing distance for standard temperatures at each weight and altitude within the operational limits for landing. The landing distance determination would start from a height of 50 feet (15 meters) above the landing surface, require the airplane to land and come to a stop (or for water operations, reach a speed of 3 knots) using approach and landing speeds, configurations, and procedures which allow a pilot of average skill to meet the landing distance consistently and without causing damage or injury. Proposed § 23.130 would have required these determinations for standard temperatures at each weight and altitude within the operational limits for landing.

Transport Canada stated proposed § 23.130 should require the landing performance to account for stall speed safety margins and minimum control speeds to maintain consistency with the take-off requirements in proposed § 23.115 (now § 23.2115) and to ensure the same level of safety as former part 23.

The FAA agrees the landing requirements of proposed § 23.130 (now § 23.2130) should expressly account for stall speed safety margins and minimum control speeds consistent with the takeoff performance requirements of proposed § 23.115 (now § 23.2115). Proposed § 23.130(b) would have generally required the determination of approach and landing speeds. As explained in the NPRM, the FAA intended proposed § 23.130 to capture the safety intent of former § 23.73, which required the reference landing approach speed to account for minimum control speed (V_{MC}) and V_{S1}. The FAA's intention to account for stall speed safety margins and minimum control speed, which would ensure the same level of safety as former § 23.73, was not clear in the proposed rule language. Accordingly, the FAA is adding language to paragraph § 23.2115(b) to clarify that an applicant must account for stall speed safety margins and minimum control speeds when determining the approach and landing speeds, configurations, and procedures.

Several commenters recommended clarifying changes to proposed § 23.130. The Associations recommended deleting the phrases ''the following'' and ''for landing'' in the introductory paragraph. Textron recommended various changes to proposed § 23.130(b), such as replacing ''meet'' with ''achieve,'' specifying that the landing distance is determined in proposed paragraph (a), and replacing ''causing damage or injury'' with ''endangering the airplane and its occupants.''

The FAA deletes the phrase ''for landing'' from the introductory paragraph of § 23.2130. This phrase is unnecessary because the section is about landing distance. However, the FAA retains the phrase ''the following'' for clarity. For § 23.2130(b), the FAA agrees that requiring a pilot of average skill ''to meet the landing distance'' is unclear, but will not replace the term ''meet'' because changing one word would not make the regulation any clearer. Instead, the FAA revises the language in § 23.2130(b) to require a pilot of average skill ''to land within the published landing distance'' and finds it unnecessary to specify in § 23.2130(b) that the landing distance is determined in § 23.2130(a). Lastly, the FAA retains the proposed language ''causing damage or injury'' because the commenter's recommended change is vague and could cause the regulations to be interpreted more stringently.

BendixKing suggested adding language to proposed § 23.130(a) that would require the speed of 3 knots for water operations to be relative to the surface in calm atmospheric conditions. Alternatively, the Associations recommended removing entirely the requirement for water operations to reach a speed of 3 knots. The commenters agreed that the term ''stop'' would differ for water and land operations, but asserted that the difference is not as simple as stating 3 knots. The commenters stated the appropriate method of compliance for determining a stop for seaplanes or amphibians should be contained in accepted standards.

The FAA agrees with the commenters and removes from the proposed rule language the requirement for water operations to reach a speed of 3 knots. The speed of 3 knots originated from AC 23–8C, which addresses water operations. Former § 23.75, the predecessor to § 23.130, required the airplane to come to a complete stop, and left the surface type undefined. The FAA intended to clarify rule language by specifying the speed of 3 knots to differentiate between land and water operations. However, in light of the comments, the proposed language added confusion and failed to allow the flexibility necessary for water operations. The FAA agrees with the commenters that the 3-knot reference is more appropriate as guidance. Accordingly, § 23.2130(a) now requires the applicant to determine the distance required to land and come to a stop, starting at a height of 50 feet above the landing surface. This change removes the need to address whether the speed of 3 knots must be relative to the surface in calm atmospheric conditions. The information necessary to comply with § 23.2130(a) will be addressed in means of compliance.

NJASAP said that wet runway data, as well as contaminated runway data, should be available for airplane certified to land under the conditions set forth in proposed § 23.130(a). NJASAP also suggested the FAA adopt concepts from the Takeoff and Landing Performance Assessment (TALPA) ARC. NJASAP pointed out that airplanes certified under part 135 fly in all weather conditions. Finally, NJASAP stated that runway excursions are a documented risk for these airplanes and this opportunity offers an additional enhancement.

While the FAA supports the NJASAP recommendation to make wet runway data available, doing so should not be a requirement. The TALPA ARC was primarily a part 25 effort targeting transport operations, not small airplane operations. The FAA is not adopting the TALPA ARC recommendations because they exceed former part 23 requirements and are therefore outside the scope of this rulemaking. The FAA recommends that NJASAP work with industry to add wet runway conditions to the industry consensus standards as possible means of compliance for airplanes used in part 135 operations.

ANAC recommended the FAA require the landing procedures to allow for a safe landing, or a transition to a balked landing configuration, as this would cover the intent of former § 23.75.

The FAA agrees that proposed § 23.130 (now § 23.2130) should address the safe transition to the balked landing conditions. The FAA intended proposed § 23.130 to capture the safety intent of former §§ 23.73 and 23.75. Former § 23.75 required a safe transition to the balked landing conditions of former § 23.77 from the conditions that existed at the 50-foot height. The balked landing conditions are now contained in § 23.2120(c), which captures the safety intent of former § 23.77. To ensure § 23.2130 contains the same level of safety as former § 23.75, the FAA revises the proposed rule language to require an applicant to determine the approach and landing speeds, configurations, and procedures that allow for a safe transition to the balked landing conditions specified in part 23.

The Associations also recommended the FAA clarify the introductory sentence of proposed § 23.130 by deleting ''each.'' The FAA agrees with this comment. Requiring determinations to be made at ''each'' combination of weight and altitude within the operational limits could be interpreted as requiring an infinite matrix of test points, which was not the FAA's intent. Rather than requiring the applicant to determine landing performance at ''each'' combination of weight and altitude within the operational limits, the FAA is requiring the determinations to be made at ''critical combinations'' of weight and altitude. This change is consistent with the change the FAA made to § 23.2100(b).

h. Controllability (Proposed § 23.200/ Now § 23.2135)

In the NPRM, proposed § 23.200 (now § 23.2135) would have required—

- The airplane to be controllable and maneuverable, without requiring exceptional piloting skill, alertness, or strength, within the operating envelope, at all loading conditions for which certification is requested. This would have included during low-speed operations, including stalls, with any probable flight control or propulsion system failure, and during configuration changes;
- The airplane to be able to complete a landing without causing damage or serious injury, in the landing configuration at a speed of V_{REF} minus 5 knots using the approach gradient equal to the steepest used in the landing distance determination;
- V_{MC} not to exceed V_{S1} or V_{S0} for all practical weights and configurations within the operating envelope of the airplane for levels 1 and 2 multiengine airplanes that cannot climb after a critical loss of thrust; and
- An applicant to demonstrate those aerobatic maneuvers for which certification is requested and determine entry speeds.

Kestrel questioned whether proposed § 23.200, which is intended to capture the requirements of former § 23.145, would be interpreted to include the former requirement to show the airplane can pitch nose downward when approaching stall, thus avoiding or recovering from stall, or, alternatively, whether the FAA found that requirement to be too prescriptive, representing only one possible means of compliance with the proposed controllability requirements.

The FAA intended proposed § 23.200 (now § 23.2135) to capture the safety intent of the former controllability §§ 23.141 through 23.157 and allow for other possible means of compliance appropriate to new or innovative designs. Therefore, proposed § 23.200 was not related only to former § 23.145 and was not intended to capture the specific requirements of former § 23.145, but did intend to capture its broader safety intent. The former requirement referenced by the commenter is prescriptive and provides a means of compliance for traditional configuration airplanes. Because it is possible for novel configurations and control schemes in the future to need different means of compliance, the FAA finds that the prescriptive language from former § 23.145 is more appropriate as means of compliance.

Textron commented on proposed § 23.200(a)(2). Textron pointed out that former § 23.143(a) and the proposal from the Part 23 ARC referenced ''all flight phases,'' which better captures the general intent of former § 23.143(a). Additionally, Textron stated that proposed § 23.215 addresses stall characteristics, making the stall aspect of proposed § 23.200(a)(2) redundant. Textron recommended the FAA maintain language similar to former part 23 by replacing the phrase ''low-speed operations, including stalls,'' with ''all flight phases.''

The FAA agrees with Textron. The FAA's intent in proposed § 23.200(a) (now § 23.2135(a)) was to capture the safety intent of former § 23.143, which required the airplane to be safely controllable and maneuverable during all phases of flight. The FAA agrees that the phrase ''all flight phases'' better captures the safety intent of former § 23.143(a). Additionally, upon further review, the language of proposed § 23.200(a)(2) is confusing because, while the FAA proposed to add requirements to essentially avoid the stall maneuver in proposed § 23.215, proposed § 23.200(a)(2) would have required controllability in the stall. While this is a desirable and recommended condition, the FAA does not want to add confusion. The stall requirements belong in proposed § 23.215 (now § 23.2150). For these reasons, the FAA adopts Textron's recommendation.

Textron also commented on proposed § 23.200(a)(3). Textron noted that former § 23.143 and the proposal from the Part 23 ARC did not address failures other than a response to a sudden engine failure. Textron also noted that proposed § 23.1315 already covers general airplane system or equipment failures. Textron claimed the requirements of proposed § 23.200(a)(3) could be interpreted as requiring demonstration of all probable flight control and propulsion failures in a flight-test environment, which the commenter said would not be practical or safe. Textron recommended maintaining the traditional scope of former subpart B controllability requirements, which included normal operations and, for multiengine airplanes, the response to critical loss of thrust, and using the methods employed for proposed § 23.1315 to evaluate responses to other failures.

In light of Textron's comment, the FAA finds it necessary to clarify that § 23.2135(a)(3) applies to ''reversible,'' which were traditionally mechanical flight controls, not ''irreversible'' flight controls. The FAA's intent in proposed § 23.200(a) was to capture the safety intent of former §§ 23.145(e) and 23.147(c), which required applicants to address mechanical control system failures. Historically, these requirements targeted control cable failures or push-pull tube disconnects. Former subpart F, which contained requirements on equipment, addressed powered- and computer-controlled flight control systems. Under this final rule, subpart F continues to address equipment, such as powered- and computer-controlled flight control systems, and § 23.2135 addresses mechanical control system failures, which is consistent with former §§ 23.145(e) and 23.147(c).

The Associations and EASA also addressed proposed § 23.200(a)(3).[25] The Associations recommended the FAA delete the word ''any'' from the phrase ''any probable flight control or propulsion system failure.'' EASA recommended the FAA replace the word ''probable'' with ''likely,'' to avoid creating ambiguity with probability definitions.

The FAA agrees the term ''any'' does not add value compared to the potential for confusion coming from an absolute qualifier. The FAA therefore deletes the word ''any'' in § 23.2135(a)(3).

The FAA also agrees the term ''probable'' has specific meaning relative to systems. Furthermore, the FAA expects a transition from mechanical flight controls to computer-controlled flight control systems, which are covered under the requirements in subpart F. Because the term ''probable''

[25] EASA actually referred to proposed § 23.200(a)(4) in its comment, but the FAA assumes EASA meant to refer to proposed § 23.200(a)(3), which is where the term ''probable'' is used.

has the potential to create confusion between the flight test requirements of subpart B and the systems requirements of subpart F, the FAA is using the term ''likely,'' rather than ''probable,'' which will reduce the potential for confusion while maintaining the intent of the requirement. For more detailed discussion on the use of ''likely'', please refer to the discussion on proposed § 23.205 (now § 23.2140).

The Associations commented on proposed § 23.200(b), stating that it does not account for preferred technologies, such as angle of attack indicators, for executing safe approach and landing procedures. The commenters recommended proposed paragraph (b) require the airplane to complete a safe landing when following the landing procedures; providing a safe margin below V_{ref} or above angle of attack. EASA recommended removing the configuration details and specific speed margin from proposed § 23.200(b) because future designs would not be able to comply with them.

The FAA agrees with these comments. The FAA intended proposed § 23.200(b) (now § 23.2135(b)) to capture the safety intent of former § 23.153 for control during landings. The FAA agrees that specifying a prescriptive speed of V_{ref} minus 5 knots, which former § 23.153 required, may not be appropriate for entry-level airplanes with very-low landing speeds and may not even apply to new configurations. The FAA therefore removes this prescriptive speed. Instead, the FAA is requiring a reasonable margin below V_{ref} or above approach angle of attack, as recommended by the Associations. This change from what was proposed is consistent with the safety intent of former § 23.153 as it requires a safe speed margin and it accounts for entry-level airplanes and new technology. The FAA also deletes the phrase ''equal to the steepest used in the landing distance determination'' and replaces it with ''steepest approved'' approach gradient procedures as this is clarifying.

Textron recommended proposed § 23.200(b) be modified to require the airplane to land without ''endangering the airplane and its occupants,'' rather than to land without ''causing damage or serious injury.''

The FAA finds that Textron's recommendation does not capture the safety intent of former § 23.153, which required safe completion of a landing. However, in light of Textron's comment, the FAA is clarifying the term ''damage.'' As proposed in the NPRM, the rule would not have allowed any damage, no matter how trivial. This was not the intent of former § 23.153. The FAA intended to capture the safety intent of former § 23.153 in proposed § 23.200(b) (now § 23.2135(b)); therefore, the FAA revises the proposed rule language by defining the damage that could be accepted during demonstration. Section 23.2135(b) now requires the airplane to be able to complete a landing without causing ''substantial'' damage or serious injury. Substantial damage is defined in 49 CFR part 830 as requiring major repairs and effectively preclude the use of the airplane for its intended purpose.

Textron also noted that proposed § 23.200 would not have required V_{MC} to be determined. ANAC and Textron recommended the FAA require V_{MC} to be determined, because it must be accounted for in the determination of takeoff performance. Textron recommended adding a new paragraph to proposed § 23.200. Textron recommended the new paragraph state V_{MC} is the calibrated airspeed at which, following the sudden critical loss of thrust, it is possible to maintain control of the airplane. For multiengine airplanes, the applicant must determine V_{MC} for each flight configuration used in takeoff and landing operations.

The FAA agrees the rule should require V_{MC} to be determined. Proposed § 23.200 was intended to capture the safety intent of former § 23.149, which defined and required the determination of V_{MC}. The FAA is adding language to § 23.2135(c) that is consistent with former § 23.149, but removes the prescriptive requirements of former § 23.149, such as the specific configuration requirements. Section 23.2135(c) now states that V_{MC} is the calibrated airspeed at which, following the sudden critical loss of thrust, it is possible to maintain control of the airplane. Section 23.2135(c) also requires the applicant to determine V_{MC}, if applicable, for the most critical configurations used in the takeoff and landing operations. The FAA is requiring the applicant to determine V_{MC} in the most ''critical'' configurations rather than in ''each'' configuration because requiring the determination at each configuration would present an infinite number of test points. Additionally, the FAA added the phrase ''if applicable'' to the rule language because there are multiengine airplanes that do not have a V_{MC}.

ANAC recommended proposed § 23.200(c) be written in a less prescriptive manner to allow for different technology solutions. ANAC stated that proposed § 23.200(c) should contain only the safety objective stated in the NPRM. For example, proposed § 23.200 should have stated that an airplane should not depart controlled flight at low speeds above stall as a result of asymmetric thrust.

The Associations stated that while proposed § 23.200(c) represented a potential solution to the typical accident scenario involving loss of control in multiengine airplanes, which are unable to climb on a single engine, there are other solutions that may be better depending on the design of the airplane. The commenters noted that instead of assuring V_{MC} is below the stall speed, solutions might include envelope protection, increased awareness of the loss of control condition, or automatic-power response. To ensure the rule allows the best solution for a particular design, the commenters recommended the FAA not adopt proposed § 23.200(c). Instead, the commenters recommended the section on loss of control, proposed § 23.215, require multi-engine airplanes, not certified for aerobatics, not have a tendency to suffer a loss of control after a likely critical loss of thrust. Several other commenters also expressed concerns about proposed § 23.200(c) and made similar recommendations.

As explained in the NPRM, the critical safety issue that the FAA intended proposed § 23.200(c) to address was the loss of control caused by asymmetric thrust. The FAA recognized in the NPRM concerns regarding the effectiveness of the proposed requirement in addressing loss of control caused by asymmetric thrust and requested comments on the proposal. In light of the comments received, the FAA is not adopting proposed § 23.200(c). The FAA agrees with ANAC and the Associations that the rule should allow for different technologies as design solutions to the identified safety issue. The FAA also agrees that § 23.2150 should include the requirement to address this loss of control issue. Therefore, the FAA adopts less prescriptive language similar to that recommended by the commenters, which is consistent with the intent of proposed § 23.200(c). This will allow for alternative design solutions. Section 23.2150(c) now requires levels 1 and 2 multiengine airplanes, not certified for aerobatics, to not have a tendency to inadvertently depart controlled flight from thrust asymmetry after a critical loss of thrust.

The Associations and EASA recommended the FAA apply this requirement to all multiengine airplanes, rather than only levels 1 and 2. The FAA is not adopting this recommendation. As explained in the NPRM, the FAA does not have the accident history data to support it. The FAA encourages manufacturers of levels

3 and 4 multiengine airplanes to incorporate safety features that prevent inadvertent departure as with levels 1 and 2 multiengine airplanes.

ICON commented an airplane designed in accordance with proposed § 23.200(c) would require less skill and presence of mind during an emergency, resulting in better safety.

While the FAA is not adopting proposed § 23.200(c), new § 23.2150(c) achieves the safety objective of proposed § 23.200(c).

Transport Canada noted the reason for requiring V_{MC} to be less than the stall speed is to avoid loss of control following an engine failure. Transport Canada suggested an airplane designed with a large enough rudder to meet this requirement may be more prone to inadvertent spin entries. Transport Canada recommended requiring all multiengine airplane to have a positive climb gradient following an engine failure.

As explained in the NPRM, while the Part 23 ARC discussed the option that all multiengine airplanes have guaranteed climb performance after a critical loss of thrust, the FAA ultimately rejected this option because it could impose a significant cost on the production of training airplanes.

i. Trim (Proposed § 23.205/Now § 23.2140)

In the NPRM, proposed § 23.205 (now § 23.2140) would have required the airplane to maintain longitudinal, lateral, and directional trim under various conditions, depending on the airplane's certification level, without allowing residual forces to fatigue or distract the pilot during likely emergency operations, including a critical loss of thrust on multiengine airplanes.

EASA commented the text of proposed § 23.205 failed to take into account residual forces for lateral and directional control for those level 1, 2, and 3 airplanes with ground-adjustable trim tabs.

The FAA agrees with EASA that while the FAA addressed ground-adjustable trim tabs for level 1, 2, and 3 airplanes, the proposed rule failed to account for residual forces in lateral and directional axes. The FAA intended for proposed § 23.205 to maintain the level of safety found in former § 23.161. Former § 23.161(a), which applied generally to all airplanes and to lateral, directional, and longitudinal trim, stated that it must be possible to ensure the pilot will not be unduly fatigued or distracted by the need to apply residual control forces exceeding those for prolonged application of former § 23.143(c) in normal operations of the airplane. In light of EASA's comment, the FAA recognizes that proposed § 23.205 (now § 23.2140) would only have prohibited residual control forces from fatiguing or distracting the pilot during likely emergency conditions. The FAA agrees with EASA that the rule should account for residual control forces in lateral and directional axes for levels 1, 2, and 3 airplanes. However, to maintain the same level of safety as former § 23.161, the rule should also account for residual control forces in longitudinal axes and should apply generally to levels 1, 2, 3, and 4 airplanes. Accordingly, the FAA is adding the requirement for residual control forces not to fatigue or distract the pilot during normal operations of the airplane to § 23.2140(c). This requirement is consistent with former § 23.161(a).

Textron noted that the reference ''normal operations'' would require all level 4 airplanes to be able to trim in all three axes from obstacle height to obstacle height. Textron contended that would seem to increase the burden from the former requirements in § 23.161, at least regarding lateral and directional trim.

The FAA considered Textron's comment, but is retaining the reference to ''normal operations'' in proposed § 23.205(a)(2) (now § 23.2140(a)(2)). While § 23.2140(a)(2) could be interpreted more stringently than former § 23.161(b)(2), the FAA never intended the proposed language to increase the burden from the previous requirements. Former § 23.161 required lateral and directional trim for commuter category airplanes, which are the equivalent of level 4 airplanes, at all speeds from $1.4V_{S1}$ to the lesser of V_H or V_{MO}/M_{MO}. The objective of the proposed rule was to allow the prescriptive requirements of former § 23.161 to be addressed in means of compliance. While specific speeds such as $1.4V_{S1}$ are appropriate as the lower speed limit for defining ''normal operations'' for traditional configurations of level 4 airplanes, it may not fit new airplanes with novel propulsion, high lift, and flight control system configurations. For this reason, the FAA finds the proposed language of ''normal operations'' best addresses the top-level safety requirement of former § 23.161(b)(2) while allowing the appropriate speed range to be addressed in means of compliance.

In reference not only to this section, but also to its use throughout the proposed rule, ANAC commented that the term ''likely'' is not precise and should be clarified or replaced with more precise terms such as ''probable'', ''remote'', or ''not extremely improbable.''

The FAA infers that ANAC recommended using a quantitative term, such as ''probable,'' because it is defined in guidance material. While the FAA agrees with ANAC's comment that the term ''likely'' is not precise, the FAA intends to allow some imprecision for the objective of providing performance-based standards that are sufficiently flexible to accommodate new technologies. The term ''likely'' was chosen to mean a reasonable expectation based on the existing conditions. This is consistent with the former usage of the term throughout part 23. Clarification of what should or should not be considered likely for a particular rule will be provided in the means of compliance.

Textron recommended deleting the qualifying term ''likely'' from proposed § 23.205(c) because it would be subject to interpretation. Textron also recommended adding abnormal operations to those operations during which residual control forces must not fatigue or distract the pilot. Lastly, Textron recommended a few editorial changes, including adding the term ''control'' to residual forces.

While Textron took exception to the word ''likely'' to describe emergency operations, the FAA finds the term to be appropriate in this case. Deleting the qualifier ''likely'' could actually lead to more stringent interpretations of the requirement. The term ''likely'' bounds the requirement within rational and probable emergencies. Simply using the term ''emergency'' could be construed as requiring an applicant to address any possible emergency regardless of how improbable it is.

The FAA agrees with Textron concerning the addition of abnormal operations. Former § 23.161 referenced the specific condition of an engine failure, which would have been based on traditional engine configuration on the wing. Looking ahead, that failure condition could be considered an abnormal and/or an emergency operation depending on the number of engines, location, and control of the engines. Furthermore, there may be other types of failures where trim would be important. For these reasons, the FAA finds that addressing the situation using the performance-based terms of ''abnormal'' and ''emergency'' is appropriate and consistent with the objective of providing performance-based standards that are sufficiently flexible to accommodate new technologies.

The FAA also agrees with Textron's recommendation to add ''control'' to residual forces. The FAA notes that former § 23.161 referenced ''residual control forces,'' not ''residual forces.'' This was an oversight in the NPRM. Accordingly, § 23.2140(c) now prohibits residual control forces from fatiguing or distracting the pilot during likely abnormal or emergency operations.

The Associations and Textron recommended streamlining the proposed rule language by moving a phrase that appeared twice in proposed § 23.205(a)(1) and (2) to a single, earlier reference in proposed § 23.205(a).

The FAA agrees with the commenters and has adopted their recommendation. Section 23.2140(a) now requires the airplane to maintain lateral and directional trim without further force upon, or movement of, the primary flight controls or corresponding trim controls by the pilot, or the flight control system, under the conditions specified in paragraphs (a)(1) and (a)(2). This marks a change from what was proposed in the NPRM in that paragraph (a) no longer addresses longitudinal trim. The FAA removed the reference to longitudinal trim in paragraph (a) because longitudinal trim is addressed by paragraph (b).

Furthermore, the FAA is adding language to paragraph (b) that requires the longitudinal trim to be maintained without further force upon, or movement of, the primary flight controls or corresponding trim controls by the pilot, or the flight control system, under the conditions specified in paragraphs (b)(1) through (b)(4). This requirement, which is consistent with the intent of the NPRM, ensures § 23.2140(b) maintains the same level of safety as former § 23.161. Former § 23.161(a) required each airplane to meet the trim requirements of former § 23.161 after being trimmed and without further pressure upon, or movement of, the primary flight controls or their corresponding trim controls by the pilot or the automatic pilot. This requirement applied generally to lateral, directional, and longitudinal trim.

j. Stability (Proposed § 23.210/Now § 23.2145)

In the NPRM, proposed § 23.210 (now § 23.2145) would have required airplanes not certified for aerobatics to have the following in normal operations: (1) Static longitudinal, lateral, and directional stability, and (2) dynamic short period and combined lateral directional stability. Proposed § 23.210 would have also required airplanes not certified for aerobatics to provide stable control force feedback throughout the operating envelope. Additionally, proposed § 23.210 would have precluded any airplane from exhibiting any divergent stability characteristic so unstable as to increase the pilot's workload or otherwise endanger the airplane and its occupants.

Kestrel suggested removing the phrase ''in normal operations'' from proposed § 23.210(a)(1) because it could be interpreted to mean that static stability is not required in abnormal operations.

The FAA understands Kestrel's concern with the phrase ''in normal operations'' in the proposed language. However, the FAA intended proposed § 23.210(a) (now § 23.2145(a)) to capture the safety intent of the stability sections in former part 23, which did not require demonstrations in abnormal or emergency conditions. Former § 23.171 required an airplane to show static stability in ''any condition normally encountered in service,'' which the FAA considers to be normal operations. The former requirements have provided an acceptable level of safety. The FAA adopts the proposed language in § 23.2145(a)(1) as proposed.

Optimal stated that proposed § 23.210(a)(2) appears to require that all lateral modes be stable, implying that airplane need to be spirally stable. This commenter indicated that most airplane have divergent spiral modes and therefore could not meet this requirement as proposed.

The FAA agrees with Optimal that the proposed requirement could be interpreted as including spiral mode. The FAA intended proposed § 23.210(a)(2) to capture the short period and Dutch-roll stability that former part 23 required. ''Combined lateral-directional oscillations'' means ''Dutch roll.'' The FAA revises the language in § 23.2145(a)(2) to replace ''combined lateral-directional stability'' with ''Dutch roll'' stability.

ANAC suggested including the terms ''adequate'' or ''appropriate'' to qualify dynamic stability in proposed § 23.210(a)(2).[26] ANAC stated that requiring only a showing of stability may allow for the interpretation that ''marginally stable'' is acceptable, while current part 23 has minimum damping factors prescribed.

The FAA agrees with ANAC that requiring only stability without a qualifier could allow for interpretations outside of the prescriptive standards of former part 23. However, the FAA does not agree with qualifying stability in § 23.2145(a)(2). Under the new part 23, applicants will have to propose a means of compliance. While this is a significant change from the former part 23, the language in § 23.2145(a)(2) will enable the FAA to accept the current prescriptive limits as a means of compliance. Alternatively, if a new technology requires something different, the FAA can accept what is appropriate.

[26] ANAC actually addressed this comment to § 23.205(a)(2), but it appears it was supposed to address § 23.210(a)(2).

NJASAP suggested the ''Dutch roll'' characteristic on the EMB505 airplane is close to the language used in proposed § 23.210(b). NJASAP sought to ensure any stability system used to comply with this section is not so dependent on Global Positioning System (GPS) technology that its loss or interruption could cause the electronic augmentation system to fail.

NJASAP's comment is outside the scope of this section as the FAA proposed § 23.210 (now § 23.2145) to include requirements for flight controls, not for their underlying systems. The FAA notes, however, that flight control systems used to comply with this section must also meet the system requirements of subpart F, which adequately address the commenter's concern.

k. Stall Characteristics, Stall Warning, and Spins (Proposed § 23.215/Now § 23.2150)

In the NPRM, proposed § 23.215 (now § 23.2150) would have required an airplane to have controllable stall characteristics in straight flight, turning flight, and accelerated turning flight with a clear and distinctive stall warning that provides sufficient margin to prevent inadvertent stalling. Proposed § 23.215 would have allowed for alternative approaches to meeting this requirement for levels 1 and 2 airplanes and level 3 single-engine airplanes, not certified for aerobatics, in order to avoid a tendency to inadvertently depart controlled flight. Proposed § 23.215 would have also required airplanes certified for aerobatics to have controllable stall characteristics and the ability to recover within one and one-half additional turns after initiation of the first control action from any point in a spin, not exceeding six turns or any greater number of turns for which certification is requested while remaining within the operating limitations of the airplane. Proposed § 23.215 would have also precluded airplanes certified for aerobatics from having spin characteristics that would result in unrecoverable spins due to pilot disorientation or incapacitation or any use of the flight or engine power controls.

Garmin commented that while the proposal contained a lengthy discussion about requirements to improve the airplane's resistance to departing controlled flight, proposed § 23.215(a) would only have required the airplane to have controllable stall characteristics in straight, turning and accelerated flight. Garmin stated there was no mention of flight characteristics related to control usage at the stall that does not precisely and correctly control the stall. As an example, Garmin noted an applicant can comply with the rule and have an airplane that is controllable through a stall if flown correctly, but if not flown correctly, can enter an uncontrollable spin if the airplane is allowed to stall while not precisely coordinated. Garmin recommended the FAA change either the rule or the preamble to be consistent with each other.

The FAA acknowledges the NPRM preamble discussion may have been unclear. The FAA only intended proposed § 23.215(b) (now § 23.2150(b) to improve an airplane's resistance to departing controlled flight. This increase in level of safety applied only to the smaller part 23 airplanes, not all part 23 airplanes. Furthermore, the FAA intended for proposed § 23.215(a) to capture the safety intent of former §§ 23.201 and 23.203. Garmin's example will continue to be true for airplanes not required to meet § 23.2150(b). The FAA notes that § 23.2150(a) will not include requirements related to conditions and control usage at the stall. While former §§ 23.201 and 23.203 included these requirements, the FAA finds they are better addressed in means of compliance.

The FAA notes the details from these former rules will be addressed in the means of compliance and will remain essentially unchanged, especially for larger, higher-performance airplanes. The reason is that the accident history of the larger airplanes does not warrant the change. The means of compliance for the level 1 and 2 airplanes and level 3 single-engine airplanes is expected to allow for more alternative approaches from what is acceptable today to meet the higher level of safety in this rule.

Textron and the Associations commented that § 23.215(b) should not require multiengine airplanes to not have a tendency to inadvertently depart controlled flight. The commenters explained that loss of control accidents involving multiengine airplanes result mostly from pilots failing to maintain directional control following a critical loss of thrust. Textron noted that this concern is being addressed by proposed § 23.200(c), which proposes new requirements for airplanes that cannot climb after a critical loss of thrust. Textron also noted former § 23.221 was not a requirement for multiengine airplanes and that proposed § 23.215(b) would have represented a significant new burden with no safety justification.

The Associations stated it believed loss of control accidents predominately involve single-engine airplanes, or multiengine airplanes during a critical loss of thrust event. The Associations recommended that the FAA revise proposed § 23.215 to ensure the loss of control requirements are applied in a manner that will maximize safety while being applied in an efficient manner. The Associations specifically recommended the FAA revise proposed § 23.215 to require multiengine airplanes, not certified for aerobatics, to not have a tendency to suffer a loss of control after a likely critical loss of thrust. This would be an alternative to adopting proposed § 23.200(c). The Associations also recommended the FAA revise the proposed § 23.215(b) to require single-engine airplanes, not certified for aerobatics, to not have a tendency to inadvertently depart controlled flight.

The FAA agrees that proposed § 23.215(b) (now § 23.2150(b)) should apply only to single-engine airplanes. The FAA proposed to apply paragraph (b) to level 1 and 2 multiengine airplanes in an attempt to address the loss of control accidents in light multiengine airplanes that can occur after an engine failure if the pilot does not maintain a safe single-engine speed. However, as noted by Textron, the FAA proposed § 23.200(c) to address this safety issue by requiring that V_{mc} not exceed V_{s1} or V_{so}. In light of the comments, the FAA recognizes it is more appropriate to address the loss of control issue for light multiengine airplanes in § 23.2150 rather than § 23.2135 because it is redundant to address the issue in both sections. The FAA revises § 23.2150(b) in this final rule to reflect that it only applies to single-engine airplanes in all certification levels to be consistent with former § 23.221. While the FAA did not propose in the NPRM that level 4 single-engine airplanes would be subject to this requirement, extending this requirement to such airplanes is a logical outgrowth from the proposal because the same safety benefit applies regardless of certification level. Also, the FAA finds no valid technical basis for excluding level 4 airplanes from this requirement. The airplane categories in former part 23 did not provide for certification of single-engine airplanes with passenger capacities greater than nine; however, it is possible that applicants may seek approval for such an airplane in the future. In such cases, these airplanes will have the same level of safety as smaller single-engine airplanes.

As discussed in the preamble discussion of § 23.2135, the FAA is withdrawing proposed § 23.200(c) and adding a new § 23.2150(c). Paragraph (c) requires levels 1 and 2 multiengine airplanes, not certified for aerobatics, to not have a tendency to inadvertently depart controlled flight from thrust asymmetry after a critical loss of thrust. The FAA finds that paragraphs (b) and (c), as revised, more accurately reflect the FAA's intent regarding the prevention of loss of control accidents in both single and multi-engine airplanes.

EASA commented that proposed § 23.215(b) would not have provided the flexibility needed for future designs. EASA recommended the FAA allow levels 1 and 2 airplanes and level 3 single-engine airplanes not certified for aerobatics to meet one of three alternatives: (1) Not to have the tendency to inadvertently depart controlled flight; (2) have a benign behavior when departing controlled flight; or (3) have a system preventing departure from controlled flight.

While the FAA understands EASA's recommended approach, § 23.2150(b) and (c) contain the most significant safety improvements in this rulemaking effort. Any departure from controlled flight is likely to result in a fatal accident unless an experienced pilot demonstrating spins in an aerobatic airplane intentionally does it. Allowing levels 1 or 2 airplanes or level 3 single-engine airplanes to have a benign behavior when departing controlled flight would not meet the FAA's safety objective for airplanes that are not certified for aerobatics. The FAA notes that an airplane that can depart controlled flight with benign behavior can inadvertently depart controlled flight. Furthermore, having a system that prevents departure from controlled flight may be a means of compliance for § 23.2150(b). Therefore, the FAA finds it inappropriate to offer it as an alternative in the regulation.

The FAA did not intend § 23.2150(b) to be absolute in that ''spin resistance'' is the only way to meet the rule. An airplane using enhanced stall warnings and envelope protection could be very difficult to depart from controlled flight and comply with § 23.2150(b). That same airplane, with some effort, could be made to spin (depart controlled flight) and have good recovery capability and still—because of the stall characteristics and the enhanced warning and systems protection—comply with the new requirement. The

FAA is working on means of compliance that will allow numerous combinations of airframe and systems approaches to complying with the new requirement so that applicants have alternative ways to comply with the regulation. Furthermore, this approach will encourage the development of new innovative technology that targets resistance to departure from controlled flight.

Several commenters took issue with the proposed requirement in § 23.215(b) that certain airplanes must not have a tendency to inadvertently depart controlled flight. Air Tractor, Optimal, and an individual commenter noted the proposal does not define this phrase. The individual commenter asked whether this phrase includes proper use of flight controls, improper use of flight controls, conditions beyond and per former § 23.221(a)(2) for spin resistance. Air Tractor stated it would be difficult to prove an airplane meets this requirement.

The FAA purposely used language that would allow flexibility in showing compliance. The FAA recognizes the lack of clear, detailed requirements may increase the difficulty of proving that the airplane meets this requirement. However, the FAA finds providing clear, detailed requirements would prevent the acceptance of alternative approaches to this safety problem. It could also prevent the use of new technology, which would discourage the development of even newer technology. As explained in the NPRM, the FAA envisions numerous alternative approaches to meeting this requirement, ranging from a stick pusher to full spin resistance. The FAA is relying on industry to develop acceptable means of compliance beyond these two acceptable approaches for this requirement, should industry fully leverage the flexibility the FAA built into the rule. The FAA is also relying on industry to incorporate new technologies into the airplane to address stall-based accidents. Currently, the ASTM committee is maturing an innovative approach that incorporates many of the variables associated with stall characteristics to prevent inadvertent departures from controlled flights.

Air Tractor expressed concern that it may not be able to comply with the intent of the proposed requirement because its airplanes are designed to operate close to the ground and sometimes close to a stall. According to Air Tractor, if it were to add some kind of substantial departure resistance to prevent inadvertent stalls resulting in a departure from controlled flight, as described in the NPRM, this modification could potentially increase pilot fatigue significantly.

The FAA notes that Air Tractor's airplanes are certified in restricted category and have the latitude to modify the part 23 requirements where necessary. For example, as Air Tractor pointed out, its airplanes are designed to operate close to the ground and sometimes close to a stall. For this reason, Air Tractor did not have to meet the one-turn spin requirement from former part 23 as specified on TCDS Number A19SW. However, because Air Tractor's airplanes are operated close to the ground and sometimes close to a stall, characteristics or features that prevent inadvertent departure would be desirable, unless these characteristics or features add control forces that fatigue the pilot or reduce maneuverability. The FAA finds these issues apply only to a small subset of airplanes and can be addressed most efficiently and effectively in the certification context, rather than by revising the regulatory text. Optimal expressed concern with unintended consequences that may result from imposing departure from controlled flight resistance requirements. Specifically, it questioned whether proposed § 23.215(b) can be satisfied without compromising other aspects of the airplane's performance and handling.

The FAA notes that, historically, when only using traditional mechanical controls, there are performance and handling tradeoffs that can come from imposing departure resistance requirements. This is one reason the FAA has been reluctant to push for departure resistant characteristics in the past. However, the development, availability, and cost of new technology to address departure resistance have matured such that the FAA believes it is time to introduce this requirement to reduce loss of control accidents. Aerodynamics and systems combined can address departure resistance without compromising performance and handling. The FAA will not accept a means of compliance that has a detrimental effect on safety.

Transport Canada questioned whether proposed § 23.215(b) would result in designs that have a significant effect on the loss of control accident rate and asked what the flight test requirements would be for demonstrating compliance with paragraph (b). American Champion Aircraft Corporation (American Champion) stated the regulation should provide a means to determine acceptable departure resistance, or a description of an acceptable means of compliance.

The FAA recognizes that the means of compliance will be very important in the success of this requirement to improve safety. The FAA adopts a general performance-based requirement in § 23.2150(b) to enable numerous alternative approaches to meet the requirement. For this reason, it is impossible to specify a single set of flight test requirements. The flight test requirements will depend on the applicant's approach to complying with this rule and the means of compliance it uses. It would have been impossible to adopt requirements for all combinations of safety features and characteristics that reduce the tendency to inadvertently depart controlled flight in the requirements themselves. However, applicants can still use the spin resistance requirements from former § 23.221 for spins, and a stick pusher compliant with former § 23.691 for artificial stall barrier systems. Additionally, ASTM is developing an expandable matrix concept that will allow credit for combinations of stall warning, stall/envelope protection, and flight characteristics. This matrix should result in not only encouraging manufacturers to install more safety enhancing equipment, but more importantly, it will also encourage the development of innovative approaches to preventing inadvertent departure because of the speed at which new technology can be incorporated into the certification process. To address the wide range of airplane characteristics and solutions, the FAA is adopting a standard that the airplane may not have tendency to inadvertently depart controlled flight.

American Champion noted inconsistencies with the required degree of departure resistance throughout the NPRM. For example, the commenter noted proposed § 23.215(b) stated ''must not have a tendency to inadvertently depart controlled flight.'' Section V of the NPRM referred to departure resistant as ''stall characteristics that make it very difficult for the airplane to depart controlled flight,'' and section VI states certification levels would have required ''substantial departure resistance.'' American Champion recommended the FAA clarify the degree of departure resistance intended by proposed § 23.215(b).

The FAA notes § 23.2150(b) states that single-engine airplanes, not certified for aerobatics, ''must not have a tendency'' to inadvertently depart controlled flight. Therefore, ''must not have a tendency'' is the standard. The FAA acknowledges, however, that the NPRM discussions should have been more consistent when discussing the proposed rule language.

Optimal expressed concern about removing the requirement for single-engine airplanes not certified for aerobatics to recover from a one-turn/three-second spin at this time because pilots have been adept at finding unanticipated ways to get spin resistant airplanes to depart from controlled flight and because airplanes that are the most reluctant to spin tend to be the most reluctant to recover. Optimal recommended the FAA retain the requirement to recover from an incipient spin until sufficient certification and operational experience has been acquired with departure resistant airplanes.

The FAA removes the requirement for the one-turn/three-second spin for normal category single-engine airplanes. Historically, airplanes that were reluctant to spin tended to be reluctant to recover. This history is based on airplanes with inherent stability and reversible controls, which to date are all small airplanes. The FAA intentionally focused on the prevention of the conditions that lead to an inadvertent spin (departing controlled flight) versus the historical focus on spin recovery. For decades, the FAA has focused on spin recovery in certification programs only to have those same certified airplanes depart controlled flight at altitudes so low that even experienced pilots could not recover. For decades, this scenario has accounted for a large percentage of fatal accidents. The FAA has to change the approach to certification in order to reduce the number of departure from controlled flight fatal accidents.

Kestrel expressed concern that demonstrating compliance to proposed § 23.215(d) would be prohibitively expensive and potentially impossible. Kestrel suggested the FAA modify the proposed rule language to read ''with any typical use of the flight or engine power controls.''

The FAA agrees that proposed § 23.215(d)(1) (now § 23.2150(e)(1)) could have been interpreted as imposing an unbounded requirement, which was not the FAA's intent. The FAA revises the proposed rule language as Kestrel suggested.

EASA commented that proposed § 23.215(d)(2) (now § 23.2150(e)(2)) would have contained a flightcrew interface requirement that does not belong in the airworthiness (design) requirements. EASA recommended the FAA move this requirement to subpart G, which addresses flightcrew interface requirements.

The FAA is retaining the requirement in subpart B because it originated from former subpart B, § 23.221(c). The FAA finds that keeping it in the same subpart, in this instance, will avoid confusion.

American Champion commented that it is unnecessary to restrict certification of dual-purpose airplanes by requiring a mechanical or electronic change, as described in the NPRM, because airplanes can both meet the enhanced stall characteristics and also be suitable for some aerobatic maneuvers. The commenter noted that departure resistance, proposed § 23.215(b), does not preclude an airplane from aerobatic maneuvering, although it may affect the ability of the airplane to enter a spin.

The FAA proposed to restrict certification of new airplanes for dual use to prevent inadvertent stalls, which was one of the proposal's objectives. If an airplane can spin for spin training, then the airplane can inadvertently stall and depart into a spin during normal operations. In light of American Champion's comment, however, the FAA acknowledges there may be airplanes in the future that are approved for limited aerobatics that do not include spins. This would be similar to military fighter airplane. The military approach has historically been to explore thoroughly the post stall regime including spins and departures from controlled flight that do not result in traditional spins. This is done in the military and for civilian aerobatic airplanes to address the situation where a mistake during a planned maneuver results in departing controlled flight. The FAA can envision a flight control system that could prevent departures from all approved maneuvers. To the FAA's knowledge, the F–16 flight control system has been very successful in preventing inadvertent departures from controlled flight even though these airplane are frequently flown ''acrobatically.'' For these reasons, the FAA may allow certification of a new airplane for dual use even if the airplane is not approved for spins. However, an applicant proposing a system, such as a flight control system that could prevent departure from controlled flight during normal operations, should expect to work with the FAA to thoroughly address FAA concerns for safe margins from inadvertent departure from controlled flight.

Proposed § 23.215(d) would have precluded airplanes certified for aerobatics from having spin characteristics that would result in unrecoverable spins due to pilot disorientation or incapacitation or any use of the flight or engine power controls. Upon further reflection, the FAA revises the proposed rule language to require spin characteristics in airplanes certified for aerobatics to recover ''without exceeding limitations.'' The FAA inadvertently omitted this clause from proposed § 23.215(d) (now§ 23.2150(e)), which was intended to capture the safety intent of former § 23.221(c). Former § 23.221(c) required the applicable airspeed limits and limit maneuvering load factors not to be exceeded. Additionally, including this clause in the requirement will better align the FAA language with EASA's NPA language.

The NTSB commented that while it supports reducing the rate of loss of control accidents in general aviation, it is unclear how proposed §§ 23.200 and 23.215 would have accomplished this. The NTSB explained that the only link it sees to reducing loss of control accidents is the change to V_{MC} and asked the FAA to clarify exactly how the revisions will reduce loss of control accidents.

The FAA notes that the NPRM included a substantial discussion explaining how the FAA envisions the rule reducing loss of control accidents. The new rules allow alternative approaches that an applicant may use, ranging from a stick pusher to full spin resistance. Adding flexibility to the rule will allow alternate approaches to address inadvertent departure by using combinations of new technology not addressed in the former requirements. These alternatives will be addressed in means of compliance. There is no ''exact'' approach to meet the new rule because the objective is to encourage new approaches to loss of control that are more effective than the ones that are failing us today.

Additionally, the NTSB submitted detailed comments on the stall departure characteristic exception in the ASTM standard. The FAA will address these comments in the AC because these comments are on the acceptability of an ASTM standard as a means of compliance rather than on the proposed rule.

l. Ground and Watering Handling Characteristics (Proposed § 23.220/Now § 23.2155)

In the NPRM, proposed § 23.220 (now § 23.2155) would have required airplanes intended for operation on land or water to have controllable longitudinal, and directional handling characteristics during taxi, takeoff, and landing operations. Proposed § 23.220 would have also required an applicant to establish a maximum wave height shown to provide for controllable longitudinal, and directional handling characteristics and any necessary water handling procedures for those airplanes intended for operation on water.

Textron and the Associations noted that the FAA proposed to remove the prescriptive requirements related to establishing demonstrated crosswind capability from former § 23.233, but proposed to retain similar requirements for water operations to establish wave height criteria. These commenters stated that operational specificity related to water landings should be addressed in means of compliance standards and recommended that the FAA not adopt proposed § 23.220(b).

The FAA agrees with the commenters that proposed § 23.220(b) would have been overly prescriptive for water operations and that it would be more appropriate as a means of compliance. While proposed § 23.220(a) would have included the top-level safety requirements for both land and water operations, proposed § 23.220(b) would have been inconsistent with the approach taken for land airplanes as it would have contained prescriptive requirements only for airplanes intended for operation on water. Accordingly, the FAA is not adopting proposed § 23.220(b). The information necessary to comply with proposed § 23.220(a) (now § 23.2155 in its entirety) and the method to communicate that information to the pilot will be addressed in means of compliance with this section.

EASA also recommended that the FAA not adopt proposed § 23.220(b). EASA explained that the AFM requirements in subpart G should cover ''how-to'' information and how that information is provided to the pilot, as proposed in the NPRM. Therefore, proposed § 23.220(b) should not require what must be included in the AFM.

The FAA agrees with EASA that the information is more appropriately addressed in the AFM means of compliance. The AFM requirements are located in subpart G.

m. Vibration, Buffeting, and High-Speed Characteristics (Proposed § 23.225/Now § 23.2160)

In the NPRM, proposed § 23.225 (now § 23.2160) would have—

- Precluded vibration and buffeting from interfering with the control of the airplane or causing fatigue to the flightcrew, for operations up to V_D/M_D;
- Allowed stall warning buffet within these limits;
- Precluded perceptible buffeting in cruise configuration at 1g and at any speed up to V_{MO}/M_{MO}, except stall buffeting for high-speed airplanes and all airplanes with a maximum operating altitude greater than 25,000 feet (7,620 meters) pressure altitude;
- Required an applicant seeking certification of a high-speed airplane to determine the positive maneuvering load factors at which the onset of perceptible buffet occurs in the cruise configuration within the operational envelope and preclude likely inadvertent excursions beyond this boundary from resulting in structural damage; and
- Required high-speed airplanes to have recovery characteristics that do not result in structural damage or loss of control, beginning at any likely speed up to V_{MO}/M_{MO}, following an inadvertent speed increase and a high-speed trim upset.

Textron and the Associations noted that the language from which proposed § 23.220(a) originated (former § 23.251) included the term ''excessive fatigue,'' rather than ''fatigue.'' These commenters recommended that the FAA use the term ''excessive fatigue'' in proposed § 23.220(a). Textron explained that by omitting the term ''excessive,'' any perceptible level of fatigue could be considered unacceptable and the proposal would result in an unwarranted change in standards for vibration.

The FAA agrees with the commenters and is adding the term ''excessive'' to § 23.2160(a).

ICON contended that proposed § 23.225(b) would have been fine for landplanes, but not for seaplanes because seaplanes, with their hull step, will always have some buffet in cruise. Additionally, ICON noted that airplane with windows removed will have perceptible buffeting at all speeds.

The FAA agrees with ICON that seaplanes and floatplanes routinely operate with a limited amount of buffet during normal operation. The FAA did not intend for proposed § 23.225(b) to increase the level of safety over former § 23.251, which allowed for the limited buffeting normal to seaplanes and floatplanes. Historically, this level of buffeting has not interfered with the control of the airplane or caused excessive fatigue to the pilot. Because the proposed rule language originated from former § 23.251, the FAA finds that it does not create a new certification burden on applicants with seaplanes or floatplanes. Accordingly, the FAA adopts the language as proposed. Furthermore, airplanes approved for operations without doors or windows, or those that allow the windows to open in flight, were not intended to be addressed under this rule.

Textron and the Associations noted that the former requirement for a high-speed trim upset (former § 23.255) applied to designs with adjustable horizontal stabilizers. However, the FAA did not specify whether proposed § 23.220(d)(2) would have been limited to airplanes with adjustable horizontal stabilizers. Textron explained that, as proposed, § 23.220(d)(2) would have contained an additional requirement for high-speed airplanes that did not have trimmable horizontal stabilizers. The commenters recommended the FAA limit the application of proposed § 23.220(d)(2) to airplanes that incorporate a flight adjustable horizontal stabilizer.

The FAA intended to keep this requirement as general as possible, not to propose a new requirement on high-speed airplanes that lacked trimmable horizontal stabilizer. As stated in the NPRM, the FAA intended proposed § 23.220(d)(2) (now § 23.2160(d)(2)) to address the current safety intent of former § 23.255, which applied only to airplanes that included trimmable horizontal stabilizers. The FAA adopts language in § 23.2160(d)(2) to clarify that the requirement applies only to airplanes that incorporate trimmable horizontal stabilizers.

n. Performance and Flight Characteristics Requirements for Flight in Icing Conditions (Proposed § 23.230/Now § 23.2165)

In the NPRM, proposed § 23.230 (now § 23.2165) would have required—

- An applicant requesting certification for flight in icing conditions to demonstrate compliance with each requirement of this subpart. Exceptions to this rule would have been requirements applicable to spins and any requirement that would have to be demonstrated at speeds in excess of 250 KCAS, V_{MO} or M_{MO}, or a speed at which an applicant demonstrates the airframe would be free of ice accretion;
- The stall warning for flight in icing conditions and non-icing conditions to be the same.
- An applicant requesting certification for flight in icing conditions to provide a means to detect any icing conditions for which certification is not requested and demonstrate the airplane's ability to avoid or exit those conditions; and
- An applicant to develop an operating limitation to prohibit intentional flight, including takeoff and landing, into icing conditions for which the airplane is not certified to operate.

Proposed § 23.230 would have also added optional icing conditions where a manufacturer may demonstrate its airplane can either safely operate in, detect and safely exit, or avoid. Finally, proposed § 23.230 would have only applied to applicants seeking certification for flight in icing.

NJASAP stated it viewed proposed § 23.230 as a safety enhancement and noted that several accidents have demonstrated a benefit to having one stall standard—meaning the airplane should be able to remain largely free of ice in conditions within which it is certified to operate. The NTSB stated that adopting proposed §§ 23.230 and 23.1405 will likely result in Safety Recommendation A–96–54 being classified as ''Closed—Acceptable Action.''

Textron and the Associations asked the FAA to clarify that proposed § 23.230(a) applies to the airplane's ice protection system when it is operating normally, not when it is in a failed or degraded mode. Therefore, rather than requiring the applicant to demonstrate the requirements of proposed paragraphs (a)(1) and (a)(2), the Associations recommended that the FAA require the normally-operating airplane ice protection systems to include the requirements of proposed paragraphs (a)(1) and (a)(2).

The FAA agrees with the comments made by the Associations and Textron, and the FAA adopts language to clarify that § 23.2165(a) applies to the normal operation of an ice protection system. Accordingly, § 23.2165(a) now requires the applicant to demonstrate the requirements of paragraphs (a)(1) and (a)(2) under the normal operation of the ice protection system.

The FAA is also changing the language in § 23.2165(a) to clarify that § 23.2165 applies to an applicant who requests certification for flight in icing conditions defined in part 1 of appendix C to part 25, or to an applicant who requests certification for flight in these icing conditions and any additional atmospheric icing conditions. This change better reflects the FAA's intent.[27]

Additionally, the FAA is using the phrase ''must show'' rather than ''must demonstrate'' in § 23.2165(a), because ''must demonstrate'' may be interpreted as requiring a flight test, as Textron suggested in its comment on proposed § 23.230(b) (discussed later). This change is consistent with the NPRM, which explained that demonstration, as a means of compliance, may include design review and/or analysis and does not mean flight tests are required.[28]

The FAA is also adding the never-exceed speed (V_{NE}) to the exception in § 23.2165(a), under paragraph (a)(1)(ii), to correct an inadvertent omission in the proposal. Because proposed § 23.230(a)(1)(ii) was intended to apply to both piston and turbine airplanes, the addition of V_{NE} is necessary as the proposed V_{MO}/M_{MO} would only have applied to turbine airplanes. This change from what was proposed is consistent with the current guidance in AC 23.1419–2D.

BendixKing, Daher,[29] the Associations, Kestrel, and Textron all requested clarification of the wording of proposed § 23.230(a)(2), which proposed that the applicant must demonstrate that the stall warning for flight in the icing conditions and non-icing conditions is ''the same.'' Several of the commenters explained that the stall warning in icing conditions needs to provide a similar notification as the stall warning in non-icing conditions, but it does not need to occur in the same way.

Textron similarly stated that proposed § 23.230(a)(2) could be interpreted as indicating that the stall warning must be the same in all of its aspects, which should not be the intent. Textron explained that the stall warning system in icing conditions cannot be the same as in non-icing conditions because some designs require a different angle of attack schedule in icing to obtain the same airspeed margin between stall warning and stall. Textron recommended requiring ''the means by which stall warning is provided to the pilot'' to be the same in icing and non-icing conditions.

In response to the comments on proposed § 23.230(a)(2), the FAA did not intend to require the stall warning to be the same in all material aspects for flight in icing conditions and non-icing conditions. Rather, the FAA intended proposed § 23.230(a)(2) to require the same type of stall warning, such as an artificial stall warning system or an aerodynamic buffet. Therefore, the FAA adopts Textron's recommendation. Accordingly, § 23.2165(a)(2) now requires the means by which the stall warning is provided to the pilot to be the same in both icing and non-icing conditions. This change from the proposal addresses the other commenters' concerns by clarifying that the type of stall warning provided to the pilot, rather than the design of the stall warning system, must be the same.

Textron recommended replacing the words ''must demonstrate'' with the words ''must show'' in proposed § 23.230(b), because the former typically implies compliance by flight testing, whereas the latter allows more than one means of compliance. Similarly, the Associations commented that proposed § 23.230(b) should ensure the design includes a means to safely avoid and exit icing conditions. However, the FAA should not require the applicant to ''demonstrate the airplane's ability'' to avoid or exit icing conditions because the means by which the airplane safely avoids or exits icing conditions may not have to be demonstrated under part 21. The commenters noted that amended designs, for example, may use similarity to a previously approved design to show compliance.

The FAA agrees that ''must demonstrate'' in proposed § 23.230(b) may be interpreted as requiring a flight test. Because the FAA did not intend to preclude other means of compliance, the FAA adopts the phrase ''must show,'' as recommended by Textron. Accordingly, § 23.2165(b) now requires an applicant requesting certification for flight in icing conditions to show the airplane's capability to avoid or exit icing conditions for which certification is not requested.

Kestrel supports categorizing SLD as an icing condition, but noted that guidance in AC 23.1419–2D is currently used on part 23 icing certification programs to establish SLD detection cues and exit procedures. Kestrel asked the FAA to clarify whether this guidance will continue to be an acceptable means of compliance for the ice detection requirement.

The NPRM stated ''many manufacturers already have equipped recent airplanes with technology to meet the standards for detecting and exiting SLD conditions in accordance with current FAA guidance.'' Although systems to detect SLD are being developed, none have been certified. Inclusion of the pilot cues as listed in AC 23.1419–2D into the AFM have been an acceptable means to detect SLD, and will continue to be an acceptable means of compliance to § 23.2165(b).

ANAC questioned whether proposed § 23.230(c) was intended to prohibit flight into known icing conditions or forecast icing conditions. ANAC recommended including the term ''known'' before ''icing conditions.''

The FAA agrees with ANAC's position that only ''known'' icing conditions should be prohibited. However, § 23.2165(c) prohibits intentional flight into icing conditions. Because the term ''intentional'' implies that the icing conditions are known, the FAA finds it unnecessary to include the term ''known'' before ''icing conditions.'' Accordingly, the FAA

[27] 81 FR 13452, 13462

[28] 81 FR 13452, 13493

[29] In its comment, Daher quoted 23.230(a)(2) but attributed that quote to 23.300

adopts the language in § 23.2165(c) as proposed.

An individual commenter appeared to criticize the FAA for not requiring de-icing to work and suggested that ''[a] wind tunnel at the far North or South may be enough for a conclusive test.'' In response to the individual commenter, an icing tunnel is a standard means of compliance to test ice protection systems on new airplane designs. Any resulting intercycle, residual, or runback ice has to be accounted for when showing compliance with the subpart B regulations in icing. No changes are made as a result of this comment.

4. Subpart C—Structures

a. Structural Design Envelope (Proposed § 23.300/Now § 23.2200)

In the NPRM, proposed § 23.300 (now § 23.2200) would have required the applicant to determine the structural design envelope, which describes the range and limits of airplane design and operational parameters for which the applicant would show compliance with the requirements of subpart C. Proposed § 23.300 would have required the applicant to account for all airplane design and operational parameters that affect structural loads, strength, durability, and aeroelasticity, including structural design airspeeds and Mach numbers.

Several commenters identified concerns with the detailed definitions of airspeeds for which applicants would be required to account. They pointed out that, for some types of airplanes, these airspeeds may not be appropriate in particular circumstances. EASA recommended removal of the speed definitions for a more generic proposal in its proposed CS 23.320.

The FAA recognizes the commenters' concerns on the various issues in proposed § 23.300(a). The FAA believes the best way to address these comments is to adopt regulatory text similar to the text in EASA's section CS 23.320, which removes the need to define individual design airspeeds in the regulation. Some comments on proposed § 23.300(a) recommended retaining certain methods of compliance language, such as defining V_C in terms of V_H, which is in former part 23. In keeping with the intent of this rulemaking, however, the FAA believes these types of prescriptive standards are best moved to means of compliance.

Air Tractor commented on proposed § 23.300(b), which addressed design maneuvering load factors for the structural design envelope. Air Tractor raised concerns that obtaining consensus compliance from the FAA without the prescriptive formula established by former § 23.337(a) would be a protracted battle—worse than the existing issue paper process for non-standard design.

Regarding Air Tractor's concerns, the FAA has decided to move the prescriptive formula for determining the design maneuvering load factors to means of compliance. The FAA also reiterates that the phrase ''service history'' is intended to mean the design maneuvering load factors should be based on those load factors used for airplanes with successful service histories that have similar design, operational capabilities, and intended use. If there are no existing similar designs, the FAA will work with the applicant to identify the most appropriate means of compliance. In general, the FAA does not expect applicants to measure and record maneuvering load factors on new designs.

EASA asserted that the language in proposed § 23.300(c) was too design specific and could be replaced with the text from its proposed CS 23.305.

The FAA finds that proposed § 23.300(c) is not overly design specific, because each of the enumerated items must be taken into account, regardless of the applicant's design. The FAA therefore adopts paragraph (c) as proposed.

Air Tractor recommended the FAA change ''empty weight to the maximum weight'' to ''minimum flying weight to maximum weight,'' in proposed § 23.300(c)(1). Air Tractor stated this language applies to all airplanes and is appropriate for certification; while ''empty weight'' applies only to certain airplanes' operational requirements.

The FAA notes Air Tractor's recommendation that ''empty weight'' in § 23.2200(c)(1) should be replaced with ''minimum flying weight.'' However, the FAA believes that establishing a design empty weight is necessary so that variations in the mass of properties such as fuel, payloads, and occupants, when added to the airplane, can be accounted for.

The Associations recommended deleting the term ''All'' from the beginning of proposed § 23.300(c)(1) and (e) for simplification. Textron recommended changing ''All'' in proposed § 23.300(c)(1) to ''Each.'' Textron stated the change would be consistent with former part 23, which uses ''each weight'' throughout the subparts, whereas ''all'' implies an applicant would have to evaluate an infinite number of weights rather than those that are relevant. Textron also recommended replacing ''All'' in proposed § 23.300(e) with ''Each critical altitude,'' because ''all'' is too encompassing.

The FAA agrees with the recommendation to replace ''All'' with ''Each'' in proposed § 23.300(c) and (e) and revises the language in both paragraphs accordingly. The FAA also adds the word ''critical'' so the subsection text reads ''Each critical. . .''. In this context, ''critical'' refers to a weight or altitude that results in a maximum or minimum structural loading condition. A ''critical weight'' will, for example, be the weight of the airplane at its highest possible value with no fuel in the wing. This condition will reduce the effects of inertia in the wing and result in maximum structural loads. A ''critical altitude'' will be the altitude where the maximum pressure differential occurs in a pressurized cabin, or an altitude where the effects of atmospheric compressibility cause changes to the airplane aerodynamic coefficients, resulting in maximum structural loads.

EASA commented that proposed § 23.300(d) was too design specific and should cover loads resulting from controls.

The FAA interprets EASA's comment to mean the FAA should consider non-traditional methods of control, such as vectored thrust. The FAA agrees and revises paragraph (d) to include non-traditional control systems.

EASA also commented on proposed § 23.300(e), stating it would create a requirement that is not applicable to very-light aircraft (VLA) today. EASA asserted that the intent can be covered by the new proposal for flight loads in proposed § 23.310 (now § 23.2210).

While the FAA notes EASA's concern with proposed § 23.300(e), the FAA finds that paragraph (e), as proposed, would place only an insignificant burden on an applicant using the VLA standard. The FAA finds a simple method of compliance, such as for a maximum altitude of 14,000 feet, could be incorporated into an industry consensus standard to meet this requirement.

b. Interaction of Systems and Structures (Proposed § 23.305/Now § 23.2205)

In the NPRM, proposed § 23.305 (now § 23.2205) would have provided a regulatory framework for the evaluation of systems intended to modify an airplane's structural design envelope or structural performance, and other systems whose normal operating state or failed states may affect structural performance. Compliance with proposed § 23.305 would have provided acceptable mitigation of structural hazards identified in the functional hazard assessments required by proposed § 23.1315.

Textron recommended removing proposed § 23.305 because the NPRM makes clear that, with or without proposed § 23.305, the safety intent of proposed § 23.1315 covers the interaction of systems and structures. Textron also objected to the use of, or reference to, non-part 23 data. As an example, Textron cited the reference in the preamble to FAA special condition number 25–390–SC,[30] which the FAA said would be an acceptable means of compliance with proposed § 23.305. Textron questioned whether there was justification for this requirement if part 23 data was not available.

In response to Textron's comment regarding the necessity of proposed § 23.305, the FAA notes the intent stated in the NPRM was erroneous in its description of the relationship between proposed § 23.305 and proposed § 23.1315 (now § 23.2510). The correct intent of proposed § 23.305 is to provide a requirement for those systems intended to directly affect structural performance. An example of this type of system is a structural load alleviation system. Former § 23.1309 and § 23.2510 do not envision these types of systems and the FAA has previously issued special conditions to address these unique and novel systems. Therefore, the FAA retains proposed § 23.305 as § 23.2205 in this final rule because it provides a way for applicants to address failures in systems intended to directly affect structural performance by accounting for the probability of such failures and the likely pilot reactions to them.

Also, regarding Textron's comment that the NPRM preamble referenced a part 25 special condition that did not contain part 23 data, the FAA notes the reference was used as an example because the wording of the special condition was typical of others relating to Interaction of Systems and Structure, which establish an acceptable method of compliance with this section. The FAA has issued a part 23 special condition (23–258A–SC).[31] However, the FAA did not use the part 23 special condition as an example because, while it is an acceptable method of compliance with this section, the approach used in it is not typical of other special conditions addressing these issues.

Textron also stated the phrase ''affect structural performance'' was too vague and should be better defined for clarity. Textron noted every trim system, flight control system, and high lift system affects structural performance at some level. Textron recommended either eliminating this phrase or using the preamble to define ''structural performance.'' Textron recommended proposed § 23.305 be revised to provide that, for airplanes equipped with systems intended to alleviate the impact of the requirements of this subpart and affect the structural design envelope, either directly or as a result of failure or malfunction, the applicant must account for the influence and failure conditions of these systems when showing compliance with the requirements of this subpart.

The Associations commented that proposed § 23.305 was intended to address systems, which may use aerodynamic or other means to alleviate loads in certain conditions and to ensure structural integrity remains in the event these systems were to fail. The commenters requested the FAA change the language to ensure the intent of this section is clear and there are no unintended consequences, such as creating a requirement to perform systems safety assessments on all systems and structure interactions. The commenters asserted that this would create a tremendous burden with no measurable benefit. The commenters proposed § 23.305 be revised to provide that, for airplanes equipped with systems that are intended to alleviate structural loads, the applicant must account for the influence and failure conditions of these systems when showing compliance with the requirements of this subpart.

The FAA agrees with Textron and the Associations that § 23.2205 should address only those systems intended to affect structural performance. In the NPRM, the FAA referred to these types of systems as ''structural systems''. The FAA referred to other types of systems as ''non-structural systems''. The FAA agrees that these non-structural systems are adequately addressed by § 23.2510. The FAA is using the NPRM description of structural systems in rewording § 23.2205 to ensure that any airplane equipped with a system intended to affect structural performance would be provided the same level of safety as an airplane not equipped with such a system.

c. Structural Design Loads (Proposed § 23.310/Now § 23.2210)

In the NPRM, proposed § 23.310 (now § 23.2210) would have required—

- An applicant to determine structural design loads resulting from an externally or internally applied pressure, force, or moment that may occur in flight, ground and water operations, ground and water handling, and while the airplane is parked or moored.
- An applicant to determine structural design loads at all combinations of parameters on and within the boundaries of the structural design envelope that would result in the most severe loading conditions; and
- The magnitude and distribution of these loads be based on physical principles and be no less than service history has shown can occur within the structural design envelope.

The Associations recommended adding the phrase ''as applicable'' to proposed § 23.310(a) to address the varying bases to determine load calculations. These commenters also recommended replacing the term ''any'' with the word ''likely,'' because the calculation of any externally or internally applied pressure, force, or moment would result in boundless design and calculation. Textron recommended the same revisions. Textron noted that the rule implies that all airplanes will be required to determine both ground and water loads, but not all airplanes are amphibious.

The FAA agrees with Textron and the Associations concerning the comments on adding the phrase ''as applicable'' and removing the word ''any'' in proposed § 23.310(a). The FAA also agrees with limiting the scope of proposed § 23.310(a) by adding the word ''likely'' to the description of the loading conditions the applicant must consider. As explained in the discussion of proposed § 23.205, ''likely'' means reasonably expected based on the conditions that may exist. Accordingly, the FAA revises § 23.2210(a) to capture these changes.

Air Tractor recommended the FAA delete the ''service history'' clause from proposed § 23.310(c) because there is no ''service history'' for most new airplanes and there is danger that the FAA will require that service history be collected before certification is granted for a new design. EASA also noted that a ''service history'' will not always be available for innovative designs.

The FAA partially agrees with Air Tractor regarding the meaning of ''service history'' in proposed § 23.310(c). Service history, in this sense, refers to the service history and experience gained throughout aviation history. In Air Tractor's case, service history would be the service history of other restricted category agricultural airplanes of similar design. The FAA finds § 23.2200(b) adequately covers the intent of the ''service history''

[30] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgSC.nsf/MainFrame?OpenFrameset.*

[31] 78 FR 10055, February 13, 2013.

requirement and therefore removes it from § 23.2210(c).

d. Flight Load Conditions (Proposed § 23.315/Now § 23.2215)

In the NPRM, proposed § 23.315 (now § 23.2215) would have required an applicant to determine the loads resulting from vertical and horizontal atmospheric gusts, symmetric and asymmetric maneuvers, and, for multiengine airplanes, failure of the powerplant unit which results in the most severe structural loads.

EASA noted the proposed rule did not cover the objective that loads should be considered for the operational envelope, but instead based the requirement on measured gust statistics. EASA proposed using its CS 23.315 language because it is more objective and does not include design details.

The FAA finds the requirement to consider loads throughout the operational envelope is addressed by proposed § 23.310(b) (now § 23.2210(a)(2)). However, the FAA agrees with EASA's comment that the proposed rule language is too design specific. Therefore, FAA revises the rule language to remove design specifics. In particular, the FAA removes proposed § 23.215(c), which addressed canted lifting surfaces. The FAA finds § 23.2210(c) adequately addresses this requirement. The FAA also changes the wording of proposed § 23.215(d) (now 23.2215(c)) to account for the possibility that a single powerplant, operating two separate propellers, could develop asymmetric thrust if one propeller system experienced a failure. This would result in a condition similar to an engine failure in a multiengine airplane, described in the former regulations. Although no applicant has submitted such a design for approval to date, given the increased flexibility this rule provides, future applicants may propose such a design. In that case, this design will be subject to the same safety concern and the same need to address it, as applicants for approval of multiengine airplanes.

Air Tractor commented on proposed § 23.315(a) and questioned whether the gust velocities in former part 23 or CAR 3 were based on ''measured gust statistics.'' Air Tractor noted it has never seen a technical report to that effect. Air Tractor also questioned whether the FAA would deem the CAR 3 and current part 23 values sufficient, and raised concerns that making up its own requirements to meet FAA approval would be difficult.

The FAA changed the gust load formula in former § 23.341, amendment 23–7 [32] to incorporate the mass parameter approach to calculating gust loads. The mass parameter approach was developed and calibrated against measured gust data on transport category airplanes. The FAA does not intend for applicants for a new TC to measure gust loadings. The former gust formula remains an acceptable method of compliance with this regulation. The FAA developed this regulation so certain airplanes could take advantage of alternate analysis methods, including the power spectral density approach. Examples of these types of airplanes include high altitude and endurance airplanes, where dynamic response of the airplane structure must be considered in the gust load analysis.

e. Ground and Water Load Conditions (Proposed § 23.320/Now § 23.2220)

In the NPRM, proposed § 23.320 (now § 23.2220) would have required an applicant to determine the loads resulting from taxi, take-off, landing, and ground handling conditions occurring in normal and adverse attitudes and configurations.

EASA proposed using its A–NPA CS 23.325 language because it is more objective and covers more situations, such as landing on snow or other surfaces not covered in proposed § 23.320. BendixKing asked that the FAA delete ''sea,'' stating the word is neither required nor accurate.

The FAA agrees with EASA's comments and revises the text in § 23.2220 to include all operating surfaces, which includes, at a minimum, snow or ice covered land and water. EASA referred to snow and other surfaces not covered in the proposed text, presumably meaning EASA does not consider operations on ''snow or other surfaces'' to be operations on the ground. While the FAA is using EASA's CS A–NPA 23.325 language, the FAA finds EASA's language citing weight and velocity to be unnecessary. These parameters are addressed in § 23.2200.

Air Tractor asked whether the ''ground handling conditions'' in proposed § 23.320(a) would be different from the ''jacking and towing conditions'' in proposed § 23.320(c). If so, the commenter asked what ''ground handling conditions'' meant. Air Tractor also asked whether this dealt with protection from ''hangar rash.'' Finally, Air Tractor sought clarification on whether it would now need to define the structural loads associated with docking an airplane, or from wave motion causing scuffing when a seaplane is moored against a dock.

[32] 34 FR 13078, August 13, 1969.

The FAA notes the ''ground handling conditions'' referenced in proposed § 23.320(a) (now § 23.2220) are different than the ''jacking and towing conditions'' referenced in § 23.320(c) (now § 23.2220). The reference to ''handling conditions'' is intended to cover both ground handling conditions and jacking and towing conditions. The FAA revises § 23.2220 to cover ''taxi, takeoff, landing, and handling conditions.''

f. Component Loading Conditions (Proposed § 23.325/Now § 23.2225)

In the NPRM, proposed § 23.325 (now § 23.2225) would have required an applicant to determine the loads acting on each engine mount, flight control, high lift surface, and the loads acting on pressurized cabins.

EASA commented that proposed § 23.325(b) covered the loads on components subject to earlier defined loads in proposed §§ 23.305 through 23.320. EASA recommended the FAA simplify the requirement to avoid different interpretations by reflecting the relation to the previous requirements as follows:

- Interaction of systems and structures
- Structural design loads
- Flight Load Conditions
- Ground and water load conditions

The FAA finds that a separate rule for component loading conditions is necessary to address structural loading conditions that do not fall under the requirements for flight and ground loads. Examples of these loading conditions include control surface jamming and pressurized cabin loads. The FAA revises § 23.2225 to clarify the types of loads applicants must account for.

Textron and the Associations asked the FAA to revise the ''relief valve'' language in proposed § 23.325(c), which was a design-specific solution, in favor of more performance-based language. Textron suggested language such as ''from zero to the maximum relief pressure combined with gust and maneuver loads.'' The Associations recommended replacing ''valve'' with ''pressure.''

The FAA agrees with Textron and the Associations on the use of the term ''relief valve.'' The FAA revises § 23.2225(c)(1), (2), and (3) by replacing the term ''relief valve'' with ''relief pressure.''

The FAA agrees with a comment made at the public meeting by the Associations that proposed § 23.325 should cover sudden engine stoppage loads for turbine engines, as did former part 23. A requirement for the design of engine mounts for turbine engines to be able to withstand a sudden engine stoppage has been in former part 23 since 1980.[33] Former § 23.361(b)(1) required, in pertinent part, that for turbine engine installations, the engine mounts and supporting structure be designed to withstand an engine torque load imposed by a sudden engine stoppage. The requirement applied only to turbine engines because reciprocating engines typically do not have significant rotational moments of inertia. As in former part 23, reciprocating powerplants, with their lower moments of inertia, are not included in this section of the rule. The requirement applies only to turbines and other types of powerplants that have significant rotational moments of inertia created by rotating powerplant components (*e.g.,* electric motor powerplants). Therefore, the FAA adds protection of powerplant mounts and supporting structure from sudden powerplant stoppage for all non-reciprocating powerplants to § 23.2225(a)(2). This change is consistent with the goal of capturing the safety intent of former part 23, including § 23.361, as stated in the NPRM preamble, and with the performance-based nature of this rule and its goal of more easily accommodating future designs and technologies.

Finally, the FAA revises § 23.2225(b) to clarify the gust loads that must be accounted for and the meaning of ''ground operations,'' making this section consistent with the changes discussed previously for § 23.2220.

g. Limit and Ultimate Loads (Proposed § 23.330/Now § 23.2230)

In the NPRM, proposed § 23.330 (now § 23.2230) would have described how the applicant must determine the limit and ultimate loads associated with the structural design loads. Proposed § 23.330 retained the current 1.5 safety factor for ultimate loads.

The Associations recommended the FAA revise proposed § 23.330 by deleting the phrase ''special or other factors of safety are necessary to meet the requirements of'' and replacing it with ''ultimate loads are specified in.'' These commenters noted the section, as written, would not require the establishment of limit loads if a special factor of safety is used to meet the requirement. Textron recommended the same revision, explaining that proposed § 23.330 need not address ''special or other factors of safety,'' other than in some cases when an ultimate load is specified, because proposed § 23.515(c) specified that limit and ultimate loads are multiplied by special factors of safety.

The FAA agrees with the comments regarding cases where loads are expressed only as ultimate loads. The FAA deletes the introductory phrase ''unless special or other factors of safety are necessary to meet the requirements of this subpart,'' in proposed § 23.330. The FAA notes § 23.2265(c) specifies that limit and ultimate loads are multiplied by special factors of safety. Furthermore, the FAA revises § 23.2230 by inserting the phrase ''unless otherwise specified elsewhere in this part,'' which captures the intent of former § 23.303.

EASA recommended the FAA should also address the former requirement for redistribution of loads due to deflections under loads. EASA also recommended the regulation cover the specific case where strength specifications are expressed only in ultimate loads and permanent deformation is accepted.

The FAA notes § 23.2210(b) addresses the issue of redistribution of loads. Specifically, 23.2210(b) requires the distribution of loads be based on physical principles. The FAA finds redistribution of load due to deflection is an expression of physical principles and is retaining this requirement in § 23.2210(b) of this rule.

An individual commenter asked the FAA to remove the ''arbitrarily prescriptive'' 1.5 factor of safety and substitute a more performance-based approach. The commenter explained that advances in probabilistic analysis have increased understanding of actual variables like load predictions, material properties, and airplane operations. The commenter proposed defining the value for structural failure more explicitly and allowing the applicant to account for the variations to achieve the value, allowing for more efficient designs. The commenter suggested retaining the 1.5 factor of safety as a possible approval approach to establish the means of compliance.

The FAA notes the 1.5 factor of safety has been used for many years and has provided an acceptable level of safety. Probabilistic analysis methods and the data necessary to support them are not sufficiently mature to provide the same level of assurance of safety. As probabilistic methods mature, the FAA will consider their use if applicants can show they provide an equivalent level of safety.

h. Structural Strength (Proposed § 23.400/Now § 23.2235)

In the NPRM, proposed § 23.400 (now § 23.2235) would have required an applicant to demonstrate the structure will support limit and ultimate loads. The NPRM explained that in this context, ''demonstrate'' means the applicant must conduct structural tests to show compliance with the structural performance requirements unless the applicant shows that a structural analysis is reliable and applicable to the structure.

The Associations recommended adding ''unsafe'' at the beginning of proposed § 23.400(a)(1) to clarify the intent of the requirement and ensure it is not viewed as including expected or non-critical types of interference, such as thrust reverser buckets making normal contact with each other. Similarly, Textron recommended inserting the word ''safe'' before ''operation'' in proposed paragraph (a)(1) to ensure that ''interference'' in the regulation will always be interpreted to mean interference that would cause an unsafe condition.

The FAA agrees that inserting the word ''safe'' in the text of proposed § 23.400(a)(1) will clarify that the structure must support limit loads without interference with the ''safe'' operation of the airplane. This suggested change is consistent with the corresponding requirements in former part 23, and will resolve the Associations' concern as well. Accordingly, the FAA revises § 23.2235(a)(1) to capture this change.

NJASAP asked why the FAA proposed removing time requirements (the capability of the airplane structure to support ultimate loads without failure for at least three seconds) in proposed § 23.400.

As discussed in the NPRM preamble, the FAA considers the ''3-second'' rule a statement of physical principles and sound testing practices that does not need to be stated in the requirements for structural strength. It is more appropriate for inclusion in a means of compliance. The FAA makes no change to the regulatory text based on NJASAP's comment.

i. Structural Durability (Proposed § 23.405/Now § 23.2240)

In the NPRM, proposed § 23.405 (now § 23.2240) would have required an applicant to develop and implement procedures to prevent structural failures due to foreseeable causes of strength degradation, and to prevent rapid decompression in airplanes with a maximum operating altitude greater than 41,000 feet. Proposed § 23.405 would have also required an airplane to be capable of continued safe flight and landing with foreseeable structural damage caused by high-energy

[33] 45 FR 60171, September 11, 1980.

fragments from an uncontained engine or rotating machinery failure.

The Associations said proposed § 23.405 remains ''far too prescriptive and design oriented.'' The commenters recommended language that they believed addresses the objectives of the rule without being so design focused. Specifically the Associations suggested the phrase ''serious or fatal injuries, loss of the airplane, or extended periods of operation with reduced safety margins'' in § 23.2240(a) be replaced with ''unsafe conditions.''

Textron suggested that the proposed rule is too prescriptive regarding the number of compartments for compartment floor depressurization, as well as in prescribing the ''design'' structure rather than specifying the required capability of the structure. Textron suggested revising proposed § 23.405 similar to that suggested by the Associations.

An individual commenter recommended the FAA delete the phrase ''loss of the airplane'' from proposed § 23.405(a). The commenter stated this would address the long-understood interpretation that part 23 does not include certain structures for required evaluation on the effects of fatigue failure, such as landing gear and engine support (or hull loss, as discussed in the NPRM preamble). Without this revision, the commenter noted the intent of the rule not to increase the burden on certification would be nullified. In effect, the commenter found the proposed rule would require the same structure as is currently evaluated in part 25, which is inconsistent with former part 23. The commenter favored incorporating a comprehensive fatigue evaluation of structure as is currently in part 25.

The FAA agrees with the suggestion to delete the phrase ''loss of the airplane'' in paragraph (a). The FAA finds the prevention of serious or fatal injuries and the prevention of extended periods of operation with reduced safety margins is the objective of § 23.2240. The FAA will not adopt the Associations' recommended change to replace the phrase ''serious or fatal injuries, loss of the airplane, or extended periods of operation with reduced safety margins'' with ''unsafe conditions.'' The term ''unsafe condition'' is the threshold for the FAA issuing airworthiness directives under 14 CFR part 39, and is not an accurate term to be used in this section.

The FAA also revises paragraph (a) to reflect more completely the requirements of the former part 23 regulations this section is replacing.[34] Because proposed § 23.405(a) did not refer specifically to the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness (ICA) (as did former § 23.575), it could be interpreted as allowing the procedures to be placed in another part of the ICA. Therefore, the FAA revises the text in paragraph (a) to clarify that these procedures must be in the ALS. The FAA also clarifies that ''inspections'' developed under this section must be included in the ALS in addition to the ''procedures'' developed under the section, because former § 23.575 required both to be in the ALS. Appendix G to former part 23, now appendix A to this final rule, requires the FAA to approve the ALS. Finally, the FAA notes that compliance with the ALS is mandatory under §§ 43.16 and 91.403(c).

EASA suggested replacing the design-specific requirements in proposed § 23.405(b) with more objective requirements from EASA's CS 23.340(b) to allow proportionality for different airplane levels. In particular, EASA said more objective requirements should replace the proposed requirements related to pressurized airplanes and uncontained engine failure.

The FAA notes the language in EASA's proposed CS 23.340 could be interpreted as expanding the scope of the former regulations by requiring evaluation of discrete source damage for all airplanes certificated under part 23. As stated in the NPRM, the FAA intended proposed § 23.405(b) and (c) to capture the intent of former §§ 23.365(e) and 23.571(d), which only addressed airplanes with pressurized compartments. Sudden release of pressure and operating above 41,000 feet altitude present the same hazards to the airplane occupants regardless of airplane category or size.

The FAA moves the content of proposed § 23.405(b) and (c) to § 23.2240(c)(1) and (c)(2) in the final rule. The final rule also adds new § 23.2240(b), which addresses the requirement for level 4 airplanes. This requirement is similar to the former § 23.574 requirement for damage tolerance evaluations of commuter category airplanes. The FAA inadvertently left this requirement out of the NPRM.

The FAA agrees with the comments that proposed § 23.405(b) was overly prescriptive. The FAA deletes the detailed description of the pressurized compartment and emphasizes the sudden release of pressure in § 23.2240(c)(1) and (c)(2). The FAA retains reference to door and window failures as examples of the types of failures that could result in sudden release of pressure.

EASA stated that proposed § 23.405(d) is too specific to engine rotorburst; however, other risks could be expected from new technologies that should also be considered.

The FAA agrees with EASA's comment that paragraph (d) should address all high-energy fragments, not just fragments from an engine rotorburst. The FAA revises § 23.2240(d) to include all high-energy fragments. The FAA also includes turbine engines and rotating machinery as sources of high-energy fragments.

Several other commenters also commented on proposed § 23.405(d), noting that former part 23 required ''minimizing'' hazards associated with damage from uncontained engine or rotating machinery failures, but the NPRM would require the airplane be able to ''continue safe flight and landing'' following such damage. The commenters asserted that there is no way to eliminate all the risks that will prevent the ''continued safe flight and landing,'' and asked the FAA maintain the requirement to ''minimize'' these hazards as in former § 23.903(b)(1).

The FAA agrees that proposed § 23.405(d) is inconsistent with the description in the NPRM preamble. Therefore, the FAA agrees with the commenters' recommendation to adopt the term ''minimize'' in § 23.2240(d). The FAA does not intend for applicants to incorporate all possible design precautions against rotorburst hazards, especially those that are resource prohibitive or have a negligible impact on safety. The FAA expects an applicant's compliance with § 23.2240(d) to incorporate all practical design precautions to minimize the hazards due to high-energy fragments.

j. Aeroelasticity (Proposed § 23.410/ Now § 23.2245)

In the NPRM, proposed § 23.410 (now § 23.2245) would have required an airplane to be free from flutter, control reversal, and divergence at all speeds within and sufficiently beyond the structural design envelope, for any configuration and condition of operation, accounting for critical

[34] §§ 23.365(e), Pressurized cabin loads; 23.571, Metallic pressurized cabin structures; 23.572, Metallic wing, empennage, and associated structures; 23.573, Damage tolerance and fatigue evaluation of structure; 23.574, Metallic damage tolerance and fatigue evaluation of commuter category airplanes; 23.575, Inspections and other procedures; and 23.627, Fatigue strength. (81 FR 13476, March 14, 2016).

degrees of freedom, and any critical failures or malfunctions. Proposed § 23.410 would have also required an applicant to establish tolerances for all quantities that affect flutter.

Air Tractor and Transport Canada raised concerns about the phrase ''sufficiently beyond the structural design envelope'' in proposed § 23.410(a)(1). Transport Canada said the wording is subjective and does not convey a performance requirement and suggested complementing the phrase ''sufficiently beyond'' with safety objective requirements. Air Tractor noted the existing regulations do not extend beyond the design envelope. Air Tractor asked for clarification on what is considered ''sufficiently beyond.''

Regarding Air Tractor's assertion that the former regulations did not extend beyond the design envelope, the FAA intended proposed § 23.410 to capture the safety intent of former §§ 23.629, 23.677, and 23.687 without introducing the inflexibility created by the former regulations. Former § 23.629(c) required that flutter analysis show freedom from flutter, control reversal, and divergence up to 20 percent above dive speed. Existing part 25 rule language requires flutter analysis to show this up to 15 percent above dive speed. This is to account for uncertainties inherent in analytical techniques. Part 25 requires a smaller margin above dive speed due to its more rigorous analytical requirements. Additionally, former § 23.629(b)(4) precluded any large or rapid reduction in damping as dive speed is approached in flight tests.

As for Air Tractor's comment requesting clarification on what is considered ''sufficiently beyond'' in proposed § 23.410(a)(1), the former part 23 requirements for margins on analyses and flight tests worked together to ensure a momentary inadvertent excursion above dive speed in operation, or combined variations in quantities that may affect flutter, did not result in a catastrophic flutter event. Thus, the FAA required a sufficient margin above dive speed in former part 23 for many years. The phrase ''sufficiently beyond the structural design envelope'' is intended to require a sufficient margin consistent with the requirements of former part 23. However, as technology and analytical techniques evolve and improve, the new language will allow room for the methods of compliance to adapt and possibly change the appropriate margin needed for safe operations. This language is also harmonized with EASA's proposed rule language.

Several commenters raised concerns about the use of the term ''any'' in proposed § 23.410(a). The Associations asked the FAA to revise proposed § 23.410(a)(2) to require the airplane to be free from flutter, control reversal, and divergence for ''approved'' configurations and conditions of operation, rather than for ''any'' configuration and condition of operation. Textron recommended the FAA require the airplane to be free from flutter, control reversal, and divergence for ''any likely'' configuration and condition of operation. Similarly, the Associations suggested removing the term ''any'' from proposed § 23.410(a)(4).

The FAA notes the commenters concerns about the term ''any'' in § 23.2245(a)(2) and (a)(4). In the NPRM, the FAA explained that § 23.2245 would capture the safety intent of former § 23.629. Former § 23.629(a) has required the airplane to be free from flutter, control reversal, and divergence for ''any condition of operation'' since 1978. This terminology originated from CAR 3.311, the predecessor to former § 23.629, was adopted in 1947 and required the wings, tail, and control surfaces to be free from flutter, divergence, and control reversal for ''all conditions of operation.'' The FAA recognizes it is impossible to evaluate an infinite number of data points, but that is not the intent of § 23.2245 nor was it the intent of its predecessor regulations. Rather, the FAA interprets the term ''any'' in § 23.2245(a)(2) as requiring the applicant to exercise due diligence by accounting for a sufficient number of data points that would enable the applicant to state the entire envelope has been evaluated and is safe. This interpretation is consistent with the way the FAA has interpreted CAR 3.311 and former § 23.629. Because the FAA has used the terms ''any'' and ''all'' in its flutter requirements for decades, the FAA is retaining the term ''any'' in § 23.2245(a)(2) and (a)(4). This maintains harmonization with EASA's proposed rule language.

Several commenters raised concerns with terminology in proposed § 23.410(b). Textron and the Associations suggested the FAA require the applicant to establish and account for ''sensitivities'' rather than ''tolerances'' because the term ''tolerances'' has a very specific meaning and a proper flutter analysis is a collection of flutter sensitivity analyses.[35] The Astronautics Corporation of America (Astronautics) sought clarification of the term ''quantities'' in proposed § 23.410(b) and offered alternative regulatory language in an attempt to clarify its meaning. Textron proposed replacing ''quantities'' with ''parameters.''

Regarding Textron, the Associations and Astronautics' comments on the use of ''tolerances'' and ''quantities'' in proposed § 23.410(b), the FAA is retaining the terms ''tolerances'' and ''quantities'' in § 23.2245(b). The FAA intends § 23.2245 to capture the safety intent of former § 23.629, which has contained the terms ''tolerances'' and ''quantities'' since 1978.[36] The FAA has interpreted them consistently from that time, and will continue to do so in § 23.2245. This language is also harmonized with EASA's proposed rule language.

Textron recommended removing the word ''establish'' from the proposed language. The commenter noted that you cannot account for something without establishing it first.

The FAA agrees with Textron that it would be redundant to require an applicant to establish and account for tolerances. For that reason, the FAA retains the word ''establish'' and deletes the words ''and account for'' from § 23.2245(b) in the final rule. This change emphasizes the necessity of fully analyzing these tolerances and harmonizes with EASA's proposed rule language.

k. Design and Construction Principles (Proposed § 23.500/Now § 23.2250)

In the NPRM, proposed § 23.500 (now § 23.2250) would have required—

• An applicant to design each part, article, and assembly for the expected operating conditions of the airplane;

• The design data to adequately define the part, article, or assembly configuration, its design features, and any materials and processes used;

• An applicant to determine the suitability of each design detail and part having an important bearing on safety in operations; and

• The control system to be free from jamming, excessive friction, and excessive deflection when the control system and its supporting structure are subjected to loads corresponding to the limit airloads when the primary controls are subjected to the lesser of the limit airloads or limit pilot forces, and when the secondary controls are subjected to loads not less than those corresponding to maximum pilot effort.

[35] Textron specifically noted that proposed § 23.2245(b) ''would require the applicant to specify a +/−X% tolerance on things such as cross sectional properties (torsional GJ), cross sectional moments of inertia, or other qualities that affect flutter but aren't intended to have a +/−X% tolerance.''

[36] *See* 43 FR 50592, October 30, 1978.

The Associations recommended the FAA change the title of proposed § 23.500 from ''Structural design'' to ''Design and construction principles.''

The FAA concurs with the recommendation by the Associations to change the title of § 23.2250 to ''Design and construction principles.'' The FAA agrees the suggested title is a better descriptor and will harmonize with EASA's proposed title for this section, and adopts it for this rule.

Several comments addressed proposed § 23.500(d). Air Tractor recommended that the FAA revise the wording of proposed § 23.500(d) to specify that it applies to flight controls. Air Tractor further noted that it appears that the definition of ''maximum pilot effort'' has been untethered from former §§ 23.397(b) and 23.143(c), making it necessary for every applicant ''to re-invent the wheel.''

Regarding Air Tractor's comment proposing to add the term ''flight'' to further define ''control system'', the term ''control system'' has been used consistently for many years in this context in the former regulations, and is understood to refer to ''flight'' controls. This text also harmonizes with EASA's proposed rule language. Therefore, the FAA adopts the language as proposed in the NPRM.

As for Air Tractor's concern that maximum pilot effort has been untethered from former §§ 23.397(b) and 23.143(c), the FAA notes that under the new performance-based regulations, applicants will be free to use former part 23 or other accepted means, such as industry consensus standards, as a means of compliance. These accepted means of compliance will detail how the airplane will meet the performance-based requirements.

The Associations stated that it is appropriate for means of compliance to specify how airframe and control system interactions will be tested up to limit loads and that, depending on the nature of the control system, it may be more or less appropriate to perform such a test. These tests ensure the appropriate level of testing is always applied to traditional flight controls and also to future systems, which may include fans or thrusters. The commenters suggested the level of detail be contained in accepted standards. Additionally, the commenters recommended the FAA consider revising proposed § 23.500(d) by deleting paragraphs (1), (2), and (3) and adding the phrase ''the airplane is subjected to expected limit airloads'' to the end of paragraph (d). EASA also recommended the FAA remove details in proposed § 23.500(d) that describe what parts of the system should be subject to which loads because this is design specific and should be covered in the means of compliance.

The FAA agrees with EASA and the Associations to revise proposed § 23.500(d)(1), (d)(2), and (d)(3) and adds the phrase ''the airplane is subjected to expected limit airloads'' to the end of § 23.2250(d). This change aligns with EASA's recommendation and assists in harmonization with EASA's proposed rule. The FAA considers these suggestions to be more in line with the original intent of the performance standards. Therefore, the FAA adopts the changes proposed by the commenters.

Textron suggested the FAA remove the § 23.500(d)(1) requirement that the supporting structure is loaded with limit airloads while the control system is loaded, which the commenter noted has historically never been a part 23 requirement. Textron further suggested the FAA change the phrase ''controls are'' in both subparagraphs (2) and (3) to ''control system is'' to further specify that this is a control system test. Textron commented that the word ''controls'' could imply something other than the entire system is the intent.

As noted above in this section, the FAA removes paragraphs paragraph (d)(1), (d)(2) and (d)(3). The FAA adopts the terminology ''control system'' in the revised proposed § 23.500(d).

EASA also suggested the FAA consider moving the general principle for doors, canopies, hatches, and access panels from proposed § 23.750(f) to a new § 23.2250(e).

The FAA concurs with EASA's recommendation to move the general principle for doors, canopies, hatches, and access panels from proposed § 23.750(f) to a new § 23.2250(e). The requirement is more appropriate in this section because it states a general design principle rather than a requirement relating to emergency evacuation. The FAA also notes that making this change further helps to harmonize FAA and EASA regulations.

l. Protection of Structure (Proposed § 23.505/Now § 23.2255)

In the NPRM, proposed § 23.505 (now § 23.2255) would have required an applicant to protect each part of the airplane, including small parts such as fasteners, against deterioration or loss of strength due to any cause likely to occur in the expected operational environment. Proposed § 23.505 would have also required each part of the airplane to have adequate provisions for ventilation and drainage and would require an applicant to incorporate a means into the airplane design to allow for required maintenance, preventive maintenance, and servicing.

Textron recommended clarifying the intent of proposed § 23.505(a) by including a reference to specific sources of damage because it is unclear whether the proposed rule would be an increase from what was previously required.

The FAA considered Textron's comment. However, as far back as 1949 (§ 3.295, ''Protection''), the regulations required all members of the structure to be ''suitably protected against deterioration or loss of strength in service due to weathering, corrosion, abrasion, or other causes. . . .'' The CAR 3 requirement was included in the 1965 recodification as former § 23.609, which included a non-exhaustive list of possible causes of deterioration. In the NPRM, the FAA removed the listed examples, but maintained the requirement to account for deterioration or loss of strength due to ''any cause likely to occur.''

Textron further stated that it is unclear whether the phrase ''expected operational environment'' is intended to include any environment that might occur during failure conditions, or just the environment during normal operating conditions. Textron recommended replacing the phrase ''expected operational environment'' with ''intended operational environment'' or ''normal operational environment.''

The FAA considered Textron's recommendation to change ''expected operational environment'' to ''intended operational environment'' or ''normal operational environment.'' The FAA did not intend to limit this requirement only to the normal operational environment because, if the failure conditions are an expected environment, then an applicant should consider those conditions and protect the structure. Deterioration or loss of strength due to corrosion, weathering, and abrasion are all examples of failure conditions because capability has been degraded. For many years, the rule has expressly required consideration of these causes. It was an expected environment for items to be corroded, weathered, and abraded, but applicants had to consider any other causes too.

m. Materials and Processes (Proposed § 23.510/Now § 23.2260)

In the NPRM, proposed § 23.510 (now § 23.2260) would have required—

- An applicant to determine the suitability and durability of materials used for parts, articles, and assemblies, the failure of which could prevent continued safe flight and landing, while accounting for the effects of likely environmental conditions expected in service; and

• The methods and processes of fabrication and assembly used to produce consistently sound structures and, if a fabrication process requires close control to reach this objective, an applicant would have to perform the process under an approved process specification.

Additionally, proposed § 23.510 would have required an applicant to justify the selected design values to ensure material strength with probabilities, accounting for—

• The criticality of the structural element; and

• The structural failure due to material variability, unless each individual item is tested before use to determine that the actual strength properties of that particular item would equal or exceed those used in the design, or the design values are accepted by the Administrator.

Proposed § 23.510 would have required a determination of required material strength properties to be based on sufficient tests of material meeting specifications to establish design values on a statistical basis. Proposed § 23.510 would have also required an applicant to determine the effects on allowable stresses used for design if thermal effects were significant on an essential component or structure under normal operating conditions.

Textron commented that, as proposed, the regulatory text in paragraph (a) was unclear as to whether an applicant must account for the effects of likely environmental conditions expected in service on parts, articles, and assemblies. Textron proposed combining the two sentences in paragraph (a) to clarify the FAA's intent for the effect of specific environmental conditions on parts, articles, and assemblies to be considered in determining the suitability and durability of materials.

The FAA concurs with Textron's comment regarding the lack of clarity in paragraph (a), and revises the regulation accordingly. Although the revision creates a slight disharmony with EASA's proposed rule language, the intent of the two regulations remains the same, and the change helps to clarify the FAA's intent.

Textron also requested the FAA to replace the word ''essential'' with the word ''critical''. The commenter stated the word ''essential'' has not been used or defined historically in part 23 structural compliance, whereas the word ''critical'' is used more frequently and is better defined.

Based on Textron's comment for clarity, the FAA revises § 23.2260(e) to replace the word ''essential'' with the word ''critical'', since ''critical'' is a more common and widely used term of art amongst structural engineers than ''essential.'' Specifically, the failure of a critical component or structure is potentially catastrophic.

In the public meeting, Aspen Avionics asked the FAA to clarify whether the requirement in proposed paragraph (b) to perform the process under an ''approved process specification'' refers to an FAA-approved process specification or an accepted industry standard or some other approved process specification. Aspen Avionics also commented on proposed paragraph (d), which stipulates that if material strength properties are required, a determination of those properties must be based on sufficient tests of material meeting the specifications. Aspen Avionics questioned whether this requirement applies to the applicant or whether the applicant can rely on statements from a manufacturer—*i.e.,* Aspen asked the FAA to clarify who has to do what testing for the materials. Aspen also asked whether the testing requirement applies to primary, secondary, or tertiary structure.

Regarding Aspen Avionics' request for clarification of what constitutes an approved process specification for paragraph (b), the FAA does not intend any change from current practices under former regulation § 23.605(a), where nearly identical language was used. The process specification is ''approved'' by the FAA, and the FAA expects to have access to the specification in order to review and determine whether it contains sufficient control to substantiate compliance with the regulation. The specification may be proprietary to the OEM or sub-contractor, but should have formal document approval and control procedures like other engineering reports, documents and drawings necessary for the type design.

As for Aspen Avionics' question regarding the test requirements and whether the requirement is for primary, secondary, or tertiary structure, the FAA does not intend any change from current practices under former regulation § 23.613(a), where nearly identical language was used. The TC holder is responsible for data used to substantiate its type design. Whether the required testing is performed by the OEM or a sub-contractor does not matter as the FAA holds the OEM responsible, and expects the data to be available for FAA review to ensure compliance with the regulation. This requirement for statistically based material properties applies to any airplane primary structure. Existing published FAA guidance and widely used industry practices should be consulted for the finer divisions of structure, such as secondary and tertiary, and the material properties typically used.

n. Special Factors of Safety (Proposed § 23.515/now § 23.2265)

In the NPRM, proposed § 23.515 (now § 23.2265) would have required an applicant—

• To determine a special factor of safety for any critical design value that was uncertain, used for a part, article, or assembly likely to deteriorate in service before normal replacement, or subject to appreciable variability because of uncertainties in manufacturing processes or inspection methods;

• To determine a special factor of safety using quality controls and specifications that accounted for each structural application, inspection method, structural test requirement, sampling percentage, and process and material control; and

• To apply any special factor of safety in the design for each part of the structure by multiplying each limit load and ultimate load by the special factor of safety.

The Associations recommended changing § 23.515(a) by requiring special factors of safety be ''established and applied'', rather than determined, by the applicant. Additionally, they suggested the language of the regulation focus on critical design values ''affecting strength.''

The FAA has used ''determine'' in numerous other places in the NPRM. The commenters' suggested change would not imply a different meaning. As for the commenters' suggestion that the term ''critical design value'' should be limited to those values ''affecting strength,'' there may be other critical design values aside from strength that warrant the use of special factors of safety. For example, former part 23 specified bearing factors for certain applications. These were intended to account for not only strength, but also for durability and consideration of possible dynamic loading. In a performance-based standard where these factors are not specified, it is necessary to make sure that future designs, materials, and applications, not yet envisioned, account for any critical ''design values,'' in the same way the former regulations account for known critical values in those applications today. The FAA adopts § 23.2265(a) with minor modifications.

Air Tractor commented that proposed § 23.515(b) added unwarranted specificity and is worded such that the special factor must account for each inspection method, whether or not it is critical. Air Tractor further commented that certain conditions, such as structural test requirements, sampling percentages, and process and material controls, would be defined in a quality system approved under a production certificate (PC), not as part of a type design. Air Tractor contended that a type design should be approved independently of any quality system or production system requirements.

The FAA agrees with Air Tractor that conditions, such as structural test requirements, sampling percentages, and process and material controls, would be defined in a quality system that is approved under a PC. However, there are instances where those items are defined by type design or inspection methods in an approved type design. As with the former § 23.621, ''Casting factors,'' special casting factors of safety are to be applied to any structural casting, not just critical ones. The specific casting factor used in all those cases is inseparably tied to the applicable tests and inspections, both of which include sampling percentages specified for the part being produced. Former § 23.621(a) required these factors to be defined in the type design, and they are in addition to whatever tests and inspections are required for foundry quality control. Therefore, proposed § 23.515(b) is not substantively different from the former regulations.

The FAA generally agrees with Air Tractor's comment that approval of a type design is independent of any quality system or production system requirements. However, as explained previously in this section, the special factor of safety used to substantiate the type design is approved for use based completely on the part criticality, inspections, tests, and sampling percentages specified for a particular part.

Additionally, the Associations recommended changing proposed § 23.515(b)(1) by replacing ''structural'' application with ''kind of'' application. The commenters contended it would ensure that special factors of safety continue to be applied in the same manner as they are applied in the former rule, while also providing for more flexibility for new materials and construction techniques.

The FAA agrees with the Associations that the term ''structural'' in proposed § 23.515(b)(1) should be revised. However, the FAA believes the words ''type of'' is more accurate than ''kind of'' in this application, and revises the text of § 23.2265(b) accordingly.

The Associations recommended changing proposed § 23.515(c) to require a factor of safety established under proposed § 23.330(b) to be multiplied by the highest pertinent factor of safety established under proposed § 23.515(b). The commenters explained that this change would ensure special factors of safety are applied in the same manner as they are applied in the former rule, while also providing for more flexibility for new materials and construction techniques.

The FAA disagrees with the Associations as such a change has led to convoluted regulations in the past. Further, the limit and ultimate loads are clearly defined in this subpart, so this cross-reference is unnecessary.

Additionally, EASA noted that although the strict wording in former part 23 and CS 23 did not require special factors to be applied to ultimate loads that do not have corresponding limit loads (*e.g.,* emergency landing conditions), this is not reflected in the NPRM. Referring to proposed § 23.515(c), EASA noted that former part 23 and CS 23 use the highest pertinent special factor, instead of any special factor as proposed in the NPRM. EASA suggested that coordination is necessary for harmonization.

The FAA does not agree with EASA's assertion that a narrow interpretation of former part 23 would not require special factors of safety to be applied to ultimate loads that do not have corresponding limit loads. Former § 23.625(d) required the attachments of seats, berths, and safety belts and harnesses to multiply the inertia loads in the emergency landing conditions in former § 23.561 by a special factor of safety (*i.e.,* fitting factor) of 1.33. However, the FAA concurs with EASA that new part 23 should require the use of the ''highest pertinent'' special factor of safety, and not ''any'' special factor of safety. Therefore, the FAA revises § 23.2265(c) accordingly.

Additionally, upon further review, the FAA finds that the proposed wording in § 23.515(c) appears to require an applicant to multiply not only each ultimate load by the special factor of safety, but also each limit load by the same factor even though sometimes there is no corresponding limit load. Therefore, the FAA also revises § 23.2265(c) to state that the special factor of safety is applied regardless of whether there is a limit load condition corresponding to the ultimate load condition. Although the FAA's language may not be harmonized with EASA's NPA, the intent is the same.

o. Emergency Conditions (Proposed § 23.600/Now § 23.2270)

In the NPRM, proposed § 23.600 (now § 23.2270) would have required—

- The airplane, even if damaged in emergency landing conditions, to provide protection to each occupant against injury that would preclude egress;
- The airplane to have seating and restraints for all occupants, consisting of a seat, a method to restrain the occupant's pelvis and torso, and a single action restraint release, which meets its intended function and does not create a hazard that could cause a secondary injury to an occupant;
- The airplane seating, restraints, and cabin interior to accommodate likely flight and emergency landing conditions and should not prevent occupant egress or interfere with the operation of the airplane when not in use;
- Each baggage and cargo compartment be designed for its maximum weight of contents and for the critical load distributions at the maximum load factors corresponding to the determined flight and ground load conditions; and
- Each baggage and cargo compartment to have a means to prevent the contents of the compartment from becoming a hazard by impacting occupants or shifting, and to protect any controls, wiring, lines, equipment, or accessories whose damage or failure would affect operations.

Air Tractor, commenting on proposed § 23.600(a), said the NPRM preamble suggested that future certification endeavors will require more effort (*e.g.,* possibly full-scale crash testing of the fuselage) to meet necessary requirements. Air Tractor also noted that inertial loads likely to occur in an emergency landing were not defined. Additionally, Air Tractor presumed the conditions defined in former § 23.561 would be accepted, but doing so would not make things under the proposed rule any easier, faster, or less expensive. Air Tractor also claimed that should some other inertial loads likely to occur in an emergency landing be proposed, the applicant should expect a protracted discussion with the FAA to defend any differences.

The FAA disagrees that future certification endeavors will require more effort and possibly full-scale crash testing of the fuselage to meet the requirements. Existing conditions of current static and dynamic testing would remain as a means of compliance. Proposed § 23.600(a) would not have required full-scale crash testing of the fuselage. The FAA's intent was to allow for an evaluation of a ''crash landing'' considering the performance of the entire airframe, safety equipment, and occupant. The former requirements only required evaluation of the seat from the floor up, and the restraints, using generic floor impulses independent of airframe reaction. Additionally, the FAA did not define inertial loads because one of the goals of creating performance-based standards was to move away from mandated prescriptive standards, which inhibit innovation and safety enhancing technology adoption. The inertial loads likely to be encountered will be contained in the means of compliance. An applicant may propose inertial loads other than those contained in industry standards already accepted by the Administrator, and substantiate why they are adequate, representative, and equally safe as accepted loads. This rule will allow applicants to evaluate crash landing conditions considering the entire airplane and its performance, instead of limiting applicants to just these tests.

The NTSB noted the NPRM stated that proposed § 23.600 would capture the safety intent of former §§ 23.561 and 23.562, which the FAA described as containing prescriptive design standards. The NTSB disagreed that former §§ 23.561 and 23.562 are prescriptive design standards, and stated former §§ 23.561 and 23.562 were performance-based standards that do not specify any elements of the design, but instead prescribed a test and measureable levels of performance needed to ensure safety.

The NTSB shared the FAA's concern regarding consideration of occupiable space in a post-crash situation, and agreed former standards do not address these issues. However, the NTSB disagreed with the FAA's suggestion that analysis techniques available in the automotive industry are transferable to new airplane designs. The NTSB said it is likely that differences between airframe and automotive structures will require a significant number of full-scale aircraft crash tests before analytical techniques have been validated to the point they can be used as means of compliance. Pointing to NTSB Safety Recommendation A–11–3, which it issued in 2011 after conducting a study of the performance of airbags in general aviation airplane, the NTSB recommended the FAA consider the variation in the sizes and anthropometry of airplane occupants when evaluating a proposed means of compliance.

The FAA understands the NTSB's comments, but does not agree. Former §§ 23.561 and 23.562 assessed only the seat, attachment, restraints, and head strike. The generic floor impulse used did not take into account the variables inherent to the airplane, such as the ability to protect the survivable volume, crushable airplane structure, or features that absorb impact energy or offer the ability to evaluate how all of these variables can work together to enhance crashworthiness. This rule will allow a more holistic approach to crashworthiness. Not prescribing a specific seat test opens the door for future technology and advances in analytical techniques to demonstrate equivalent and even enhanced safety, utilizing all advances available to the engineer. At the same time, until these enhanced techniques become available and proven, the existing seat test methods are still acceptable for showing compliance with this rule and will be contained in a means of compliance.

Additionally, the FAA will accept the former regulations as an acceptable method of compliance, despite their limitations. Testing in accordance with the former regulations has provided a certain level of safety for many years; therefore, continuing to accept them for future designs will maintain that level of safety. However, the FAA contends that having a prescriptive set of tests in the rule has prevented the industry from moving beyond this one standard of protecting occupants. This is because the former regulations required a very specific seat sled test; detailing seat mounting misalignment, impulse force peak and rise times, and maximum forces allowed to be experienced by the restraint system, and the occupant's lumbar spine among other things. Due to the rule specifying all these details, it is nearly impossible for the FAA to find equivalency in applicants proposed alternatives. By changing the requirement from a prescriptive test to the safety intent behind the test, the FAA will only need to evaluate whether new methods meet the safety intent, and not have to evaluate their relative safety against the former requirements. The determination that likely crash scenarios do not generate loads on the occupants that exceed the limits of human injury was the basis of the former rule language, and how the test and crash impulse was derived. It was a combination of various scenarios, represented by one specific set of tests. The new rule will allow a holistic approach to enable designs to achieve occupant protection more effectively.

While the automotive industry generally has a more-developed crashworthiness analysis capability than that used in the aviation industry, the FAA wants to allow for incorporation of holistic crashworthiness in addition to conventional compliance. The FAA notes the NTSB's concern that automotive technology will not directly transfer to aerospace applications because it requires significant numbers of full-scale aircraft crash tests for validation to yield the confidence in the analytical techniques. However, the FAA disagrees. The FAA has not yet determined how much and what type of validation will be required for a given crash scenario. This determination will depend on the particular design and what the validation is attempting to demonstrate. The automotive and other industries have gained a lot of knowledge on what is needed to demonstrate valid models using dynamic transient analysis. The FAA believes that the knowledge from these industries can be leveraged to reduce or eliminate the need for full-scale aircraft crashes for validation. For example, there may be scenarios where only a small part needs validation for demonstration of its energy absorption. This rule will provide an applicant with the option to examine the performance of more than just the seat and restraints, and avoids defining methods of restraint. This will allow consideration of a myriad of ways to protect an occupant in an emergency landing, such as using airbags.

Also, the FAA notes the NTSB's recommendation that the FAA consider the variation in the sizes and anthropometry of airplane occupants when evaluating a proposed means of compliance. This would be an increase in the burden to the manufacturers, and this burden has not been justified.

Several organizations commented on proposed § 23.600(b). Kestrel noted that proposed § 23.600(b)(1) referred to impact at stall speed, but did not specify the configuration and atmospheric conditions associated with this stall speed. Kestrel also requested clarification on whether applicants must design for stall speed in icing conditions.

The FAA revises the proposed rule language. The configuration and atmospheric conditions will be located in the means of compliance based on a determination of the conditions that are likely to occur.

In discussing proposed § 23.600(b)(1), ICON questioned whether industry can deliver on this ''new requirement.'' Textron noted that proposed § 23.600(b) referred to the emergency landing conditions specified in paragraph (a), which would mean the items of mass specified in paragraph (a) must meet the dynamic conditions specified in paragraph (b). Textron noted this is a significant departure from the former rule and assumed it was not the FAA's intent to require dynamic conditions for items of mass. Similarly, the Associations commented that § 23.600(b) would be a new requirement without foundation. They believed the FAA intended to apply the requirement only to occupant restraint systems.

The FAA agrees with Textron and others that an unintentional new requirement would have been imposed by the proposed wording of paragraph (b)(1). The FAA did not intend to apply dynamic loading requirements to items of mass that previously required accounting only for static loads. The FAA modifies the text of paragraph (b) to refer only to subparagraphs (a)(1) and (a)(2) instead of all of paragraph (a), thereby eliminating reference to items of mass.

EASA said the ''dynamic'' condition specified in paragraph (b)(1) should be in the means of compliance, not in the rule. ICON noted that proposed § 23.600(b)(1) would require a very long list of variables be considered in an impact, which seems prohibitively difficult to achieve with any degree of confidence.

The FAA agrees with ICON and EASA. The long list of variables is reduced to simply ''emergency landing'' conditions, which can then be further detailed as part of the means of compliance.

Transport Canada said the requirement in proposed § 23.600(b)(2) appeared inaccurate. It noted that what must not exceed established injury criteria for human tolerance are the loads experienced by the occupant, not the emergency landing conditions. Transport Canada recommended a rewrite of paragraph (b)(2) that would state that the occupants would not experience loads which exceed established injury criteria for human tolerance due to restraint or contact with objects in the airplane.

The FAA agrees with Transport Canada. The FAA adopts the recommended language and revises the rule to clarify it is the loads experienced by the occupant, not the emergency landing conditions that should not exceed the established injury criteria for human tolerance.

BendixKing suggested replacing the word ''restraints'' with ''protection'' in the two instances the word occurs in proposed § 23.600(c). BendixKing suggested this change is appropriate because the intent of the rule is to ensure crash protection for the occupant, which may or may not be what is understood to be restraint. BendixKing also stated it is important not to assume a particular solution, but to focus on the safety intent or occupant protection from harmful motion during an impact. Therefore, it suggested words used in proposed § 23.600(d) like ''restraint,'' ''pelvis,'' ''torso,'' be replaced with language like ''protection'' or ''securing the occupant from harm.'' EASA commented that proposed §§ 23.600(c) and (d) should be an accepted means of compliance, not regulatory requirements. The Associations commented that the language in proposed § 23.600(d) should be aligned with current DOT practices related to automobile safety. The commenters noted the proposed language may preclude some better methods of safety in crashworthiness and might unnecessarily restrict design capabilities.

The FAA agrees with BendixKing that using design-specific solution terminology such as ''restraints'' is not appropriate for a performance-based regulation. While the occupant needs to be restrained, restraints should be considered on a broader basis. The FAA also agrees with EASA that the portions of §§ 23.600(c) and (d) that use design-specific terminology should be in the means of compliance. As such, the FAA will use more generic terms like ''protection'' or ''occupant protection system'' in lieu of the design-specific terms proposed in paragraphs (c) and (d), to allow for other methods of compliance to meet the safety intent of the rule. Finally, due to these word changes, the FAA moved the consideration of ''ground loads'' from paragraph (d) to paragraph (c).

Transport Canada noted the reference to water loads is missing in paragraphs (d) and (e)(1). Transport Canada recommended those paragraphs be modified by adding the word ''water'' in the phrase ''For all flights and ground loads.''

The FAA considered Transport Canada's comment, but one of the goals of adopting performance-based regulations is to remove some of the specificity, to enable the flexibility to adapt to changing technologies and environments. Specifying every possible landing surface would not align with this goal. Therefore, the FAA is not incorporating Transport Canada's changes into the final rule.

Transport Canada also commented that proposed § 23.600(e) should provide a performance-based standard for the requirements in former § 23.787(b) for baggage or cargo sharing the same compartment as passengers.

The FAA agrees baggage and cargo sharing the same compartment with passengers should be restrained. However, a change to the proposed rule is not necessary to address this. Section 23.2270(a) of this rule requires restraint of items of mass within the cabin utilizing static inertial loads, including baggage or cargo that is in the cabin.

The Associations and Textron addressed the requirement in proposed § 23.600(e)(3) that baggage and cargo compartments must protect controls, wiring, lines, equipment, or accessories whose damage or failure would ''affect operations.'' Textron noted that any kind of damage or failure would arguably ''affect operations,'' making it difficult to comply with the rule. Textron recommended the FAA qualify the requirement by adding the word ''safe'' in front of ''operations.'' The Associations recommended the FAA delete the word ''any'' in front of ''controls,'' delete the word ''affect,'' and add the words ''limit safe'' in front of ''operations.''

The FAA agrees with the comments from Textron and the Associations and is adding ''safe'' to modify ''operations.'' Adopting this change will harmonize the text with EASA's proposed rule language. The FAA will not adopt the other recommended changes as they would not have a substantive effect on the rule.

Daher commented generally on § 23.600, indicating the phrase ''rolling and pitching'' would be more appropriate than ''pitching and yawing.'' Daher did not indicate where these phrases were, but the FAA believes it is referring to a statement made in the NPRM preamble discussion of proposed § 23.600 that stated dynamic seat testing requirements address the ability of seat assemblies to remain attached to the floor, even when the floor shifts during impact. Pitching and yawing of the seat tracks during dynamic seat tests demonstrates the gimbaling and flexibility of the seat.

Furthermore, the FAA believes Daher was specifically inferring that ''rolling and pitching'' would be more appropriate in § 23.2270(b)(1) because the rule language in former § 23.562 required the seat rails to be misaligned by 10 degrees in the ''pitch'' and ''roll'' axis, not the ''pitch'' and ''yaw'' axis. The FAA's intent was not simply to mimic the original § 23.562 misalignment requirements, but to identify static airplane orientation at impact in order to assess the level of airframe crushing and energy absorption. However, based on other comments on proposed § 23.600, the FAA has removed specific references to the terms ''flight path angle,'' ''flight pitch angle,'' ''yaw,'' and ''airplane configuration.'' These parameters will be included in the means of compliance.

An individual commenter in the seatbelt manufacturing industry suggested putting a life limit of 10 years on seatbelts, because the webbing loses its strength due to exposure to UV lights and heat. The FAA notes that a seat belt life limit is not within the scope of this rulemaking. The details of seat belts and seat belt webbing materials are controlled by industry standards and Technical Standard Orders (TSOs). Additionally, specifying those types of design-specific solutions is counter to performance-based regulations.

5. Subpart D—Design and Construction

a. Flight Control Systems (Proposed § 23.700/Now § 23.2300)

In the NPRM, proposed § 23.700 (now § 23.2300) would have required an applicant to design airplane flight control systems to prevent major, hazardous, and catastrophic hazards. Proposed § 23.700 would have required an applicant to design trim systems to prevent inadvertent, incorrect, or abrupt trim operation. In addition, proposed § 23.700 would have required an applicant to design trim systems to provide a means to indicate—

- The direction of trim control movement relative to airplane motion;
- The trim position with respect to the trim range;
- The neutral position for lateral and directional trim; and
- For all airplanes except simple airplanes, the range for takeoff for all applicant requested center of gravity ranges and configurations.

Proposed § 23.700 would have also required an applicant to design trim systems to provide control for continued safe flight and landing when any one connecting or transmitting element in the primary flight control system failed, except for simple airplanes. Additionally, proposed § 23.700 would have required an applicant to design trim systems to limit the range of travel to allow safe flight and landing, if an adjustable stabilizer is used.

Furthermore, proposed § 23.700 would have required the system for an airplane equipped with an artificial stall barrier system to prevent uncommanded control or thrust action and provide for a preflight check. The FAA also proposed requiring an applicant seeking certification of a level 3 high-speed or level 4 airplane to install a takeoff warning system on the airplane, unless the applicant demonstrates that the airplane, for each configuration, could takeoff at the limits of its trim and flap ranges.

In light of comments received, the FAA revises proposed § 23.700 to withdraw paragraphs (a)(1) and all its subparagraphs, rename proposed paragraph (a)(2) as (a)(1), add new paragraph (a)(2), withdraw proposed paragraphs (b)(3), (b)(4), and paragraphs (c) and (d) and all their subparagraphs. This section discusses these changes in more detail.

Textron and Kestrel questioned how the term ''prevent'' was intended to be used with the system safety analysis terms ''major,'' ''hazardous,'' and ''catastrophic.''

The FAA acknowledges the term ''prevent'' caused confusion in proposed § 23.700(a)(1), and replaces ''prevent'' with ''protect against'' in § 23.2300(a)(2). The FAA did not intend to require additional safety analysis in this section, as suggested by these comments.

The Associations, Kestrel, Air Tractor, and Textron expressed concern that proposed § 23.700 appears to require that applicants perform System Safety Assessments (SSAs) for traditional mechanical flight control systems that have never been subject to this requirement in the past. They note this would impose substantial new costs on applicants. The commenters acknowledge that SSAs would be appropriate for unconventional designs, such as fly-by-wire systems.

The FAA did not intend to imply that a safety analysis would be required for all flight control systems, including simple mechanical flight control systems in proposed § 23.700(a). The FAA deletes the terms that could have been associated with safety analysis and revises § 23.2300(a)(2) to require the applicant to design airplane flight control systems to protect against likely hazards. The FAA intends ''protect against likely hazards'' to be a high-level requirement to consider potential hazards to the flight control system, and incorporate features in the design to protect against these hazards. One way for a traditional flight control system to satisfy this would be to use the former part 23 regulations, which addressed hazards such as jamming, chafing, interference, incorrect assembly, asymmetric flaps, control system lock inadvertent engagement in flight, etc.

The FAA agrees with the comments stating that safety analysis is necessary, as required by § 23.2510 (proposed as § 23.1315), for fly-by-wire flight control systems, powered flight control systems, and automatic flight control systems. The FAA withdraws the safety analysis requirement in § 23.2300 because § 23.2510 adequately addresses the requirement for safety analysis. The FAA notes the applicability of the § 23.2510 safety analysis requirements will be addressed as a means of compliance, similar to the current practice in AC 23.1309–1E.

The Associations and Textron recommended the FAA eliminate proposed paragraph § 23.700(a)(1)(iii), which lists ''flutter'' as one of the possible major, hazardous or catastrophic hazards, because it is redundant and unnecessary as the safety intent of flutter is covered in the aeroelastic section, proposed § 23.410 (now § 23.2245). The FAA agrees because § 23.2245 ''Aeroelasticity'' adequately addresses flutter for normal operation, exceedances and failure conditions. The FAA also withdrew the other examples of hazards in proposed § 23.700(a)(1) so that they can be addressed more completely in means of compliance.

The Associations and Textron also questioned the use of the term ''misconfiguration'' in proposed § 23.700(a)(1)(v). Textron asked the FAA to clarify whether the term refers to items like rigging and installation or items like wing configurations (*e.g.,* flaps, speed brakes) and trim. The Associations recommended ''misconfiguration'' be replaced with ''misrigging'' for clarity and anticipated the traditional misrigging practices would continue to apply. Proposed § 23.700(a)(1)(v) was intended to address the requirement from former § 23.685(d) that each element of the flight control system must have design features, or must be distinctively and permanently marked, to minimize the possibility of incorrect assembly that could result in malfunctioning of the control system. The FAA agrees that ''misrigging'' incorporates the intent of this requirement more clearly than ''misconfiguration.'' However, the FAA has decided to remove proposed § 23.700(a)(1)(v) from the final rule as discussed.

With the withdrawal of the list in proposed § 23.700(a)(1), the FAA renumbers proposed § 23.700(a)(2) as § 23.2300(a)(1) and adds a new paragraph (a)(2).

Textron commented that proposed § 23.700(a)(2) could seem reasonable for all systems and recommended moving the paragraph to proposed § 23.1305 (now § 23.2505).

The FAA disagrees with applying proposed § 23.700(a)(2) to all systems and equipment because the requirement to ''operate easily, smoothly and positively enough to allow normal operation'' does not apply to all systems. For example, evaluating a flight data recorder for ''smoothness'' would not make sense. The FAA revises § 23.2300(a)(1) to be consistent with former § 23.671(a) because it states the intent of the requirement more clearly.

The Associations proposed revising § 23.700(b) to state ''the trim systems must . . .'' instead of ''[t]he applicant must design trim systems to.'' They made a similar comment on proposed § 23.700(a).

The FAA used ''the applicant must design . . .'' throughout the NPRM. The FAA retains this wording because it's consistent with part 21 to impose the obligation on the applicant.

Textron noted that proposed § 23.700(b)(1) was a general concept that should actually apply to all systems, and therefore recommended changing the word ''trim'' to ''system,'' and moving proposed § 23.700(b)(1) to proposed § 23.1305. Textron also questioned whether the term ''prevent'' in proposed § 23.700(b)(1) meant ''meet the associated requirements of a system safety assessment.'' Textron recommended rewriting proposed paragraph (b)(1) to provide that the applicant must design trim systems to meet system safety requirements, according to the assessment mandated by proposed § 23.1310, and that the evaluation of the system shall include hazards caused by inadvertent (uncommanded) trim operation and incorrect (motion in the opposite direction than commanded) trim operations.

The FAA notes the requirement to ''prevent inadvertent, incorrect, or abrupt system operation'' would not be appropriate for some systems. For example, evaluating a flight data recorder for ''abrupt system operation'' would not make sense. Therefore, the FAA did not incorporate Textron's recommendation in this rule. The FAA also declines to move the regulation to proposed § 23.1305 (now § 23.2505) because that section applies to all systems, while this requirement is only intended for flight control trim systems. In light of Textron's comment, the FAA has changed ''prevent'' to ''protect against'' for consistency with § 23.2300(a)(2). However, the FAA did not incorporate Textron's recommendation to change proposed § 23.700(b)(1) because this section does not require safety analysis. This section applies to all trim systems while § 23.2510 does not apply to trim systems that are considered ''flight control surfaces and their simple systems'' as discussed in AC 23.1309–1E.

Several organizations commented on proposed § 23.700(b)(3). The Associations recommended deleting proposed paragraph (b)(3). They stated that addressing the loss of any single flight control link with traditional mechanical flight controls has provided a substantial level of safety and as new stability and fly-by-wire systems are discussed, it will be increasingly important to develop adequate means of compliance in acceptable documents.

EASA asserted the proposed requirement to have a trim system as a means of control in case of failure of a connecting or transmitting element was too prescriptive and should be captured by the intent that a flight control system must prevent major, hazardous, and catastrophic hazards for likely failure conditions.

The FAA agrees that proposed § 23.700(b)(3) was too prescriptive because means other than trim could be used to safely control the airplane when any one connecting or transmitting element in the primary flight control system fails. The requirement to protect the airplane from loss of control when any one connecting or transmitting element in the primary flight control system fails is captured in § 23.2300(a)(2) at a high level. Therefore, the FAA withdraws proposed § 23.700(b)(3). In addition, the FAA adds ''if installed'' to § 23.2300(b) in light of the comments that future designs may not use trim systems.

Transport Canada observed that VLA rules permit trim systems that do not provide safe flight and landing following failure of the primary control system. Transport Canada said it did not believe this alleviation should be carried into the part 23 revisions, even for small airplanes. Transport Canada recommended the level of safety for trim system failures be raised for simple airplanes.

As discussed elsewhere, the FAA has decided to withdraw the simple category, proposed in § 23.5(d), and also to withdraw proposed § 23.700(b)(3) because § 23.2300(a)(2) captures the requirement. The FAA has determined that the level of safety for trim system failures should not be raised for entry-level airplanes. One of the goals of the NPRM was to provide appropriate standards for ''entry-level airplanes'', and the FAA finds § 23.2300(a)(2) meets that goal. As discussed in this section, § 23.2300(a)(2) requires the applicant to design airplane flight control systems to protect against likely hazards. While the FAA's intent is that flight control systems that meet the former part 23 requirements adequately protect against the likely hazard of failures in any one connecting or transmitting element in the primary flight control system, those airplanes certified under EASA's Certification Specification—Very Light Aeroplanes (CS–VLA), were not certified under part 23. Rather, they were imported to the U.S. and certificated as special class airplanes in accordance with § 21.17(b). Under § 23.2300(a)(2), these airplanes could be certified under part 23, using the CS–VLA to meet the requirements.

Upon further consideration of proposed § 23.700(b)(4), the FAA decided the safety intent of the requirement to limit the range of travel to allow safe flight and landing, if an adjustable stabilizer is used, is already incorporated in the regulations through the requirement for the applicant to design airplane flight control systems to protect against likely hazards. The proposed requirement was prescriptive and may not be appropriate for non-traditional airplane designs. Therefore, the FAA withdraws proposed § 23.700(b)(4).

The Associations asserted including specific information for the verification of stall barrier systems in proposed § 23.700(c) is not beneficial because the issue being addressed is already covered by ''flight control reliability aspects.'' The commenters also noted the simple checks being specified may not be appropriate for all stall barrier systems and that addressing stall barrier flight controls would be better detailed in means of compliance. The commenters recommended deleting proposed § 23.700(c).

The FAA agrees that there is no benefit to including § 23.700(c) because § 23.2510 adequately addresses stall barrier system failure conditions and checks for latent failures. Therefore, the FAA withdraws § 23.700(c).

Textron, ANAC, and Air Tractor commented that proposed § 23.700(d) would require a takeoff warning system without explanation of what it would be, and this could increase complexity.

The FAA withdraws proposed § 23.700(d) because the safety requirement of warning a pilot who is attempting to takeoff with the trim or flaps in an unsafe configuration is adequately addressed in § 23.2605(c).

b. Landing Gear Systems (Proposed § 23.705/Now § 23.2305)

In the NPRM, proposed § 23.705 (now § 23.2305) would have required—

- The landing gear and retracting mechanism be able to withstand operational and flight loads;
- An airplane with retractable landing gear to have a positive means to keep the landing gear extended and a secondary means for extending the

landing gear that could not be extended using the primary means;

• A means to inform the pilot that each landing gear is secured in the extended and retracted positions; and

• Airplanes, with retractable landing gear, except for airplanes intended for operation on water, to also have a warning to the pilot if the thrust and configuration is selected for landing and yet the landing gear is not fully extended and locked.

Furthermore, if the landing gear bay is used as the location for equipment other than the landing gear, proposed § 23.705 would have required that equipment be designed and installed to avoid damage from tire burst and from items that may enter the landing gear bay. Proposed § 23.705 would have also required the design of each landing gear wheel, tire, and ski account for critical loads and would require a reliable means of stopping the airplane with kinetic energy absorption within the airplane's design specifications for landing. For level 3 high-speed multiengine and level 4 multiengine airplanes, proposed § 23.705 would have required the braking system to provide kinetic energy absorption within the design of the airplane specifications for rejected takeoff as the current rules do for multiengine jets over 6,000 pounds and commuter category airplanes.

Several commenters argued that proposed § 23.705 was too design specific and recommended the FAA replace specific design elements such as brakes, wheels, and tires with objectives that would work for a wide array of technologies.

In light of comments received, the FAA revises proposed § 23.705 to withdraw proposed paragraphs (a)(1) through (d), to be replaced with new paragraphs (a)(1), (a)(2), (b), (c)(1) and (c)(2). This section discusses these changes in more detail.

The FAA reassessed the need for the language of proposed § 23.705(a)(1) and (b) and decided not to adopt the proposed paragraphs. The FAA has determined these requirements are adequately addressed by proposed §§ 23.310 (now § 23.2210), 23.320 (now § 23.2220), and 23.400 (now § 23.2235). Section 23.2210 requires structural design loads to be determined that result from likely externally or internally applied pressures, forces or moments, that may occur in flight, ground and water operations, ground and water handling, and while the airplane is parked or moored. This includes operational and flight loads on the landing gear and retracting mechanism, including the wheel well doors specified in the FAA's proposed § 23.705(a)(1). Section 23.2235 requires the structure to support these loads. Section 23.2220 requires the applicant to determine the structural design loads resulting from taxi, takeoff, landing, and ground handling conditions occurring in normal and adverse attitudes and configurations. This includes the critical loads on wheels, tires, and skis specified in proposed § 23.705(b). Section 23.2235 requires the structure to support these loads.

Commenters noted proposed § 23.705 diverged from EASA's proposed CS 23.425, and recommended the FAA work with EASA to achieve harmonization. Several commenters recommended the FAA reject the language originally proposed for § 23.705 and replace it with the language from EASA's proposed CS 23.2325.

The FAA agrees that it should harmonize § 23.2305 as much as possible with CS 23.2325, and has done so where appropriate.

The Associations recommended the FAA revise proposed paragraph (a), which would define landing gear. Textron recommended the FAA add a requirement to provide stable support and control to the airplane during ground operation. The commenters noted the change to paragraph (a) would harmonize with EASA.

The FAA finds the recommended language for paragraph (a) unnecessary. The FAA also finds the accepted means of compliance will describe what is considered landing gear for a particular airplane design. The FAA notes the recommended language is overly broad and can be read to encompass rudder systems and other systems that do not directly interact with the ground, but are necessary to control the airplane during surface operation. The FAA notes rudder systems and other systems are adequately addressed elsewhere.

The FAA revises § 23.2305(a)(1) to adopt CS 23.2325(b)(1) by requiring the landing gear to be designed to provide stable support and control during surface operation. Although the NPRM did not specifically address this requirement, the FAA intended for the revised regulations to capture the safety intent of the former part 23 regulations. This also harmonizes with EASA.

The FAA will not adopt the landing gear loads and energy absorption requirements in CS 23.2325(b)(2) and (b)(3) because these requirements are adequately addressed in §§ 23.2210, 23.2220, and 23.2235. The FAA notes the airplane has to be designed for the anticipated loads, and energy absorbed by the landing gear affects the airframe loads, which are addressed in these sections. Additionally, proper function of any systems related to absorption of energy in the landing gear is addressed in § 23.2505.

The FAA adopts CS 23.2325(b)(4) as § 23.2305(a)(2), requiring the landing gear to be designed to account for likely system failures and likely operation environment, including anticipated limitation exceedances and emergency procedures. As a result of this revision, the FAA withdraws proposed § 23.705(a)(3).

Although the NTSB supported proposed § 23.705(a)(3), the FAA notes proposed § 23.705(a)(3) only addressed tire failures on airplanes with retractable landing gear based on the assumption that tire burst and foreign object risk is greater on airplanes with retractable landing gear. This is generally true for traditional airplane designs. The risk is generally more severe on airplanes with large numbers of passengers, flight critical systems near the landing gear, complex systems, and high-speed operation on the ground. These factors generally exist on airplanes with retractable landing gear, but they could exist on airplanes with fixed landing gear. Conversely, the risk is generally less severe on airplanes with no passengers, no flight critical systems near the landing gear, simple systems and low-speed operation on the ground. These factors generally exist on airplanes with fixed landing gear, but they could exist on airplanes with retractable landing gear (*e.g.,* powered gliders). Therefore, the proposed § 23.705(a)(3) assumption that airplanes with retractable landing gear should be protected from the risks of tire failures and foreign objects, but airplanes with fixed landing gear should not be protected, may not be correct for future designs.

Section 23.2305(a)(2) applies to all landing gear and requires landing gear failures to be considered more generally. The FAA finds § 23.2305(a)(2) will allow traditional designs to comply using current practices as means of compliance, with the flexibility to develop new means of compliance more appropriate for potential future designs. This furthers the goal of moving to performance-based requirements.

The FAA notes § 23.2305(a)(2) captures the intent of former §§ 23.721, 23.729, 23.735, and 23.1309, which required that applicants account for likely landing gear failures. It also captures the intent of former §§ 23.603, 23.721, 23.729, 23.735, 23.1301, and 23.1309, which required that applicants account for likely operation environments, and/or anticipated limitation exceedances and emergency procedures.

The commenters recommended that the FAA move the substance of proposed § 23.705(a) for airplanes with retractable landing gear to proposed § 23.705(c) and replace the proposed language with CS 23.2325(d), which deals with airplanes that have a system that actuates the landing gear.

The FAA has considered the comments and has decided to adopt CS 23.2325(d)(1) and (4) as § 23.2305(c)(1) and (2). CS 23.2325(d)(1) and (4) require a positive means to keep the landing gear in the landing position and an alternative means available to bring the landing gear in the landing position when a non-deployed system position would be hazardous. The FAA adopts § 23.2305(c)(1) because it is less prescriptive than proposed § 23.705(a)(2)(i). The FAA notes the recommended phrase ''in the landing position'' is less prescriptive than ''extended'' and better expresses the intent of the requirement. Moreover, § 23.2305(c)(1) does not increase the burden on traditional designs; provides flexibility to allow new designs to be certified because it applies to all landing gear actuated by a system, not just retractable landing gear; and assists in harmonization.

The FAA adopts the language of CS 23.2325(d)(4) as § 23.2305(c)(2), with one minor change. The FAA is using the phrase ''a hazard'' instead of ''hazardous'' to avoid confusion with former § 23.1309's use of the phrase ''hazardous failure condition.'' The language of CS 23.2325(d)(4) better captures the safety intent of former § 23.729(c), which did not require a secondary means for landing gear that could be extended manually, and is less prescriptive because it only requires an alternative means to bring the landing gear to the landing position if a non-deployed position would be a hazard. Additionally, moving the location of this requirement has no technical impact and harmonizes with CS 23.2325.

The FAA does not adopt proposed § 23.705(a)(2)(iii) or the language from CS 23.2325(d)(2) and (d)(3) because the FAA considers both proposals to be adequately addressed by proposed § 23.1500(b) (now § 23.2600(b)). Section 23.2600(b) requires the applicant to install flight, navigation, surveillance, and powerplant controls and displays so qualified flightcrew can monitor and perform defined tasks associated with the intended functions of systems and equipment. The systems and equipment design must minimize flightcrew errors which could create additional hazards. Section 23.2600(b) incorporates the safety intent of previous requirements for landing gear indications and effectively requires the pilot to be informed of the landing gear position (secured in extended or retracted position) should the pilot need that information.

Textron recommended the FAA remove the requirement for a secondary means of extending the landing gear in proposed § 23.705 and rely instead on the requirements of proposed § 23.1315.

The FAA disagrees as Textron's recommendation does not capture the intent of the former regulation, which was a specific requirement for a secondary means of deploying landing gear. Furthermore, this requirement in proposed § 23.705 was not covered by the general systems failure requirements of proposed § 23.1315.

Several commenters recommended deleting proposed § 23.705(a)(2)(iv), in part, because it was too prescriptive. One commenter recommended rewriting the rule as a performance-based regulation to encourage alternate—and perhaps better—means of detecting wrong configurations for landing.

The FAA agrees that proposed § 23.705(a)(2)(iv) is too prescriptive, and finds it is adequately addressed by the requirements of new § 23.2605(c), which requires information concerning an unsafe system operating condition must be provided in a timely manner to the crewmember responsible for taking corrective action. Accordingly, the FAA withdraws proposed § 23.705(a)(2)(iv).

Textron recommended the FAA add the word ''essential'' before ''equipment'' in proposed § 23.705(a)(3),[37] asserting that non-essential equipment is not important to protect in the landing gear bay.

The FAA disagrees with Textron's recommendation as it is possible that failures of non-essential equipment like a fuel line for a combustion heater may result in hazards more severe than the loss of the non-essential function. Therefore, the FAA is not adopting this change in the final rule.

Textron recommended rewording proposed §§ 23.705(c) and (d) to limit their applicability to airplanes with wheels, asserting these paragraphs required airplanes without wheels to have brakes. Alternatively, Textron suggested moving the requirement to proposed § 23.1300(a) (now § 23.2500(a)) because an airplane with wheels will need a braking system to meet proposed § 23.1300(a), making § 23.705(c) redundant. Other commenters recommended the FAA replace proposed § 23.705(c) and (d) with the CS 23.2325(c), which addresses kinetic energy absorption.

The FAA concurs with the recommendation to replace proposed § 23.705(c) and (d) with CS 23.2325(c). The FAA notes CS 23.2325(c) has the same meaning as proposed § 23.705(c) and (d), but harmonizes with EASA's NPA 2016–05. The FAA has determined the removal of the phrase ''within the airplane's design specifications for landing'' and replacement with ''sufficient . . . to account for landing'' has no technical impact. The FAA adopts the change as § 23.2305(b).

The FAA disagrees with Textron's recommendation to reword § 23.705(c) and (d) to limit their applicability to airplanes with wheels. The FAA notes proposed paragraphs (c) and (d) would not require brakes. While the FAA has considered Textron's alternative recommendation, the specific energy absorption requirement of proposed § 23.705(c) is not adequately addressed by the general system performance requirements of proposed § 23.1300(a). Therefore, the FAA is not adopting this change in the final rule.

Textron suggested the FAA should harmonize its proposed regulations on this topic with CS 23.600 by removing language related to brakes as a subset of meeting the requirements of proposed § 23.1300(a).

The FAA agrees with harmonizing with EASA wherever possible. However, specifically requiring a reliable means of stopping the airplane is not excessively prescriptive and provides clarity to the regulation. Furthermore, Textron's suggested text would not harmonize with CS 23.2325.

EASA recommended eliminating the reference to level 3 and 4 airplanes in proposed § 23.705(d), and replacing it with a reference to airplanes ''required to demonstrate aborted take-off capacity,'' which links the requirement to takeoff performance. Similarly, all of the comments on this section recommended making proposed § 23.705(d) applicable to the same airplanes covered by proposed § 23.115(c)(1) (now § 23.2115(c)(1)).[38] Textron also suggested directly referencing proposed § 23.115 to prevent the link between the two

[37] Textron referenced ''the 2nd line of the 2nd paragraph,'' but the FAA infers they intended to reference proposed § 23.705(a)(3) because this is the provision that would require protection of equipment.

[38] Proposed § 23.115(c)(1) would have applied to ''levels 1, 2, and 3 high-speed multiengine airplanes, multiengine airplanes with a maximum takeoff weight greater than 12,500 pounds and level 4 multiengine airplanes.''

requirements from being inadvertently broken.

The FAA agrees with the recommendation to make § 23.2305(b) applicable to the same airplanes as § 23.2115(c)(1) for several reasons. First, in order to comply with § 23.2115(c)(1), applicants must design airplanes with a means to decelerate the airplane after a rejected takeoff, regardless of the requirements in § 23.2305(b), so adopting the recommended change would not increase the burden on applicants. Second, making the applicability of § 23.2305(b) different from § 23.2115(c)(1) could cause confusion, especially because the proposed applicability would have included airplanes excluded from § 23.2115(c)(1). In former §§ 23.55 and 23.735(e), the FAA applied the requirement to determine the distance for an aborted takeoff at critical speed to the same airplanes required to provide kinetic energy absorption in the brakes for a rejected takeoff, and there is no reason to discontinue this practice. Additionally, adopting this recommendation harmonizes the FAA requirement with CS 23.2325(c).

c. Buoyancy for Seaplanes and Amphibians (Proposed § 23.710/Now § 23.2310)

In the NPRM, proposed § 23.710 (now § 23.2310) would have required airplanes intended for operations on water to provide buoyancy of 80 percent in excess of the buoyancy required to support the maximum weight of the airplane in fresh water. Proposed § 23.710 would have also required airplanes intended for operations on water to have sufficient watertight compartments so the airplane will stay afloat at rest in calm water without capsizing if any two compartments of any main float or hull are flooded.

The FAA noted in the NPRM that it was proposing to remove the requirement that each main float must contain at least four watertight compartments of approximately equal volume because it was a specific design requirement that would be addressed by the proposed performance-based standard.

All of the comments on this section noted a problem with the prescriptive design specificity of proposed § 23.710(b); in particular, the requirement to have watertight compartments. The commenters noted an erroneous assumption that all airplanes intended for operations on water would have watertight compartments. The commenters noted that manufacturers could employ a different solution—such as foam-filled floats—eliminating the need for compartments, and still meet the buoyancy intent. BendixKing commented that the buoyancy requirement needs to be ''more generic to address the core safety intent, which is adequate floatation in the event of a failure.'' The Associations and Textron offered alternative regulatory language that would remove the requirement to have watertight compartments and provide a general performance-based standard for demonstrating buoyancy.

The FAA agrees that proposed § 23.710(b) is excessively prescriptive. The FAA recognizes there are other ways to meet the safety goal of protecting the airplane from capsizing. Therefore, the FAA revises proposed § 23.710(b) to establish a more performance-based standard for demonstrating buoyancy.

ICON noted that hull type and float seaplanes were treated differently in former part 23, and recommended that they be treated differently in the new part 23 as well, because they deal with a loss of buoyancy in different ways. In particular, ICON noted differences in the rate of capsizing, the ability to detect an intrusion of water, and the pilot's ability to remove the water while operating the airplane. ICON asked the FAA to eliminate the separate compartment requirements for hull-type seaplanes.

The FAA agrees that, as proposed, the combination of hulls and floats into one regulation would have imposed a requirement on hulls that is more stringent than the requirements in former part 23. The FAA revises the proposed language to remove the prescriptive requirement for watertight compartments. As such, § 23.2310 contains a more general standard for buoyancy that is appropriate for both floats and hulls.

d. Means of Egress and Emergency Exits (Proposed § 23.750/Now § 23.2315)

In the NPRM, proposed § 23.750 (now § 23.2315) would have required—

- The airplane cabin exit be designed to provide for evacuation of the airplane within 90 seconds in conditions likely to occur, excluding ditching, following an emergency landing. For ditching, proposed § 23.750 would have required the cabin exit for all certification levels 3 and 4 multiengine airplanes be designed to allow evacuation in 90 seconds;
- Each exit to have a simple and obvious means, marked inside and outside the airplane, to be opened from both inside and outside the airplane, when the internal locking mechanism is in the locked position; and
- Airplane evacuation paths to protect occupants from serious injury from the propulsion system, and require that doors, canopies, and exits be protected from opening inadvertently in flight.

Proposed § 23.750 would have precluded each exit from being obstructed by a seat or seat back, unless the seat or seat back could be easily moved in one action to clear the exit. Proposed § 23.750 would have also required airplanes certified for aerobatics to have a means to exit the airplane in flight.

The Associations, BendixKing, Textron, and EASA recommended the FAA remove the 90-second evacuation requirement in proposed § 23.750(a) and replace it with less prescriptive language. EASA stated that the 90-second evacuation time was not contained in the former part 23 regulations and would not be reasonable for all airplanes. EASA stated that leaving the acceptable design solutions to an acceptable means of compliance would be better. As alternatives to the proposed language, BendixKing suggested a requirement for ''adequate and timely'' evacuation, Textron suggested a requirement for ''rapid'' evacuation, and the Associations suggested a requirement for ''rapid and safe'' evacuation.

The FAA agrees and removes the airplane 90-second evacuation requirement because specifying the time limit in the regulation is unnecessarily prescriptive. The FAA replaces the evacuation requirement with the requirement to ''facilitate rapid and safe evacuation of the airplane in conditions likely to occur following an emergency landing, excluding ditching for level 1, level 2, and single-engine level 3 airplanes.'' This harmonizes more closely with EASA's proposed CS 23.2335.

The Associations specifically proposed revisions to the regulatory text, which appeared to align with EASA's proposed regulation. In accordance with their recommendation, the FAA revises the beginning of proposed § 23.750(a) to move a portion of its content into § 23.2315(a)(1). Section 23.2315(a) is revised to read: ''With the cabin configured for take-off or landing, the airplane is designed to,'' followed by more detailed requirements in the subparagraphs. The FAA believes this change more clearly preserves the intent of former regulations. It also harmonizes with EASA's proposed regulation.

Textron also commented that the FAA should either replace the word ''likely'' in proposed § 23.750(a) or ensure the ''likely conditions'' referred to in paragraph (a) are clearly defined in the ASTM standards. The FAA intends the term ''likely'' to be nonprecise or within a mathematical certainty. As explained in the discussion of proposed § 23.205, the FAA finds the most appropriate location for defining ''likely conditions'' is in a means of compliance, because these conditions may vary for different airplanes; therefore, the FAA retains the word ''likely'' in paragraph (a).

Textron also noted that proposed § 23.750(a) specifies ''likely conditions,'' but excludes ditching for all but levels 3 and 4 multiengine airplanes. However, Textron stated that ditching as a likely condition associated with emergency evacuation had not been required previously. It recommended the FAA add a requirement to proposed § 23.750, to require a means on levels 3 and 4 multiengine airplanes to evacuate the airplane safely following a ditching event.

The FAA notes the requirement to safely evacuate the airplane during ditching is already addressed generally in § 23.2315(a)(1). The methods for meeting this requirement will be in a means of compliance.

Textron further commented on using former § 23.807(e) as a means of compliance to show that occupants have a means available to safely evacuate the airplane. Textron stated that former § 23.807(e) only prescribes one exit on each side of the airplane to be above the waterline or alternative methods must be employed.

The FAA agrees that providing one exit on each side of the airplane above the waterline is an acceptable means of compliance. While this may be one means of compliance that is acceptable for traditional designs, the FAA's goal in this rule is to use means of compliance, developed by industry or individuals, to allow for non-traditional designs.

Transport Canada commented on proposed § 23.750(a), noting that cabin exit design is just one of several elements that affect evacuation performance. Transport Canada also noted that the expectation to meet the evacuation performance with the airplane's maximum certified occupancy should be made explicit. Transport Canada suggested a revision to proposed paragraph (a) stating that the airplane design, including the cabin exit design, must provide for evacuation of the airplane of the maximum number of occupants within 90 seconds in conditions likely to occur following an emergency landing.

The FAA agrees that cabin exit design is just one of several elements that affect evacuation performance and that rapid evacuation with the airplane's maximum certified occupancy is required, but the regulation does not have to explicitly include this requirement. Section 23.2315 addresses generally all the likely conditions that affect emergency evacuation, which would include an airplane with maximum certificated occupancy. Therefore, the FAA is not adopting the language proposed by Transport Canada.

The Associations recommended the following revisions to proposed § 23.750(a), which deleted or combined portions of proposed paragraphs (a), (b), (c), (d) and (f) into a new paragraph (a), and renumbered paragraph (e) as paragraph (b). Their proposed paragraph (a)(1) appears to correlate with proposed § 23.750(a). They proposed a revision to proposed paragraph (a)(1) stating that, with the cabin configured for take-off or landing, the airplane is designed to facilitate rapid and safe evacuation of the ''aeroplane'' in conditions likely to occur following an emergency landing, excluding ditching for level 1, level 2, and single-engine level 3 airplanes.

The FAA adopts this language as § 23.2315(a)(1), except for spelling ''aeroplane'' as ''airplane.'' This is better organized and more understandable than the proposed language, while still retaining the intent of former regulations and harmonizes the regulations between FAA and EASA.

Textron commented that the phrase ''when the internal locking mechanism is in the locked and unlocked position'' in proposed § 23.750(b) is not necessary and should be deleted. The FAA agrees and removes the phrase because this is a detailed design consideration, which is more appropriately addressed in means of compliance.

Textron also recommended the FAA add a requirement similar to the requirement for auxiliary locking devices in former § 23.783(c)(6), which would provide, in pertinent part, that auxiliary locking devices that are actuated externally to the airplane may be used but such devices must be overridden by the normal internal opening means. Textron's view was that auxiliary locking devices used to secure the airplane would likely be needed to prevent unauthorized entry into the airplane when it is left unattended.

The FAA disagrees with Textron's recommendation as the suggested text because it is more appropriate for a means of compliance.

The Associations proposed revisions to proposed § 23.750(a)(2) that coincidently address Textron's comment on internal locking mechanisms. They suggested adding language stating that, with the cabin configured for take-off or landing, the airplane is designed to have means of egress (openings, exits or emergency exits), that can be readily located and opened from the inside and outside. The means of opening must be simple and obvious.

The FAA adopts this language as § 23.2315(a)(2), except the proposed marking requirement is retained. This revision captures the safety intent of the former regulations more clearly and harmonizes regulations between the FAA and EASA.

The Associations recommended deleting proposed § 23.750(c). The FAA agrees because paragraph (a)(1), as revised, already addresses similar requirements, rendering paragraph (c) redundant.

Textron commented on proposed § 23.750(d) by recommending the FAA address obstructions more generally (*i.e.,* not just seat backs), and offered the language stating that each exit must not be obstructed unless the obstruction can be easily moved in one action to clear the exit.

Transport Canada similarly suggested the requirement should more generally address that any component of the interior should be considered as a potential obstruction, and also address temporary obstructions during flight. Transport Canada proposed a revision to proposed paragraph (d) stating that each exit must not be obstructed by any interior component during taxi, take-off or landing. In addition, a seat or seat back may obstruct an exit if the seat or seat back can [be] easily moved in one action to clear the exit.

The FAA considered Transport Canada's proposed wording, but moving a seat back easily in one motion to reach an emergency exit is more appropriate as a means of compliance. The FAA agrees with Textron's and Transport Canada's comments on proposed § 23.750(d) that obstructions that could potentially block exits should be addressed more generally and not limited to seat backs, because other items could block exits and impair evacuation. The FAA revises the regulation accordingly as § 23.2315(a)(3).

The Associations proposed a revision to proposed § 23.750(a)(3) stating that, with the cabin configured for take-off or landing, the airplane is designed to have easy access to emergency exits when present.

The FAA is incorporating this suggestion in § 23.2315(a)(3). The new language captures the safety intent of the former regulations more generally and harmonizes the FAA language with the EASA NPA language.

The Associations recommended to renumber proposed § 23.750(e) as proposed § 23.750(b) (now § 23.2315(b)). The FAA agrees and adopts the proposed renumbering. This relocation will not change the substantive content of the paragraph, but matches with EASA's numbering and will lessen confusion.

The Associations recommended deleting proposed § 23.750(f). EASA commented that the requirement in proposed § 23.750(f) for doors, etc. is too design-specific and can be covered by generic principles covered in § 23.2250 (proposed as § 23.500).

The FAA understands EASA's comment, but requiring doors, canopies, and exits to be protected from opening inadvertently in flight is a general requirement that does not limit possible design solutions. However, the FAA moves this requirement to § 23.2250(e) to harmonize the location of the requirement with EASA's rule.

Upon further review, the FAA is replacing the word ''approved'' in proposed § 23.750(e) (now § 23.2315(b)) with the word ''certified''. This change does not affect the original intent of paragraph (e), but harmonizes the language with EASA.

e. Occupant Physical Environment (Proposed § 23.755/Now § 23.2320)

In the NPRM, proposed § 23.755 (now § 23.2320) would have required an applicant to design the airplane to allow clear communication between the flightcrew and passengers and provide a clear, sufficiently undistorted external view to enable the flightcrew to perform any maneuvers within the operating limitations of the airplane. Proposed § 23.755 would have also required an applicant to design the airplane to protect the pilot from serious injury due to high-energy rotating failures in systems and equipment, and protect the occupants from serious injury due to damage to windshields, windows, and canopies.

Additionally, proposed § 23.755 would have required, for level 4 airplanes, each windshield and its supporting structure directly in front of the pilot to withstand the impact equivalent of a two-pound bird at maximum approach flap airspeed and allow for continued safe flight and landing after the loss of vision through any one panel.

Furthermore, proposed § 23.755 would have required any installed oxygen system to include a means to determine whether oxygen is being delivered and a means for the flightcrew to turn on and shut off the oxygen supply, and the ability for the flightcrew to determine the quantity of oxygen available. Proposed § 23.755 would have also required any installed pressurization system to include a pressurization system test and a warning if an unsafe condition exists.

EASA commented the requirement in proposed § 23.755(a)(2) for the airplane design to provide a clear, sufficiently undistorted external view should be covered in the ''crew interface'' paragraph.

The FAA agrees with EASA that the § 23.755(a)(2) flightcrew visibility requirement is more directly related to flightcrew interface than occupant environment. The FAA is including the words ''including pilot view'' in § 23.2600(a). This change harmonizes § 23.2600(a) more closely with proposed CS 23.2600(a).

Similarly, the FAA relocates the proposed § 23.755(b)(2) requirement to § 23.2600(c), because this change harmonizes § 23.2600(c) more closely with EASA's proposed CS 23.2600(d). Additionally, the FAA adopts the language in EASA's proposed CS 23.2600(d), except for the spelling of ''aeroplanes'' versus ''airplanes'' for improved clarity and harmonization.

The Associations suggested the FAA delete the word ''any'' from the phrase ''any maneuvers within the operating limitations of the airplane,'' in proposed § 23.755(a)(2). The commenters did not provide a rationale for this suggestion.

The FAA disagrees as removing the word ''any'' could unduly restrict the scope of the rule. The FAA's intent is that adequate visibility must be provided to perform any maneuvers within the operating limitations of the airplane. Therefore, the FAA adopts § 23.2600(a) as proposed in the NPRM.

The Associations, Transport Canada, EASA, and ANAC questioned proposed § 23.755(a)(3), which would require the airplane design to protect the pilot from serious injury due to high-energy rotating failures. The Associations stated there may be new systems which may include high amounts of energy that is not the result of rotating equipment. The commenters suggested proposed § 23.755(a)(3) be broadened to include the new systems, such as high voltage systems. EASA similarly suggested amending the protection of pilots against serious injury due to high-energy rotating failures to include any high-energy risks.

The FAA has considered the commenters' suggestion to change proposed § 23.755(a)(3) as recommended. However, the FAA has concluded that the safety requirements contained in § 23.2510, ''Equipment, systems and installations,'' (proposed as § 23.1315) of this rule adequately address hazards from high-energy sources. Therefore, no change is being made to the final rule based on the commenters' suggestion.

ANAC referenced former § 23.1461(d) and asked the FAA to explain why proposed § 23.755(a)(3) excluded protection for airplane occupants other than the pilot from certain hazards. Additionally, Transport Canada commented the proposed language requires protecting the pilot from high-energy rotating failures, which suggests a lower level of safety for the other airplane occupants. It recommended replacing the word ''pilot'' with ''occupants''.

The FAA agrees with ANAC and Transport Canada that proposed § 23.755(a)(3) would effectively lower the level of safety because it did not protect all occupants from high-energy rotor failures. It also did not protect the airplane from high-energy rotor failures, and allowed the pilot and pilot controls to be in the inboard propellers' plane of rotation. The FAA intended to incorporate the safety intent of former §§ 23.771(c) and 23.1461.

Therefore, the FAA adopts § 23.2550 to better capture the safety intent of former § 23.1461. Section 23.2550 requires equipment containing high-energy rotors to be designed or installed to protect the occupants and airplane from uncontained fragments. The FAA also revises § 23.2320(a)(2) (proposed as § 23.755(a)(3)) to capture the safety intent of former § 23.771(c). Section 23.2320(a)(2) will require the pilot and flight controls be protected from propellers.

Textron and NJASAP commented on the requirement in proposed § 23.755(b)(1) for level 4 airplanes to ensure that the windshield and its supporting structure directly in front of the pilot can withstand the impact equivalent of a two-pound bird. Textron noted the 14 CFR part 33 engine requirement for medium bird ingestion is based on a 2.5-pound bird and questioned why the FAA did not use 2.5-pounds in proposed § 23.755(b)(1). Textron also recommended the FAA consider language from CS 23.440(a) with weight/type specifics being defined in the industry standards.

The FAA notes NJASAP's and Textron's comment on the weight of the bird in proposed § 23.755(b)(1). Former § 23.775(h)(1) required windshield panes directly in front of pilots in the normal conduct of their duties, and the supporting structure for these panes, to withstand, without penetration, the impact of a two-pound bird when the velocity of the airplane (relative to the bird along the airplane's flight path) is equal to the airplane's maximum approach flap speed for commuter category airplanes. The FAA codified this requirement in part 23, amendment 23–49.[39] The preamble of the NPRM[40] for amendment 23–49 explains that the two-pound bird requirement was based on ICAO bird strike data that occurred on airplanes of 19,000 pounds or less from 1981 through 1989. Also, this requirement is well established in the former regulations and has provided an acceptable level of safety. Therefore, the FAA retains the two-pound bird requirement.

NJASAP commented the methodology used to discriminate between level 3 and 4 airplanes will motivate OEMs to certify more airplanes within level 3. The commenter also noted that airplanes in this category have experienced fatal accidents due to bird strikes. NJASAP recommended the FAA apply the requirements of proposed § 23.755(b)(1) to level 3 high-speed airplanes.

The FAA acknowledges the requirement in former § 23.775(h)(1) applied to commuter category airplanes, while the proposed requirement would have applied only to level 4 airplanes. Under the former regulations, a commuter category airplane was limited to multiengine airplanes with a seating configuration, excluding pilot seats, of 19 or less and a maximum certificated weight of 19,000 pounds or less.[41] Additionally, a normal category airplane was limited to those airplanes that had a seating configuration, excluding pilot seats, of nine or less, a maximum certificated takeoff weight of 12,500 pounds or less, and intended for nonacrobatic operation.[42] Under the proposal, level 4 airplanes would be airplanes with a maximum seating configuration of 10 to 19 passengers. Thus, the proposal would have the effect of providing relief to a percentage of part 23 airplanes with a maximum certified takeoff weight more than 12,500 pounds, but have fewer than 10 passengers seating configuration.

Under NJASAP's proposal, this requirement would apply to airplanes with 7 to 9 passengers and a maximum certified takeoff weight of 12,500 pounds or less, which would increase the certification requirements of former § 23.775(h)(1). This regulation has proven to be an acceptable level of safety. Additionally, adding level 3 airplanes would increase the cost for a number of these airplanes that weigh less than 12,500 pounds.

Transport Canada and ANAC noted that former § 23.831 addresses smoke, which was not included in proposed § 23.755(c). Transport Canada recommended the FAA add the phrase ''and solid or liquid particulates'' after the word ''vapors'' in proposed paragraph § 23.755(c) because smoke is a collection of airborne solid and liquid particulates and gases.

The FAA agrees with Transport Canada and ANAC and revises § 23.2320(c) to require the air provided to each occupant be free of hazardous concentrations of smoke during normal operations and likely failures. The FAA intended proposed § 23.755(c) to incorporate the safety intent of former § 23.831(b), which requires the ventilating air in the flightcrew and passenger compartments to be free of harmful or hazardous concentrations of gases and vapors in normal operations and in the event of reasonably probable failures or malfunctioning of the ventilating, heating, pressurization, or other systems and equipment. It also requires smoke evacuation be accomplished quickly if accumulation of hazardous quantities of smoke in the cockpit area is reasonably probable.

The FAA chose the term ''smoke'' instead of ''solid or liquid particulates'' because it is a more common term. Section 23.2320(c) requires air at a breathable pressure, free of hazardous concentrations of gases, vapors, and smoke, to be provided to each occupant during normal operations and likely failures.

ANAC questioned whether general rules (like proposed § 23.1315) would address the concern of smoke evacuation capability and requested the FAA clarify how airplane manufacturers would be driven to develop a smoke evacuation system in case there is no explicit requirement, just general ones.

The FAA considers § 23.2320(c) to be an explicit requirement for cockpit smoke evacuation but general regulations may also require smoke evacuation to be considered. A pressurized airplane design that cannot evacuate smoke from the cockpit sufficiently to allow the flightcrew to safely perform their duties, does not provide each occupant with air at a breathable pressure, free of hazardous concentrations of gases, vapors and smoke, during normal operations and probable failures. Therefore, an effective smoke evacuation system is necessary to comply with § 23.2320(c) of this rule.

The Associations recommended reordering proposed § 23.755(d) and (e) to place the oxygen requirements after the pressurization requirements. The FAA agrees with the recommendation and notes this change harmonizes with EASA's regulation. In EASA's regulation, pressurization system requirements precede the oxygen systems requirements.

Textron commented that the FAA should remove proposed § 23.755(e)(1), as it covers the same subject area as proposed § 23.1305(c). Proposed § 23.1305(c) would have required information concerning an unsafe system operating condition to be provided in a timely manner to the crewmember responsible for taking corrective action. Presentation of this information must be clear enough to avoid likely crewmember errors.

The FAA agrees with Textron's comment, as both sections would require the crewmembers to be made aware of unsafe conditions. Therefore, the FAA adopts § 23.2605(c) as proposed and withdraws proposed § 23.755(e)(1).

Proposed § 23.755(e)(2) would have required pressurization systems, if installed, to include a pressurization system test. The FAA intended to capture the safety intent of former § 23.843, ''Pressurization system tests,'' which required specific tests for demonstrating compliance with safety requirements. Upon further review, the FAA finds that proposed § 23.755(e)(2) contains prescriptive requirements, which is inconsistent with the FAA's goal of establishing performance-based requirements as was set forth in the NPRM. Therefore, the FAA withdraws proposed § 23.755(e)(2).

The FAA reviewed the former regulations related to proposed § 23.755 to determine if it inadvertently omitted any safety requirements for pressurization systems. As a result of this review, the FAA has identified the following omissions, which are addressed in this rule.

This final rule now requires pressurization systems, if installed, to be designed to protect against decompression to an unsafe level, which captures the safety intent of former §§ 23.841(c), (d)(2) and (d)(3). This final rule also requires pressurization systems, if installed, to be designed to protect against excessive differential pressure, which captures the safety intent of §§ 23.841(b)(1), (b)(2), (b)(3) and (b)(8).

[39] Final Rule, Airworthiness Standards; Systems and Equipment Rules based on European Joint Aviation Requirements, 61 FR 5151, 5166 (Feb. 9, 1996).

[40] NPRM, Airworthiness Standards; Systems and Equipment Rules based on European Joint Aviation Requirements (59 FR 37620, July 22, 1994).

[41] *See* § 23.3(d), amendment 23–62.

[42] *See* § 23.3(a), amendment 23–62.

Section 23.2320(e)(1) specifically requires that if an oxygen system is installed in the airplane, it must effectively provide oxygen to each user to prevent the effects of hypoxia and be free from hazards in itself, in its method of operation, and its effect upon other components. This requirement captures the safety intent of former §§ 23.1441(a) and (d); 23.1443, and 23.1447(a), (b), (c), (d), (e), and (g). These provisions require pressure/demand oxygen equipment for the crew on high altitude airplanes; minimum oxygen flowrates and pressures at specified conditions; standards for oxygen mask and cannula effectiveness; ease of donning, retention, and accessibility; and standards for crew communication while using oxygen equipment.[43] The FAA revises 23.2320(e)(1) to capture the safety intent of these former regulations, but without their prescriptive requirements, by requiring that if an oxygen system is installed in the airplane, it must effectively provide oxygen to each user to prevent the effects of hypoxia.

The FAA has also decided to add the specific language from former § 23.1441(b) into § 23.2320. Requiring an oxygen system, if installed, to be free from hazards in itself, in its method of operation, and its effect upon other components restates former § 23.1441(b) verbatim and captures the safety intent of former §§ 23.1441(b) and (e), 23.1445, 23.1447(f), 23.1449, 23.1450(b), 23.1451, and 23.1453. These provisions required—

- A means for the crew to turn on and shut off oxygen supply at the high-pressure source in flight;
- Materials that could be used for oxygen tubing to be considered;
- A means to reserve oxygen for the flightcrew if a source is shared with passengers;
- A manual means to deploy passenger oxygen masks (or other units) for high-altitude airplanes;
- A means to allow the crew to determine whether oxygen is being delivered;
- Hazards from chemical oxygen generator temperature and pressure to be addressed;
- Protection of oxygen equipment and lines from fire hazards; and
- Protection against overload, unsafe temperatures, and hazards in a crash landing.

The FAA withdraws proposed § 23.755(d)(1) as it is rendered redundant by adopted § 23.2600(b).[44] Furthermore, by making the revisions described previously, the FAA is able to eliminate proposed § 23.755(d)(2) and (3) as redundant. Proposed § 23.755(d)(2) and (3) would have required oxygen systems to include a means to determine if oxygen is being delivered and a means to permit the flightcrew to turn on and shut off the oxygen supply at any high-pressure source in flight. The FAA considers these requirements redundant because failure to deliver oxygen to a user who needs oxygen for protection against hypoxia with no way to determine that oxygen is not flowing is a hazard in the oxygen system; and an oxygen leak that cannot be shutoff at the high pressure source is a hazard in the oxygen system. If oxygen is needed for the survival of the pilots or passengers and it is turned off at the high-pressure source (intentionally or inadvertently), the inability to turn it on would be a hazard in the oxygen system.

f. Fire Protection (Proposed § 23.800/ Now § 23.2325)

In the NPRM, proposed § 23.800 (now § 23.2325) would have required the—

- Insulation on electrical wire and electrical cable outside designated fire zones be self-extinguishing;
- Airplane cockpit and cabin materials in certification levels 1, 2, and 3 be flame-resistant;
- Airplane cockpit and cabin materials in level 4 airplanes be self-extinguishing;
- Airplane materials in the baggage and cargo compartments, which are inaccessible in flight and outside designated fire zones, be self-extinguishing; and
- Electrical cable installation that would overheat in the event of circuit overload or fault be flame resistant.

Additionally, proposed § 23.800 would have precluded thermal acoustic materials outside designated fire zones from being a flame propagation hazard. Proposed § 23.800 would have also required sources of heat that are capable of igniting adjacent objects outside designated fire zones to be shielded and insulated to prevent such ignition.

Proposed § 23.800 would have required airplane baggage and cargo compartments, outside designated fire zones, to be located where a fire would be visible to the pilots, or equipped with a fire detection system and warning system, and—

- Be accessible for the manual extinguishing of a fire;
- Have a built-in fire extinguishing system, or
- Be constructed and sealed to contain any fire within the compartment.

Proposed § 23.800 would have required a means to extinguish any fire in the cabin, outside designated fire zones, such that the pilot, while seated, could easily access the fire extinguishing means, and for levels 3 and 4 airplanes, passengers would have a fire extinguishing means available within the passenger compartment. Where flammable fluids or vapors might escape by leakage of a fluid system, proposed § 23.800 would have required each area, outside designated fire zones, be defined and have a means to make fluid and vapor ignition, and the resultant hazard, if ignition occurs, improbable. Additionally, proposed § 23.800 would have also required combustion heater installations outside designated fire zones be protected from uncontained fire.

EASA commented that the fire protection outside designated fire zones requirements proposed in § 23.800 were design solutions instead of objectives. EASA contended these proposed provisions would hamper the development of different, but acceptable future designs. EASA recommended the FAA follow the A–NPA text from CS 23.445.

The FAA does not share EASA's view that the proposed § 23.800 requirements were design specific solutions. For the foreseeable future, there will be wiring, cabling, insulating, and covering materials used in airplane cabins, cockpits, and baggage and cargo compartments. The performance standard requires certain materials be self-extinguishing, flame resistant, etc., in order to prevent the initiation or propagation of a fire. The way to demonstrate compliance with the performance standard is now moved to accepted methods of compliance instead of being specified in rule language or appendices. Additionally, the former part 23 regulations for commuter category airplanes, and the proposed regulations for level 4 airplanes, intended for personnel to be alerted to the presence of a fire and a way to extinguish it. Based on the FAA's understanding of the current technology available, for the foreseeable future, fire detection systems and extinguishers are the methods to achieve this. The FAA is not prescribing the technology and design of those systems.

[43] These specifications were intended to protect against hypoxia.

[44] Proposed § 23.755(d)(1) would have required oxygen systems to include a means to allow the flightcrew to determine the quantity of oxygen available in each source of supply on the ground and in flight. Adopted § 23.2600(b) requires the applicant to install displays so qualified flightcrew can monitor and perform defined tasks associated with the intended functions of systems and equipment.

Additionally, the FAA finds that following the A–NPA text from CS 23.445 would be a new approach to achieving the safety intent of preventing the initiation or propagation of a fire, which was not set forth for notice and comment. Further, the FAA has concerns whether EASA's proposed rule language would meet the same level of safety as provided for in the former part 23 regulations, as EASA's proposed text would require minimization of the risk of ''fire initiation'' and ''fire propagation''. The word ''minimize'' has not historically been used in this safety standard where specific tests were used with specific pass/fail criteria. The FAA also finds using the word ''minimize'' may introduce ambiguity in the rule. While the FAA is not adopting EASA's recommendation, the FAA contends the requirement in § 23.2325 harmonizes with EASA's requirements because the effect is the same.

Embraer recommended modifying the title of proposed § 23.800 to remove the word ''designated,'' as well as removing the phrase ''Outside designated fire zones'' from the lead sentence of the proposed rule.

The FAA agrees with Embraer's comment that it is unnecessary to state ''designated'' in the title. The FAA eliminates the phrase ''fire zones'' as well because the term may lead to confusion. This revision aligns the final rule with the safety intent of former regulations and has the benefit of aligning the title with EASA's proposed title. Furthermore, the FAA changes the title of § 23.2325 to ''Fire protection'' and deletes the lead-in sentence ''Outside designated fire zones:''. Finally, the FAA adds ''. . . in the fuselage . . .'' to subparagraph (c) so as not to expand the applicable area of the rule.

Transport Canada recommended the FAA define several terms used in this section, specifically, ''self-extinguishing,'' ''flame resistant,'' and ''flame propagation hazard'', because this section would otherwise be subject to a wide range of interpretation. Transport Canada stated the performance statement, as expressed, may not ensure the level of safety of former § 23.853.

The FAA finds that defining these terms is not necessary, nor that this rule will be subject to a wide range of interpretation. Putting the parameters necessary to precisely define these terms would mean specifying test standards, which is contrary to the rule's intent to move away from prescriptive standards. The specifications for meeting these requirements will be contained in an accepted means of compliance. One means of compliance accepted by the FAA is to use the former prescriptive means of compliance contained in former part 23, together with a policy statement issued by the FAA identifying means by which the FAA has addressed errors, ELOS findings to various provisions of former part 23, and special conditions (*i.e.,* ''prescriptive means''). The performance standard, plus this accepted means of compliance, will ensure the same level of safety as former § 23.853. The FAA notes that to be acceptable, any future proposed means of compliance would have to provide at least an equivalent level of safety.

Transport Canada questioned whether proposed § 23.800(a) would cover components located in between the fuselage skin and the compartment liners that were explicitly covered under former § 23.853. The commenter recommended the FAA consider these components.

The FAA finds it unnecessary to list these specific parts in the rule since all materials in those compartments must meet the standards specified for that compartment. The FAA notes, just as under former § 23.853(d)(3)(ii), items behind compartment liners are considered materials that exist in those compartments.

In level 4 airplanes, proposed § 23.800(a)(3) would have required materials in the cockpit, cabin, and baggage and cargo compartments be self-extinguishing. NJASAP stated level 3 high-speed airplanes should also be required to have self-extinguishing cockpit and cabin materials. NJASAP noted many business jets that fly at high altitude will fall into the level 3 high-speed category in the future. NJASAP indicated if a fire were to break out in this airplane type, it could take several minutes to detect it and to make an emergency landing.

The FAA notes under the former § 23.853(d), only commuter category airplanes needed to meet the self-extinguishing requirement for these specified items. In the NPRM, the FAA correlated level 4 airplanes to the commuter category. Therefore, adding the requirement to make cockpit and cabin materials self-extinguishing for level 3 airplanes would impose requirements beyond those imposed under former § 23.853 and would be beyond the scope of the notice. Furthermore, the FAA is unaware of service experience with level 3 airplanes that would justify the increased cost associated with the NJASAP's comment.

Textron and the Associations requested clarification regarding the use of ''or'' in proposed § 23.800(b)(2) with respect to circuit overload or fault. The Associations asked whether the FAA intends to allow some electrical systems, such as high-reliability primary power wires in electrically-powered airplanes, to use reliable design practices in place of circuit protection for some wires. Textron thought the use of ''or'' meant both overload and failure of the protective device do not need to be considered and asked whether the intent is to allow some circuits without overload protection, such as main start cables.

The FAA notes the focus of this rule is fire protection rather than circuit design. The FAA's intent is to make certain electrical cable installations that could overheat are flame resistant, regardless of whether this is due to a circuit overload or fault. Proposed § 23.800 nearly mirrors former § 23.1365(b), which used the same phrase ''. . . circuit overload or fault . . . .''[45] The FAA did not intend to change the meaning of former § 23.1365(b). To address the commenters' concerns, the FAA revises § 23.2325 to reflect the language as stated in former § 23.1365(b).

Also, the FAA noted a typographical error in proposed paragraph (c). A slash (''/'') between ''thermal'' and ''acoustic'' was missing. The absence of the ''/'' indicate only insulation that was both thermal and acoustic must comply. The FAA's intention was either thermal or acoustic, as required under the former § 23.856. The FAA has corrected this inadvertent omission in this rule.

Textron and the Associations submitted comments on proposed § 23.800(d), which would have required sources of heat that are capable of igniting adjacent objects, to be shielded and insulated to prevent such ignition. Textron noted the proposed rule broadened the scope of the former requirement from ''cargo and baggage compartments'' to anything that is not a designated fire zone. Textron recommended the FAA modify proposed § 23.800(d) to include the phrase ''located in the cargo and baggage compartments'' after ''Sources of heat.'' Textron also commented that preventing hot equipment from starting fires in normal operation is needed, but in the case where materials and proximities are controlled by type design (*i.e.,* other than the cargo and baggage compartments), this is sufficiently addressed by proposed § 23.1300 (now § 23.2500). The Associations recommended modifying proposed § 23.800(d) by adding the

[45] *See* 61 FR 5151, February 9, 1996.

phrase ''located in the cargo compartment.''

The FAA agrees the proposed rule would have unintentionally broadened the prior requirements. The FAA revises the rule language to add ''within each cargo and baggage compartment''. The FAA also agrees with Textron that other regulations in subpart F sufficiently address the issue of preventing hot equipment from starting fires in normal operation where materials are located in places other than the cargo and baggage compartments.

The Associations proposed removing the word ''any'' in front of ''fire'' from proposed § 23.800(e)(2) and (f). The commenters did not provide a reason for the proposal. Although ''any'' is implied, the FAA prefers to leave the word in the rule language to be explicit.

Regarding proposed § 23.800(g)(2),[46] Textron asked whether the probability of the leak is considered (*i.e.,* the ''improbable'' requirement is for ignition and hazard after a leak). Textron recommended the FAA clarify whether the requirement presumes a leak. Transport Canada commented that the language of proposed § 23.800(g)(2) was not consistent with AC 23.1309–1E. An individual commenter submitted a similar comment. Transport Canada recommended the FAA revise this provision to be consistent with AC 23.1309–1E, thereby changing the qualitative probability to be remote, extremely remote, or extremely improbable.

The FAA agrees the wording of proposed § 23.800(g)(2) was problematic because the term ''improbable'' was associated with quantitative failure rates in former § 23.1309. The FAA did not intend to require an assessment of the probability of a flammable fluid leak or ignition of a flammable fluid leak. The FAA's intent is that reasonable design precautions are used to reduce (i) the likelihood of flammable fluid leaks, (ii) the likelihood of flammable fluid ignition, and (iii) the severity of flammable fluid ignition. The FAA agrees that since the proposed rule would have required ignition to be assumed, it does not make sense to make the hazard improbable ''if'' ignition occurs.

The FAA intended to capture the safety intent of the requirement in former § 23.863. The FAA considered the suggestions for revising proposed § 23.800(g), and is using the text of former § 23.863(a). Former § 23.863(a) was a performance-based requirement and former § 23.863(b) and (c) provided details on how former § 23.863(a) must be addressed. New § 23.2325(g)(2) requires a means to minimize the probability of ignition of the fluids and vapors and the resultant hazard if ignition does occur in each area where flammable fluids or vapors might escape by leakage of a fluid system. ''Minimize'' means to reduce the probability and consequences of occurrence to the extent practical. It does not establish a probabilistic requirement, but rather requires application of sound engineering judgment to use effective means to achieve the safety objective.

[46] Textron cited proposed ''§ 23.2325(a)(2)'', but it appears the commenter intended to refer to § 23.2325(g)(2).

g. Fire Protection in Designated Fire Zones and Adjacent Areas (Proposed § 23.805/Now § 23.2330)

In the NPRM, proposed § 23.805 (now § 23.2330) would have required—

- Flight controls, engine mounts, and other flight structures within or adjacent to designated fire zones be capable of withstanding the effects of a fire;
- Engines inside designated fire zones to remain attached to the airplane in the event of a fire or electrical arcing; and
- Terminals, equipment, and electrical cables, inside designated fire zones, used during emergency procedures, be fire-resistant.

Embraer recommended modifying proposed § 23.805 to change the title from ''Fire protection in designated fire zones'' to ''Fire protection in fire zones and adjacent areas.''

The FAA agrees with the recommendation to add ''and adjacent areas'' to the title for clarification. The FAA notes that § 23.805(a) references flight controls, engine mounts, and other flight structures adjacent to a designated fire zone.

However, ''designated fire zone'' has a particular meaning. Embraer viewed this proposed definition as prescriptive and recommended the FAA use the definition of ''fire zone'' contained in the draft of AC 25.863–1. That definition stated a fire zone means a ''zone that contains a nominal ignition source and may be exposed to a flammable fluid/material as a result of a failure.'' The FAA reviewed the definition of ''fire zone'' in AC 25.863–1 and determined this definition would impose requirements beyond those in the former part 23 regulations.

Embraer also recommended removing the modifying phrase ''inside designated fire zones'' contained in the proposed regulation. Embraer stated that ''former § 23.1181 defined the 'hot' parts of an engine installation is an ignition source and considering that there are fuel, oil, and hydraulic fluids being carried around such areas, they shall be considered a fire zone, and then the term 'designated' would apply, which means that it is not necessary [for] further analysis to define if it is a flammable fluids zone or a fire zone.''

The FAA agrees with Embraer's recommendation and removes the modifying phrase from the first line of the proposed text for § 23.805(b). The FAA will clarify within each requirement if it applies in designated fire zones, or designated fire zones and adjacent areas.

EASA stated that proposed § 23.805(b) reflects current design-specific requirements that should be amended to cover other ''new'' designated fire zones, such as for batteries. Proposed § 23.805(b) would have required engines inside designated fire zones to remain attached to the airplane in the event of a fire or electrical arcing. EASA recommended revising proposed § 23.805(b) to read: ''A fire in a designated fire zone must not preclude continued safe flight and landing''.

The FAA finds EASA's proposal is beyond the scope of the NPRM. The FAA intended proposed § 23.805 to capture the safety intent of former §§ 23.865 and 23.1359(b). Former § 23.865, in part, required engine vibration isolators to incorporate suitable features to ensure the engine is retained if the non-fireproof portions of the vibration isolators deteriorate from the effects of a fire. The FAA finds this requirement is still applicable to engines that use flammable fuels and should be retained. However, the FAA agrees proposed § 23.805(b) reflected current design-specific requirements that would not be applicable to other potential designs that do not use flammable fuels for propulsion. Therefore, the FAA is making this requirement only applicable to engines in designated fire zones. The FAA also withdraws the proposed requirement for engines to remain attached to the airplane in the event of electrical arcing, because the FAA finds that the threat of electrical arcing causing structural failure is addressed adequately in the electrical systems requirements in subpart F.

Embraer commented that the word ''engine'' should be replaced with the phrase ''power unit'' in proposed § 23.805(b). The FAA understands Embraer's rationale, but the FAA's authority to issue TCs refers to ''aircraft engines,'' not power units (49 U.S.C. 44704(a)(1)) so the term ''aircraft engines'' needs to be retained. Therefore, the FAA is not adopting EASA's recommendation in the final rule.

Textron recommended the FAA replaces ''terminals, equipment, and electrical cables'' with the word ''equipment'' in proposed § 23.805(c). Paragraph (c) would have required terminals, equipment, and electrical cables inside designated fire zones, that are used during emergency procedures, be fire resistant. Textron stated that if this provision is supposed to apply to anything in a fire zone that gets used in an emergency, it is potentially misleading.

The FAA disagrees with Textron's comment. The FAA intended proposed § 23.805(c) to capture the safety intent of former § 23.1359(b), which stated ''Electrical cables, terminals, and equipment in designated fire zones that are used during emergency procedures must be fire-resistant.'' Accordingly, the FAA is not making any change to the language proposed in § 23.805(c) (now § 23.2330(c)).

h. Lightning Protection (Proposed § 23.810/Now § 23.2335)

In the NPRM, proposed § 23.810 (now § 23.2335) would have precluded primary structure failure caused by exposure to the direct effects of lightning, that could prevent continued safe flight and landing for airplanes approved for IFR. Proposed § 23.810 would have required airplanes approved only for VFR to achieve lightning protection by following FAA-accepted design practices found in FAA-issued ACs and in FAA-accepted consensus standards.

Air Tractor and Transport Canada commented that ''FAA-accepted design practices'' does not establish a performance standard in proposed § 23.810(b). Air Tractor also noted this proposed regulation would make the ACs required and regulatory. Transport Canada further stated that specifying ''FAA'' in the rule is not conducive to harmonization between authorities and recommended replacing ''FAA-accepted design practices'' with a performance-based requirement in the form of a safety objective.

The FAA agrees that proposed § 23.810(b) is not consistent with the goal to develop performance-based standards and to spur innovation. The FAA recognizes new methods of protecting the airplane from catastrophic effects from lightning may be developed that are not currently FAA-accepted design practices and these methods should be permitted if found acceptable to the FAA.

In light of the comments received for this section, the FAA revisited the goal of proposed § 23.810. The FAA intended to capture the safety intent of the former lightning regulations in former § 23.867. Former § 23.867(a) was a high-level performance-based requirement requiring the airplane to be protected against catastrophic effects from lightning. Former § 23.867(b) and (c) were means of compliance with § 23.867(a). Former § 23.867(b) specified how metallic components must be designed to protect the airplane against catastrophic effects from lightning, while former § 23.867(c) specified how non-metallic components must be designed to protect the airplane from catastrophic effects from lightning. The FAA also intended to establish safety requirements for direct and indirect effects of lightning on all systems and structure in proposed §§ 23.810, 23.930, and 23.1320. Proposed § 23.810 would have addressed protection of structure, proposed § 23.930 would have addressed protection of fuel systems, and proposed § 23.1320 would have addressed protection of electrical and electronic systems. However, upon review, proposed § 23.810 did not address all structure and proposed § 23.1320 did not address all systems and equipment.

The FAA has determined that retaining the language of former § 23.867(a) would more appropriately capture the FAA's intent for § 23.2335 because it applies to the entire airplane including all systems, equipment and structure. Therefore, the FAA revises § 23.2335 to require the airplane to be protected against catastrophic effects from lightning, which is a performance standard. The FAA finds this revision addresses Air Tractor's and Transport Canada's remaining concerns.

The FAA also identified an error in the proposed correlation table in the NPRM. Former § 23.867(b) was correlated with proposed § 23.1320, ''Electrical and electronic system lightning protection'', and not proposed § 23.810, ''Lightning protection of structure''. This reference was incorrect because proposed § 23.1320 did not address all aspects of protecting the airplane against catastrophic effects from lightning for metallic components. The FAA corrected the correlation in the table provided in this final rule.

EASA commented that the requirement of lightning protection of the structure should relate to the type of environment that causes the risk, instead of the type of operation. EASA recommended replacing IFR with instrument meteorological conditions (IMC), and replacing VFR with visual meteorological conditions (VMC).

The FAA agrees with EASA's comment that the requirements for lightning protection should be related to the risk of lightning. Rather than drawing a distinction between IFR and VFR, or IMC and VMC, the language provided in this final rule now reflects a performance-based standard. The standard will be met by an accepted means of compliance. The FAA finds this approach provides greater flexibility to allow development of means of compliance that are appropriate for different types of airplanes and different types of operation depending on the risk of lightning.

6. Subpart E—Powerplant

a. General Discussion

In the NPRM, the FAA proposed substantial changes to former subpart E based on two considerations. First, the FAA stated many of the former regulations could be combined to provide fewer regulations that accomplish the same safety intent. Second, the FAA also stated part 23 overlaps with the requirements in parts 33 and 35.

Textron noted that subpart E appeared to be missing performance requirements for key propulsion aspects. Textron recommended the FAA include rules that address engine controls, powerplant accessories and components, and powerplant instruments and indicators as set forth in former §§ 23.1141, 23.1163, and 23.1225 of appendix E of the Part 23 ARC Report.

The FAA reviewed each requirement mentioned by the commenter and finds those requirements have been addressed in the final rule using less prescriptive language. In most cases several regulations, rather than any single rule, capture the intent of the former regulations referenced by the commenter. Requirements contained in regulations for powerplant installation, airplane level systems, and flightcrew interface combined with more specific requirements found in regulations for powerplant fire protection, instrument markings, control markings, and placards, address the specific requirements noted by the commenter.

An individual commenter stated the FAA's removal of all references to part 33 and part 35 from proposed part 23 was inappropriate. The commenter contended the FAA's conclusion that those references are redundant because the requirements are already addressed during the certification of the engine or propeller is incorrect. The commenter noted that compliance with specific performance standards for engines and propellers is only ensured by requiring a product to be approved to a specific amendment level of part 33 or 35, before it is eligible for installation on a particular airplane. The commenter also noted that engines and propellers approved prior to a specific part 23 amendment level may not have met a specific installation level requirement specified by that amendment. For example, the commenter noted that former § 23.903 required minimum engine ingestion performance by the installation of an engine certified to a specific amendment level of part 33, thereby ensuring that any installed turbine engine had met a minimum performance level mandated by the FAA through that amendment level.

The individual commenter also stated engine and propeller limitations are established during the type certification of the engine or propeller, and that these limitations are required to be included in the TCDS and associated installation manuals. The installer must comply with these limitations. The commenter further implied that, if the installed engine or propeller limitations cannot be complied with, safe operation of the product cannot be ensured. For example, the commenter stated that former §§ 23.1041 through 23.1047 required the engine installation to be designed such that the temperature limitations—established under part 33 for the engine—are maintained in the installed configuration.

The individual commenter also noted that some components of an engine or propeller are approved at both the engine or propeller level and at the airplane level, but that all components require approval at the airplane level. According to the commenter, the approval of the engine or propeller TC can include items such as a propeller reversing system or a turbocharger, and this data can be used for approval of these systems at the airplane level. If an applicant prefers approval at the airplane level only, this commenter noted, the former rule provided a reference to the requirements contained in part 33 or 35, as appropriate. Without the inclusion of these references in proposed part 23, certification may require special conditions.

The commenter recommended the FAA include—

- References to parts 33 and 35 for type certificated engines and propellers being installed and consider the inclusion of similar standards when the installation of non-type certificated engines or propellers are permitted;
- A specific rule stating the powerplant installation design must be such that all installed type certificated engines and propellers remain within their respective approved limitations and installation manual requirements and that a similar provision be included when the installation of non-type certificated engines and propellers is permitted; and
- Reference in the proposal to the applicable provisions of parts 33 and 35 for engines, propellers, and any related components of those products being installed only at the airplane level.

The FAA agrees with the general intent of the commenter. The FAA notes that while some requirements in the former part 23 indeed overlap with those of parts 33 and 35, the FAA did not intend to imply that compliance with those requirements necessary for type certification of an engine or propeller were no longer applicable to the certification of the installed configuration of a type certificated engine or propeller. Historically, TCs have been required for engines and propellers installed in airplanes certificated under part 23 and this rule retains this requirement for all airplanes certificated under part 23, with the exception of level 1 low-speed airplanes.[47] Essentially, this requirement makes the requirements in parts 33 and 35 for type certificated engines and propellers applicable to the certification of airplanes under part 23, because the part 33 and 35 requirements must be met in order to install these engines and propellers on part 23 airplanes. As a result, data used to show compliance for an engine or propeller TC is considered FAA approved, and can be used to show compliance with any applicable part 23 requirement. In many cases, this permits a single showing of compliance such that a re-showing of compliance at the airplane installation level may not be required. Approval of some components, such as propeller controls or turbocharges, have been permitted at the airplane level by referencing the applicable part 33 or 35 requirements and using those requirements as an acceptable means of compliance. This certification approach will continue to remain acceptable.

The FAA does not intend to accept a means of compliance for an engine or propeller installation that would result in a level of safety lower than that set forth in a part 33 or 35 amendment level specifically referenced in former part 23.

Limitations set forth in the approval of an engine or propeller must be maintained in the installation on the part 23 airplane. These operating limitations are established in accordance with §§ 33.7 and 35.5. Installation instructions are provided to the installer in accordance with §§ 33.5 and 35.3. This regulation does not change this approach.

Additionally, the FAA is adding a requirement from existing § 23.901(e) to § 23.2400, requiring installed powerplant components—which include engines and propellers—to meet the FAA-approved component limitations and installation instructions, or be shown not to create a hazard. This requirement will ensure that any operating limitations and installation instructions applicable to the engine or propeller remain applicable to the certification of the airplane.

In the NPRM, an exception permitting the installation of non-type certificated engines and propellers as part of the airplane was proposed for simple airplanes. The proposal mirrors the precedent established for the certification of airplanes under EASA CS–VLA. The rule slightly expands the relief provided by the proposal, and permits the certification of engines as part of the airplane for level 1 low-speed airplanes. This change encompasses the same class of airplanes as originally proposed while removing the restriction that these airplanes be limited to VFR-only operations.[48]

In response to the individual commenter's concerns that the proposal does not require certain engines to meet a specific amendment level of part 33, as set forth in former regulations, and the commenter's specific concern that engine ingestion performance was not specifically addressed, the FAA notes those sections of former subpart E that required compliance with a specific amendment level for an engine installation are addressed in this performance-based rule. The engine ingestion requirements of former § 23.903(a)(2), for example, are addressed by the performance-based requirements of § 23.2400(c). The former rule specified that an applicant must construct and arrange each powerplant installation to account for likely operating conditions including foreign object threats and likely hazards in operation. Although § 23.2400(c) does not refer to a specific requirement or amendment level of part 33, the FAA expects the means of compliance with this regulation will include provisions for certificating engines with acceptable foreign object ingestion performance as required by former § 23.903(a)(2), which may include references to different amendment levels of part 33 where appropriate. Additionally, the FAA

[47] Discussed in the preamble discussion for § 23.2400.

[48] Discussed in the preamble discussion for § 23.2400.

intends to accept part 23 through amendment 23–62, which contained references to specific requirements in part 33, as a means of compliance to the performance-based requirements of this rule. The FAA will only accept a means of compliance for a performance-based regulation that encompasses the safety intent of a former regulation requiring compliance with a particular amendment level of part 33 or 35, if that means of compliance provides a level of safety equivalent to the level of safety found in former part 23.

b. Powerplant Installation and Propeller Installation (Proposed §§ 23.900 and 23.905/Now § 23.2400)

In the NPRM, proposed §§ 23.900 and 23.905 (now § 23.2400) would have clarified, for the purpose of this subpart, that the airplane powerplant installation must include each component necessary for propulsion, affects propulsion safety, or provides auxiliary power to the airplane. Proposed § 23.900 would have required the applicant to construct and arrange each powerplant installation to account for likely hazards in operation and maintenance, and, except for simple airplanes, each aircraft engine would have to be type certificated. Proposed § 23.905 would have retained the requirement that each propeller be type certificated, except for propellers installed on simple airplanes. Proposed § 23.905 would have retained the requirement that each pusher propeller be marked so it is conspicuous under daylight conditions.

EASA commented that design-specific requirements for propeller installations should be covered by proposed § 23.900, not proposed § 23.905.

The FAA adopts the regulatory approach taken by EASA for propeller installation. Under this approach, the FAA includes the requirements for propeller installation within § 23.2400. Specifically, the requirements of proposed § 23.905(a) are addressed by § 23.2400(b), proposed § 23.905(b) are addressed by § 23.2400(c)(3), and proposed § 23.905(c) are addressed by § 23.2400(c)(4). These revisions also clarify that a propeller installation must not deviate from any limitations or installation instructions as required by § 23.2400(e). Addressing propeller installation requirements in the section of the rule that establishes powerplant installation requirements also results in closer harmonization of the rule with EASA's proposed requirements in NPA 2016–05.

The FAA received numerous comments regarding the issue of whether ''power units'' should be certified under part 23 as part of the airplane type certification. The Associations noted the proposed language would allow engine and propellers that meet required standards to be certified as part of the airframe, provided the airplane is certificated as a simple airplane. The commenters contended the ability to certificate these components as part of an airframe should be based on the complexity of the components rather than on the certification or performance levels of the airplane in which they are installed. The commenters supported permitting the certification of engine and propellers that comply with traditional engine and propeller type certification requirements either through the issuance of a standalone TC or through the certification process for the airframe. The commenters also noted since electric propulsion is ''on the threshold of becoming mainstream'', the ability to certify engines and propellers as part of the airframe is critical to the successful and safe integration of that technology.

EASA asserted the need to type certify an engine should be addressed by part 21; therefore, the powerplant either could be type certificated or certified as part of the airplane. EASA noted the type certificate-related design and production controls that are part of the current type certification process are also expected to be applicable for other components such as batteries and converters. EASA stated certification of the engine should not be related to the size or speed of the airplane; therefore, EASA did not support limiting the installation of propulsion systems that are not individually type certificated to airplanes classified as simple airplanes.

Textron noted the purpose of the proposed rule is to enhance the ability to introduce new technology efficiently, and contended that treating each powerplant installation (*e.g.,* electric propulsion) using a unique ELOS finding would not be an effective way to address the issue. Textron recommended either adding the requirements for certifying the power unit as part of the airplane, or changing and including the specific requirements in the industry standard to avoid the need for unique ELOS findings. Additionally, Textron recommended adopting proposed CS 23.500(b), which would not restrict the installation of non-type certificated engines that meet an industry standard to simple level 1 airplanes.

An individual commenter expressed support for the proposal to not require certified engines for ''simple'' airplanes, but suggested expanding the definition of ''simple'' to at least four-seat airplanes with $V_{S0} < 55$kts and permitting IFR operations. The commenter stated certain airplanes should not require a type-certified engine with all of the associated costs, paperwork, and outdated technology. The commenter also noted the requirement for a certified engine in most airplanes precludes the use of electric propulsion in anything but ''simple'' airplanes, since part 33 does not allow for the certification of electric motors. The commenter also suggested revisions to part 33 aimed at realizing the same kind of cost reductions and to allow certain technologies on small airplane engines without requiring full authority digital engine control (FADEC) levels of ''design assurance.'' Additionally, other commenters specifically recommended the proposed regulation be revised to permit all power units installed in airplanes certificated in accordance with part 23 to be type certificated or meet accepted specifications.

Air Tractor questioned whether alternative types of powerplant units would receive a TC specific to that unit ''from within part 23'' and distinct from the airplane in which it is installed. If so, Air Tractor expressed concern this approach would create a series of rules for the purpose of issuing a TC for an unconventional powerplant design and stated part 23 rules should not be applied to the certification of unconventional powerplants. Air Tractor also recommended all engines and propellers be either ''type certified'' or ''possess a type certificate.''

NATCA noted if neither the engine nor the propeller would be required to be type certified when installed on a simple airplane, it is unclear how those products would be approved. Furthermore, NATCA noted by allowing non-certificated engines on simple level 1 airplanes, it was unclear how an airworthiness directive would be issued if an unsafe condition were found to exist on the engine. NATCA also recommended the FAA specify the minimum level of engineering safety certification testing necessary to demonstrate how the engine and propeller for simple airplanes could be approved, if they were not type certificated.

The FAA notes the recommendation to expand the scope of proposed § 23.900 to permit all engines and propellers installed in airplanes certificated under part 23 to be certificated under the TC of the airplane in which the engine or propeller is installed. The FAA evaluated the commenters' recommendations to base the need for an engine or propeller TC on the complexity of the powerplant system rather than on the complexity of the airplane. The FAA has established standards in parts 33 and 35 that ensure an acceptable level of safety and adequate standardization for certification of all aircraft engines and propellers. Certification of an engine or propeller with the airplane instead of requiring a separate engine or propeller TC essentially requires a showing of compliance equivalent to the airworthiness standards contained in part 33 for aircraft engines or part 35 for propellers. The FAA finds that placing these requirements in part 23 and using an accepted standard as a means of compliance (with the limited exception for airplanes that can be certificated as level 1 low speed), would not significantly reduce the regulatory burden on engine and propeller manufacturers. Additionally, at this time the FAA does not want to place the administrative responsibility for the certification of all engines and propellers installed in part 23 airplanes on two separate Aircraft Certification Directorates, with the ensuing risks of delaying implementation of the significant changes set forth in this final rule and creating the possibility of differing interpretations or regulatory requirements. The FAA is, however, open to revisit this option in the future. If, for example, actual certifications or advances in technology indicate that expanding this approach to include larger airplanes would provide a manufacturer certification efficiencies, the FAA would be willing to consider this expanded approach.

The FAA notes the Engine and Propeller Directorate (EPD) has been responsible for establishing standards for engines and propellers and continues to remain the best source for developing policy and guidance for determining compliance with those standards, to include standards for the certification of electric engines. While many commenters believe the introduction of electric engines is imminent, and shifting the responsibility for the certification of all engines and propellers installed in airplanes that meet the airworthiness standards of part 23 from the EPD to the Small Airplane Directorate (SAD) would facilitate certification of those engines, the FAA finds such action could delay both the certification of electric engines and other more conventional engine designs. Such a realignment of certification responsibilities would increase the burden on both applicants and the FAA as the involvement of two directorates would be required during the certification process for aircraft engines and propellers. Additionally, certification of an engine or propeller with the airplane increases the burden of showing compliance when the product is installed in multiple airplane models, as compliance with the basic engine and propeller requirements must be shown for each specific airplane model installation.

Accordingly, the FAA retains the basic approach discussed in the NPRM requiring that all engines and propellers require a separate TC except for those engines and propellers installed in airplanes that can be certificated as level 1 low speed. Those standards permit the certification of the engine and propeller with the airplane and do not require those products possess a separate TC. However, the FAA has slightly revised the proposal to expand the approval of aircraft engines and propellers under the airplane TC from simple airplanes, as originally proposed to all level 1, low-speed airplanes. Section 23.2400 will allow level 1 airplanes with engines not separately type certificated to be used for both VFR and IFR operations. Additionally, the FAA has added language that indicates an acceptable standard for the certification of an engine or propeller, contains airworthiness criteria the Administrator has found appropriate and applicable to the specific design and intended use of the engine or propeller, and provides a level of safety acceptable to the FAA. This language mirrors the language contained in former § 21.17(f)(1) for primary category aircraft whose engines and propellers are certificated under the airplane TC. This approach allows some streamlining for the engine approval based on a specific installation verses the generic engine TC which might be more thorough to account for the possible installation variables. The FAA's concept of the safety continuum in this context bases certification requirements on potential risk and considers the number of potential passengers and the performance of the airplane, rather than the complexity of the engine or propeller installed.

As future aircraft engines and energy sources become available, both SAD and EPD may utilize ELOS findings, special conditions, and exemptions to establish appropriate certification standards. These processes will assist the agency in developing standards to address new and novel technology, and can be applied regardless of whether the design approval for an engine or propeller occurs as the part of the airplane or as a separate engine or propeller approval. Additionally, in response to those commenters concerned with the approval of electric aircraft engines, part 33 airworthiness standards will be developed to address those products as they are presented to the FAA for type certification. Currently those standards do not exist in part 33, therefore, special conditions will likely be used to establish standards for the issuance of a TC before those standards have been promulgated.

In response to commenters' concerns related to uncertainty as to what minimum level of testing would be required for approval of engines not separately type certificated and how potential airworthiness concerns would be addressed for those products, the FAA expects any engine or propeller will meet standards that provide a level of safety at least equivalent to that achieved with the certification of those products today. The FAA may accept or reject any means of compliance proposed for acceptance and will only accept a means of compliance that ensures the design meets the performance standards set forth in part 23. An applicant intending to use this approach would have to re-establish compliance for the specific non-type certificated product in accordance with an applicable FAA accepted standard under the TC of each airplane model in which the product is installed rather than only once as would occur with an engine or propeller TC. As stated earlier, this provision permitting the type certification of both the engine and propeller under the airplane TC is limited to level 1 low-speed airplanes. Any unsafe condition related to ''non-TC'd'' engines or propellers will be addressed by issuance of an airworthiness directive requiring corrective action against the airplane TC under which those engines or propellers have been approved.

Textron questioned whether proposed § 23.900(c) includes auxiliary power units, as those units are not type certificated, but instead meet a TSO. Textron requested proposed § 23.900(c) be clarified to indicate it would apply to each aircraft power unit ''used for propulsive power.'' Embraer, however, suggested including an alternate means of compliance in proposed § 23.900(c) for electric engines, auxiliary power units, and other alternate sources of propulsion.

The FAA revises the rule to ensure APUs may be approved under the airplane TC in accordance with a standard accepted by the FAA, such as a TSO. The FAA does not intend to require a TC for these units.

The Associations stated the proposal should include provisions to address propulsion-specific hazards. The provisions include environmental issues unique to propulsion systems; ingestion of foreign object debris (FOD); and the dangers of propulsion aspects to ground personnel. To address their concerns, the commenters recommended revising proposed § 23.900 to specifically require an applicant to account for all likely operating and environmental conditions, including foreign objects threats; sufficient clearance of moving parts to other airplane parts or their surroundings; and likely hazards in operation, including hazards to ground personnel.

The FAA agrees with the commenters and revises the rule to specifically require all likely operating conditions (which include environmental conditions), including foreign object threats; sufficient clearance of moving parts to other airplane parts and their surroundings; and likely hazards in operation, including hazards to ground personnel are accounted for in each powerplant installation. Proposed § 23.900(b) referred to these conditions as ''likely hazards in operation and maintenance,'' but the FAA finds that specifically enumerating them will facilitate development of acceptable means of compliance. The FAA also notes that former subpart E required that applicants address these conditions.

To ensure compatibility between the airplanes and the power unit design, as well as the safe operation of the power unit, ANAC recommended including language, which would require the powerplant installation comply with the limitations and installation instructions provided by the power unit manufacturer. The Associations requested the proposed section include additional requirements specifying the installation of powerplant components that deviate from the component limitations or installation instructions be safe and applicable powerplant installations account for vibration and fatigue.

The FAA agrees with the commenters' intent to ensure the safe operation of the powerplant and has added paragraph (e) to § 23.2400 to specifically require powerplant components comply with their component limitations and installation instructions or be shown not to create a hazard. This requirement applies to the engine, propeller, and any other components of the powerplant installation. The rule is also revised to require powerplant installations account for vibration and fatigue. The FAA notes component limitations and an installation manual should be included as part of any powerplant installation. The evaluation of the powerplant installation should also include an evaluation of propeller vibration and compliance with proposed installation manual limits, as the installed propeller is a component of the powerplant installation.

Textron stated proposed § 23.900 does not address automatic power reserve (APR) systems. Textron recommended revising proposed § 23.900 based upon proposed CS 23.500. Textron also suggested including specific language from appendix E from the final Part 23 ARC Report, which states that an APR system that automatically advances the power or thrust on the operating engine(s), when any engine fails during takeoff, must comply with the applicable requirements of the subpart. The FAA notes proposed § 23.915 addressed the requirements for APR systems referenced by the commenter and the FAA adopted these requirements in § 23.2415 of this rule.

Textron contended the proposed rule language does not include critical items from current part 23 or redefines current requirements. For instance, Textron noted proposed § 23.900(b) appears to change the current requirement that the powerplant installation be accessible for preflight inspection and maintenance and adds a hazard assessment requirement. Textron recommended revising proposed § 23.900(b) to state each powerplant installation must ensure safe operation and be accessible for preflight inspection and maintenance.

The FAA has determined the performance-based regulations set forth in the proposal, as revised by the changes made in this rule, address all critical items in current part 23. With regard to Textron's specific comments, the FAA did not intend to remove the requirement for the powerplant installation to be accessible for preflight inspection or require a new hazard assessment. The FAA intends that § 23.2400(c) capture the current requirement that the powerplant installation be accessible for preflight inspection. Likely hazards include those that could result from lack of adequate preflight or maintenance, which includes inspection. Additionally, the regulation has not introduced a requirement to complete any hazard assessments not required under current regulations.

An individual commenter noted the proposed rules in subpart E only appear to address a design review that considers failures and hazards. The commenter elaborated by stating that unlike the current rules, the proposed rules do not require a design review for proper operation in the normal non-failed condition. The commenter stated this change is not discussed in the NPRM and appears to leave gaps in the traditional certification effort where the airplane is certified to operate properly within the approved operating envelope. The commenter recommended including an additional requirement to ensure all powerplant components and systems remain within all limitations and function properly when operated within the approved airplane operating envelope.

The FAA agrees the proposed regulatory language was not sufficiently clear and revises proposed § 23.900 (now § 23.2400) to clarify the powerplant installation must be constructed and arranged to account for likely operating conditions, likely hazards, and all component limitations are maintained or otherwise shown to not create a hazard throughout the approved operating envelope.

Textron noted proposed § 23.900(b) should require not just powerplants, but rather all systems, and particularly those installed in future airplanes, to account for likely hazards in operation and maintenance. Accordingly, Textron recommended removing the specific provisions of the proposal referring to powerplants from proposed § 23.900 and revising proposed § 23.1305 to address all systems.

While the FAA agrees all systems should be designed to account for likely hazards, the FAA notes powerplant installations have unique requirements that may not directly apply or would be burdensome when applied to the design of other systems. Accordingly, the FAA is not expanding the applicability of this specific regulation to address all systems.

In the NPRM, the FAA proposed replacing the term ''engine'' with ''power unit,'' which would have included ''auxiliary power unit'' (APU). This change was intended to ensure new requirements would be clearly applicable to various power sources, such as those using liquid fuel or electrical power, and to other power sources not yet envisioned. After further review, the FAA has determined it would be more appropriate to retain the term ''engine'' in the final rule because ''engine'' is used throughout 14 CFR, TCs are specifically issued for aircraft engines, and the term ''aircraft engine'' is specifically defined in 49 U.S.C. 40102 and 14 CFR 1.1. The operating regulations also refer to required engine indicators and engine maintenance, and Airworthiness Directives issued for aircraft engines, as opposed to ''power units.'' Introducing the term ''power unit'' could lead to unnecessary confusion and potential disagreements regarding the applicability of specific regulatory requirements. Additionally, the FAA notes the term ''engine'' includes any device that converts any form of energy into force that propels an airplane. The FAA finds the term ''engine'' can be used to address both current and new sources of propulsion and accordingly has replaced the term ''power unit'' with ''engine'', or ''auxiliary power unit'', where appropriate in this rule. The intent of this change is to clarify the requirements of this subpart are applicable to any device that propels an airplane regardless of its source of power and to avoid potential conflicts with both the statutory and regulatory definitions of the term ''aircraft engine.''

The FAA has also added paragraph (d) to address the hazardous accumulation of fluids, vapors or gases. This paragraph is virtually identical to proposed CS 23.2430(b), ''Energy storage and distribution system hazard mitigation,'' and corresponds to the safety intent of former § 23.1193(b) that addressed cowling drainage. It is designed to ensure the hazards resulting from the accumulation of these materials can be isolated from the airplane and personnel compartments and these materials can be either safely contained or discharged.

c. Powerplant Installation Hazard Assessment (Proposed § 23.910/Now § 23.2410)

In the NPRM, proposed § 23.910 (now § 23.2410) would have required an applicant to assess each powerplant separately and in relation to other airplane systems and installations to show that a failure of any powerplant system component or accessory will not—

• Prevent continued safe flight and landing;

• Cause serious injury that may be avoided; and

• Require immediate action by crewmembers for continued operation of any remaining powerplant system.

Several commenters expressed concern that proposed § 23.910 would have been impossible to meet for certain existing airplane designs. The FAA response to these comments is below.

The Associations stated that proposed § 23.910 should apply to the ''likely'' failure of powerplant systems. The commenters asserted that applying the proposed requirements to any failure would require complete redundancy, which cannot be achieved in traditional single-engine airplanes and smaller twin-engine airplanes. The commenters contended the slower stall speeds and higher levels of crashworthiness in the designs of these airplanes mitigate all but ''unlikely'' powerplant failures. These commenters recommended the FAA require the applicant to assess each powerplant separately and in relation to other airplane systems and installations to show that ''hazards resulting from a likely failure of any powerplant system component or accessory are minimized.''

Textron stated proposed § 23.910 was ''too high level'' and would not have established adequate performance-based requirements for an applicant to demonstrate compliance. As an example, Textron contended that proposed § 23.910(a) would have been an impossible requirement to meet, especially for a single-engine airplane. Textron recommended replacing the language of proposed § 23.910 with language from EASA CS 23.510, ''Powerplant Hazard Mitigation''

EASA, Garmin, and Air Tractor stated the requirements of proposed § 23.910(a) would have been applicable to single-engine airplane certification. Garmin stated, however, that a single-engine airplane cannot meet proposed § 23.910(a) unless the FAA clarifies the loss of the thrust from the propulsion unit will not necessarily prevent continued safe flight and landing. Garmin recommended the FAA either revise proposed § 23.910 or revise the definition of ''continued safe flight and landing'' to allow for failure of the engine or propeller in a single-engine airplane.

Air Tractor stated proposed § 23.910(a) would have ruled out the certification of single-engine airplanes. Air Tractor observed, for example, that under the proposed rule, if a fuel line or hose were considered a ''system component,'' then the failure of one fuel line that feeds the engine would certainly result in an engine failure. Air Tractor noted that there may be similarly insurmountable scenarios involving the controls for an engine. Air Tractor stressed the need for clearly-written rules to prevent unforeseen interpretations of provisions that have the potential to make the design and certification of light airplanes much more difficult than previously, or even impossible.

An individual commenter stated that proposed § 23.910(a) appears to be a derivation of former § 23.903(c)(1), which only applied to multiengine installations and only required continued safe operation of the remaining engines. The commenter asserted the proposed rule would have increased the requirement from ''ensuring continued safe operation of the remaining engines'' to ''ensuring continued safe flight and landing of the airplane.'' The commenter further noted proposed § 23.910 would have applied to single-engine airplanes with no justification and could have resulted in elimination of some airplanes from certification, such as large single-engine or multiengine airplanes where rotor non-containment effects on the remaining engine cannot be eliminated. The commenter also stated the proposed rule would have made ''continued safe flight and landing'' a part of the regulation, where previously it only existed in guidance material. The commenter indicated this may make it difficult to provide a conditional definition of the term. To ensure safe design of multiengine airplanes, the commenter recommended using the wording of former § 23.903(c)(1) rather than requiring a system safety approach to powerplant installation that does not permit single failures. The commenter also recommended using the term ''minimize'' when specifying the evaluation criteria for powerplant installations. The commenter noted that term has been used for many years, is well understood, and best describes the regulatory intent for those powerplant unique systems where a single failure cannot be reasonably eliminated from the design.

Another individual commenter said compliance with proposed § 23.290 would neither be practical nor possible in all situations that may result in a forced landing; therefore, the proposed rule should not include a requirement for completely eliminating hazards, which the commenter asserted is not achievable. The commenter asserted that replacing a standard based on minimization with an absolute standard is not an acceptable alternative. Ultimately, the commenter recommended revising the definition of ''continued safe flight and landing'' to allow for catastrophic outcomes of forced landings, and to either maintain the minimization standard, or withdraw the requirement. The commenter further noted that compliance with the proposed requirement of absolute prevention of hazards would be impractical or impossible for many conventional multiengine airplane configurations regarding rotor non-containment. This is also true for all single-engine and many multiengine airplanes regarding a propeller blade loss—especially since the proposed rule applies to uncontained engine failure and engine case burn-through failures for which former § 23.903(b)(1) only required the design to minimize the hazard.

Embraer observed that for turbine or reciprocating engine rotor failure and/or burn-through events, there is no way to eliminate all the risks that will prevent continued safe flight and landing. Embraer recommended revising the language to clarify certain proposed provisions and to add additional provisions that would require applicants to show operating limitations, which may adversely affect rotating component structural integrity that would not be exceeded in service. Embraer's revisions would require design precautions to minimize hazards to the airplane in the event of an uncontained engine rotor or rotating component failure or a fire originating within the engine, which burns through the engine case.

The FAA concurs with the commenters' recommendations to revise proposed § 23.910 to make its requirements only applicable to likely failures and to permit minimization of certain hazards, which could prevent continued safe flight and landing. The FAA notes the inclusion of the term ''likely'' in the requirement for the applicant to address hazards resulting from failures is intended to place reasonable and prudent bounds on the scope of analysis necessary to meet the requirement and not to require consideration of all possible failures, however remote. The scope of this analysis will be set forth in accepted means of compliance for this regulation.

In response to commenters' concerns that the term ''minimize'', or the philosophy encompassed by the use of the term, will be included in the rule, the FAA notes that the term ''minimize'' has been included in § 23.2410(a) to permit the applicant to address those hazards, which may prevent continued safe flight and landing of an airplane, that cannot reasonably be eliminated. The FAA will consider incorporation by an applicant of all practical design precautions, which minimize hazards to the airplane, associated with a particular failure acceptable in complying with this regulation. The FAA has historically accepted this compliance approach when a minimization of hazards has been required. This approach provides a simple means to continuously improve airplane safety as new technologies and design approaches evolve. It also permits acceptance of existing designs that cannot reasonably eliminate hazards resulting from certain failures, even if accepted design precautions have been incorporated into the airplane's design. Such failures could include rotor non-containment, engine case burn-through, and engine failures on single-engine airplane. This change specifically addresses a concern expressed by all commenters that the proposed regulation would make it impossible for an applicant to show compliance with the regulation for many existing airplane designs. Additionally, the rule will continue to permit the use of simple parts, such as fuel lines and control cables, in airplane designs. The FAA has traditionally considered their use acceptable without requiring redundancy where it is neither practical nor likely that a failure of the component would occur. The FAA's revisions to the proposed regulation account for the normal use of these types of simple components.

In response to the commenter who noted the term ''continued safe flight and landing'' in proposed § 23.910(a) appears to be based on former § 23.903(c), which only applied to multi-engine airplanes, the FAA agrees that proposed § 23.910(a) does not properly address certain failures on single-engine airplanes. The FAA believes the revisions discussed above addresses the individual's concerns.

Textron also recommended the FAA withdraw proposed § 23.910, as its subject area overlaps with proposed § 23.1315 (now § 23.2510).

The FAA revises proposed § 23.910 to clarify that any failure resulting in the loss of a single powerplant on an airplane with multiple powerplants cannot result in the failure of other powerplants unless those failures cannot be reasonably eliminated, in which case the hazards must be minimized. So, while § 23.2510 does apply to all powerplant systems, the FAA notes § 23.2410 includes an exception to the general requirement of § 23.2510 to account for certain powerplant failures that may prevent continued safe flight and landing or for which use of a traditional system safety compliance approach may not be appropriate. Examples of such failures include engine rotor non-containment and fire. Therefore, the FAA does not adopt Textron's recommendation to withdraw proposed § 23.910.

Garmin commented that proposed § 23.910(b) seemed highly subjective and recommended eliminating paragraph (b).

The FAA notes § 23.2410(b) requires consideration of failures affecting passenger safety such as a fan disconnect on fuselage embedded engines or exhaust heat exchanger failures that may allow hazardous fumes to enter the occupant compartment. The FAA finds withdrawing paragraph (b) would eliminate the requirement for an applicant to assess potential causes of serious injury to airplane occupants. Additionally, it serves as the underlying requirement for the development of a more-detailed means of compliance. Therefore, the FAA adopts the language in § 23.2410(b) as proposed.

ANAC observed that there is no requirement in proposed § 23.910 to ensure powerplant-driven components, necessary for airplane operation, are suitable for installation in airplanes certificated under part 23, and the powerplant installation requirement in proposed § 23.900 (now § 23.2400) is related only to components that affect propulsion safety. ANAC noted the rule does not capture the design precautions established in the former §§ 23.933 and 23.1155. The commenter also asserted that while proposed § 23.910 addresses hazard mitigation in the event of powerplant systems failure, compliance with proposed § 23.910 for turbine engines would be directly related to protection against inadvertent thrust reverser deployment.

The FAA notes ANAC's concerns; however, as discussed in the preamble for § 23.2400, the FAA has added paragraph (e) to § 23.2400 to address powerplant component installation. Additionally, the FAA addresses the design precautions of former §§ 23.933 and 23.1155, which provided reversing system requirements for turbojets, turbofans, and propellers, in the performance-based requirements contained in § 23.2420, ''Reversing systems'' (proposed as § 23.920).

d. Automatic Power or Thrust Control Systems (Proposed § 23.915/Now § 23.2405

In the NPRM, proposed § 23.915 (now § 23.2405) would have required a power or thrust augmentation system that automatically controls the power or thrust on the operating powerplant to provide an indication to the flightcrew when the system is operating, provide a means for the pilot to deactivate the automatic functions, and prevent inadvertent deactivation.

Textron commented the requirements of proposed § 23.915 could easily be addressed by revising proposed § 23.900 to state that state an automatic power reserve (APR) system that automatically advances the power or thrust on the operating engine(s), when any engine fails during takeoff, must comply with the applicable requirements of the subpart. Textron noted that this language is included in Appendix E of the Part 23 ARC Report. Also, Textron recommended deleting the prescriptive requirement in proposed § 23.915(a) for the system to provide an indication that it is operating, stating that such a requirement and other high level requirements are redundant.

The FAA finds the adoption of the proposed Part 23 ARC language, as recommended by Textron, would limit the scope of this rule to existing APR type systems. The FAA also finds the intent of the ARC language is better captured in this rule, which can apply to a wider range of potential future automatic power or thrust control systems. The FAA partially agrees with the commenter's request to remove the requirement for annunciation from proposed § 23.915(a). Although the proposal did not specifically state there must be an annunciation of the system's status, it did require the system to provide an indication of the status. The proposal has been revised to require a means to indicate the system is in an operating condition. The FAA finds this revision will provide applicants with more flexibility in designing a system to provide the flightcrew with information regarding the operational status of this critical safety system.

ANAC stated the proposed requirements of this section are too prescriptive and the requirements of proposed §§ 23.1310, 23.1500, and 23.910, which address system reliability, status monitoring, flightcrew interface, and warning indications, provide equivalent requirements that eliminate the need for a specific regulation to address APR systems.

The FAA does not find the provisions of proposed § 23.915 are adequately addressed by the requirements in proposed § 23.900. The requirements in § 23.2405 (proposed § 23.915) provide additional specific requirements the FAA considers necessary for the certification of APR systems in airplanes. The FAA does not find the requirements of § 23.2400 (proposed § 23.900) alone would adequately address the requirements necessary for approval of an automatic power control system. The specific requirements in the rule for the system to provide indication to the flightcrew that it is operating are necessary given the critical nature of both existing and future APR systems that may vary thrust or power to provide airplane control during the failure of an engine. In response to ANAC's comment that § 23.915 could be replaced with a more general rule covering system reliability, crew interface, monitoring, and warning, the FAA finds attempting to address too many systems under a general system safety requirement may result in the excessive application of non-standard performance requirements across the industry. Accordingly, for systems where basic performance requirements can be established, without requiring specific knowledge of the system's design, those requirements will be contained in a specific rule. This concept is further discussed under § 23.2420.

EASA suggested the FAA address auto power control systems and reverser systems (proposed §§ 23.915 and 23.920) in a single requirement that would address other systems such as those that use asymmetric thrust to provide directional control. EASA recommended changing the title of the proposed section to ''Propulsion Augmentation Systems'' to ensure systems that augment propulsion in any direction (drag, thrust, direction, lift) are addressed.

The FAA notes the basic performance requirements for automatic power control systems are different from those required for reverser systems. Additionally, the FAA also notes adopting the term ''augmentation'' implies that only a system's use of additional thrust or power would be addressed, whereas systems are envisioned that may also reduce power on an operating propulsion system or use aerodynamic means to respond to power or thrust abnormalities. The FAA considers an automatic power or thrust control system to be a system that automatically intervenes and provides direct or modified control to each engine, leaving the pilot indirectly in control or possibly not in control for an automatic recovery type function. Reversing systems simply change the direction of thrust or power at the direct control of the pilot. As these systems are significantly different, the FAA has determined it is necessary to retain a specific section for both automatic power or thrust control systems and reversing systems.

The FAA reviewed the draft language of CS 23.2405, Propulsion augmentation systems, and found it directly applicable to automatic power or thrust control systems. Its provisions also address many of the commenters' concerns, especially with respect to the certification of airplanes with advanced automatic control systems. This language is consistent with, but less prescriptive than, the requirements of former appendix H to part 23. Accordingly, the FAA revises proposed § 23.915 by adopting the language from CS 23.2405(b) through (e) in § 23.2405(a) through (d).

Textron noted it was unclear if the proposed rule was attempting to address ''auto throttle'' applications exclusively.

The FAA did not intend proposed § 23.915 to address autothrottle or autothrust systems unless the system has the capability to command a change to power or thrust that is not directly commanded by movement of the primary power setting control. Such a system might vary power on multiple powerplants to maintain level flight or add thrust beyond that commanded by the throttle when an engine failure is detected.

Garmin and the Associations suggested eliminating proposed § 23.915(b). Garmin stated that emerging technology may include systems that have sufficient design integrity and provide enough safety benefit that permitting deactivation as required by proposed § 23.915(b) could have the unintended effect of reducing safety. The Associations noted in the event the automatic power control systems of less reliability are used, compliance with proposed § 23.910 should result in designs that achieve the risk mitigations intended by the requirements of proposed § 23.915(b).

The FAA agrees that requiring a means for a pilot to deactivate the automatic function may have an adverse effect on safety. The FAA also agrees emerging technology may result in the development of a system with sufficient integrity the flightcrew does not directly control the thrust of each engine, but rather the power control system takes commands from the flightcrew and automatically controls each engine to execute that command, in both normal conditions and in the event of a failure of an engine. Accordingly, the FAA revises the rule to account for the possibility of a broader range of automatic power or thrust control systems and has removed the requirement for pilot deactivation of the automatic function of these systems where a system failure is shown to be extremely remote. The type of system that would have this level of authority is envisioned to be similar to an automated flight control or fly-by-wire system, and an applicant would be expected to show the system has sufficient design integrity to meet this standard. To provide applicants with greater design flexibility, the FAA also revises the proposal to require the flightcrew to be able to override, rather than deactivate systems with lower design integrity. It is intended this requirement will apply to those systems whose failure can be reasonably detected by the flightcrew and for which overriding the automatic function would not have an adverse effect on safety. Such a situation typically exists with traditional automatic power reserve systems.

ANAC suggested the requirement to maintain the maximum thrust/power increment limit be specifically retained in the regulation and not serve as a possible means of compliance. ANAC believes that although it is arbitrary, the 10 percent limit for the APR is considered in the current regulation to be a straightforward and acceptable decrement from a safety standpoint in limiting both runway critical takeoffs and degradation of all-engine climb performance factors that are not addressed by former part 23 Appendix H, paragraphs H23.4(b) and (c).

The FAA notes any automatic power or thrust control system will be required to meet all applicable regulations including § 23.2415, which requires that failures that would prevent continued safe flight not result from a single failure or from a likely combination of failures. In addition, the FAA notes that takeoff performance is determined considering a critical loss of thrust. Although the 10 percent value referred to by ANAC may be considered an arbitrary limit on the additional thrust that can be provided by an APR system, the FAA considers it unlikely an APR design would be proposed that reserves a significant amount of thrust for use only in the event of an engine failure during takeoff. Yet given the broader scope of this rule, limiting automatic power control thrust to 10 percent may not realistically permit system designs intended to augment lift, control, or stability through the propulsion system. Therefore, the FAA has decided not to include the 10 percent limit in the rule.

Kestrel questioned whether the proposed section would permit alternate automatic power control systems (such as those without thrust lever drivers) that could meet the intent of proposed § 23.1500 (now § 23.2600) without an ELOS finding or an issue paper. Kestrel noted former § 23.779 requires commanded engine thrust and actual engine thrust agree, which the commenter said has historically been accomplished by the thrust levers being mechanically driven to the actual engine thrust position.

The FAA notes that § 23.2600 does not specifically require a throttle lever, only powerplant controls. Therefore, if a design were proposed that allowed a qualified flightcrew member to perform all tasks associated with the intended powerplant control functions, an ELOS finding would not likely be required to obtain approval of that automatic power control system.

NJASAP supported the language of proposed § 23.915 and noted automatic power control system technology will be available to more airplanes in lower certification categories in the not-too-distant future.

e. Reversing Systems (Proposed § 23.920/Now § 23.2420)

In the NPRM, proposed § 23.920 (now § 23.2420) would have required an airplane to be capable of continued safe flight and landing under any available reversing system setting.

Textron stated the proposed language is too ''high-level'' and does not provide adequate performance-based requirements for an applicant to show compliance with the rule. Textron also stated the rule was ''a bit severe'' and noted the rule could be interpreted to mean that a single- or multiengine turboprop may now need a reverser lock out system for flight. Textron also claimed the flight testing required to demonstrate compliance with the proposed requirement may be complicated and dangerous. To address its concerns, Textron recommended using the language from CS 23.505.

Air Tractor commented that it seems impossible to expect an airplane to be capable of safe flight and landing with application of full reverse thrust. Air Tractor suggested the proposed language expected the airplane to ''know'' the difference between a pilot command for reverse thrust when the airplane is on the ground versus when it is in air, and to overrule the pilot command if the airplane is still flying. Air Tractor observed that while this might be an easy control issue when combined with a squat switch, many airplanes with spring steel fixed landing gear do not have squat switches. Air Tractor also noted that it has not been a safety issue to have reverse thrust capability on certain types of single-engine turboprop airplanes, all of which employ multiple means to prevent inadvertent selection of the reverse range and warn when that range is selected.

The Associations noted the proposed rule could be misconstrued to indicate the FAA will no longer permit throttle gates, which are traditionally used on turboprop designs. The commenters contended this would necessitate the development of weight on wheels lockouts and other complex designs that were not required by the former rule, and for which there is no measurable safety data to indicate this was an area of safety concern. The commenters recommended revising the rule to state the airplane must be capable of safe flight and landing under any ''easily selectable'' reversing system setting, rather than ''any available'' reversing system setting.

ICON asked for clarification as to whether proposed § 23.920 was intended to mean that if a reversible pitch setting exists on a propeller, an airplane must be able to continue flight even with selection of full reverse pitch. ICON also believed the proposed rule could be interpreted to require a demonstration of safe flight and landing at full reverse power.

The FAA notes that numerous commenters expressed concern with the proposed requirement that the airplane must be capable of continued safe flight and landing under any available reversing system setting. The FAA recognizes this language did not account for many airplane designs that do not incorporate a system that detects when the airplane is on the ground, which can be used to lockout or prevent manual inflight reversal. Additionally, the FAA recognizes the proposed rule did not provide a basic performance requirement to ensure safe operation of the reverser system under normal operating conditions, and the airplane is capable of continued safe flight and landing after failures of the reversing system.

As explained in the NPRM, proposed § 23.920 (now § 23.2420) was intended to capture the safety intent of former § 23.933(a) and (b). Therefore, given the variety of the commenters' concerns, the FAA revises proposed § 23.920 based on former § 23.933 to address the comments. The FAA intends § 23.2420 to address the requirements for propeller, turbojet, and turbofan reversing systems specified in former § 23.933. Section 23.2420 now requires each reversing system to be designed so that the airplane is capable of continued safe flight and landing after any single failure, likely combination of failures, or malfunction of the reversing system. This rule accounts for existing reversing system designs that use a mechanical throttle gate to prevent inadvertent in-flight reversing system operation that could result in an unsafe condition. For turbofan or turbojet engine reversing systems intended for ground use only, the FAA notes that a reverser lock out system for flight is not specifically required by the rule. However, the FAA expects that in the event of an inflight reverser deployment, the engine will revert to idle thrust, and the reverser can be restowed as required by former § 23.933(a)(1). The FAA also notes that § 23.2420 should result in the inclusion of these features in airplane designs, as the FAA finds they are currently the only likely means to prevent the occurrence of an unsafe condition and permit continued safe flight and landing after a failure resulting in a reverser deployment in flight. In addition to basing the revisions to the proposed rule on former § 23.933(a)(1) and (b) for ground use only reversing systems, the

FAA has included in § 23.2420(a) the requirement from former § 23.933(a)(2) for reversing systems intended for use in-flight that no unsafe condition result during normal operation. The FAA finds this action responds to commenters' concerns and will readily permit future approval of systems intended for use in-flight, which incorporate new technology.

Regarding Textron's recommendation that the FAA adopt requirements for reversing systems proposed by EASA in CS 23.505, proposed CS 23.505 combines requirements for reverser systems, thrust augmentation systems, and automatic power controls in a single regulation. For the reasons discussed in responding to this comment in the context of § 23.2405, the FAA determines the requirements for a reversing system should remain separate from those for thrust augmentation or automatic power or thrust control systems (referred to as automatic power reserve systems in former regulations), and that the basic performance requirements for these systems are significantly different.

Additionally, § 23.2405, ''Automatic power or thrust control systems,'' applies to future systems that may automatically adjust thrust to manage airplane control and stability. Such a system might operate upon a single command from the flightcrew and automatically manage multiple powerplants to perform a requested action. For this type of system, in-flight reversing of a particular propulsion unit may occur (as commanded by a flight management system) even though the flightcrew may not have specifically requested application of reverse thrust. For certification of this type of system as part of an airplane's design, the FAA envisions the requirements of both §§ 23.2420 and 23.2405 will apply.

Both Embraer and Garmin expressed concern the proposed requirement would not permit the use of a system safety approach for a reverser system under certain conditions that may prevent continued safe flight and landing, as long as those conditions are shown to be extremely improbable. Embraer recommended replacing the phrase ''under any available reversing system setting'' in proposed § 23.920 with the phrase ''at normal operating conditions and the failures not shown to be extremely improbable.'' Garmin recommended revising the proposed rule to permit the use of a safety analysis to demonstrate that certain conditions, which would potentially prevent safe flight and landing, are extremely improbable.

In response to Garmin's and Embraer's concern, the FAA notes that § 23.2420, as revised, permits the use of a system safety approach for certification of an airplane with a reverser system.

NJASAP believed a thrust reverser must have an override or the ability to emergency stow in the unlikely event of inflight deployment.

The FAA notes NJASAP's recommendation to reintroduce the requirement to stow reversers after inadvertent deployment; however, specifically requiring a system to have the capability to restow a reverser in-flight may limit or prevent the certification of certain acceptable reversing system designs. As noted in Garmin's comment, for a reverser system that cannot be shown to result in safe flight and landing of the airplane after an in-flight deployment, an applicant may include a robust control and monitoring system in its design that could be shown to make an in-flight deployment extremely improbable and not resulting from any single failures. Including this capability could prevent the system from complying with the requirement that no single failure prevent continued safe flight and landing.

f. Powerplant Operational Characteristics (Proposed § 23.925/Now § 23.2425)

In the NPRM, proposed § 23.925 (now § 23.2425) would have required the powerplant to operate at any negative acceleration that may occur during normal and emergency operation within the airplane operating limitations. Proposed § 23.925 would have required the pilot to have the capability to stop and restart the powerplant in flight. Proposed § 23.925 would have also required the airplane to have an independent power source for restarting each powerplant following an in-flight shutdown.

Embraer commented that although the preamble indicated that proposed § 23.925 intended to address the requirements of former § 23.939(a) and (b), proposed § 23.925 did not appear to require evaluation of traditional operational characteristics and did not address the adverse effects evaluation of air inlet distortion, powerplant handling, operating characteristics, and other adverse effects of an installed engine or power unit. Textron and ANAC had similar concerns. Embraer recommended the FAA revise proposed § 23.925(a) to require the powerplant handling and operating characteristics to be investigated in flight to determine that no adverse characteristics are present, to a hazardous degree, during normal and emergency operation within the range of operating limitations of the airplane and of the aircraft power unit. Textron also noted the intent of former § 23.939 was to require demonstration of proper operation of the powerplant, as installed. Textron stated it was inappropriate to claim that the tests necessary to meet part 33 requirements will demonstrate proper operation of the powerplant as installed, which the NPRM preamble seemed to imply. Textron also suggested engine vibration requirements be incorporated into § 23.2425.

Additionally, ANAC stated that proposed § 23.910 addressed hazard mitigation in powerplant failure conditions and proposed § 23.900 addressed ''likely hazards in operation.'' ANAC noted the term ''hazards in operation'' might be construed to mean external threats to the engine from foreign object ingestion or a crosswind, causing confusion for applicants seeking to meet the proposed requirements and making it difficult to accurately interpret proposed § 23.925. To remedy this concern, ANAC recommended that proposed § 23.925 include a requirement for an applicant to demonstrate the proper functioning of the powerplant in normal operation within the range of operating limits of the power unit.

In light of these comments, the FAA revises proposed § 23.925(a) (now § 23.2425(a)) to require the installed powerplant to operate without any hazardous characteristics during normal and emergency operation within the range of operating limitations for the airplane and the engine. The FAA finds this change from what was proposed indicates that evaluation of all traditional operational characteristics required by former regulations is also required by § 23.2425(a). The FAA has added the term ''installed'' before ''powerplant,'' in response to Textron, to clarify that § 23.2425(a) applies to the operation of the powerplant, as installed. The FAA notes if the installation of powerplant components do not remain within established limits, § 23.2400 requires any deviation from the component limitations or installation instructions must be shown to not create a hazard. Additionally, the requirement to evaluate the powerplant installation for vibration and fatigue characteristics is contained in § 23.2400.

Textron also recommended the FAA revise proposed § 23.925(a) to require the powerplant to operate at any condition, including negative acceleration. The Associations suggested the FAA remove the term ''negative acceleration'' from paragraph (a) and replace it with ''acceleration or deceleration.''

In response to Textron and the Associations, the FAA has removed the term ''negative acceleration'' from the regulation because the more general reference to ''normal and emergency operation'' in the revised language includes ''negative acceleration.'' Additionally, the FAA notes that § 23.2400(c) requires an applicant to construct and arrange each powerplant installation to account for likely operating conditions and likely hazards in operation. This requirement addresses all components and systems that comprise the powerplant installation, such as the oil and fuel systems, and establishes a requirement for the applicant to address all likely conditions and hazards, which may not be specifically encountered in the approved operating envelope. The original intent of former § 23.943 was to ensure no hazardous condition resulted when a powerplant or APU is exposed to negative accelerations expected in flight. The FAA finds that § 23.2425(a), together with § 23.2400(c), adequately address this need.

The Associations also submitted comments regarding proposed § 23.925(c), which would have required an airplane have an independent power source for restarting the engine after an in-flight shutdown. These commenters contended the FAA's intent in drafting § 23.925(c) was to ensure that engines can be reliably restarted in flight following an in-flight shutdown. However, these commenters noted while an independent power source may be an adequate solution for some designs, there are many designs for which an independent power source would be inappropriate. For example, the Associations stated that electric propulsion systems may include a single power source that manages many cells, which start and stop in flight, but will not have independent sources of power to restart them. As written, the commenters suggested proposed § 23.925(c) could be interpreted to require that a two-engine airplane needs three batteries for restarting (one main and an independent source for each powerplant). To address these concerns, the commenters recommended the FAA require the airplane to have a ''reliable'' power source, rather than an ''independent'' power source.

Textron, Garmin, and an individual commenter had similar concerns regarding proposed § 23.925(c). Garmin recommended either withdrawing proposed § 23.925(c) or clarifying its intent. Textron commented that proposed§ 23.925(c) was ''too high level'' and did not provide adequate performance-based requirements for an applicant to demonstrate compliance. Textron recommended the FAA revise proposed § 23.925(c) based upon language contained in appendix E of the ARC's final report.'' The individual commenter noted that proposed § 23.925(c) would appear to require multiengine airplanes to have multiple and possibly duplicate electronic distribution systems for in-flight restarts by battery power. The commenter suspected this was an unintended expansion of the requirements of former §§ 23.903(g) and (or alternatively) § 23.1165. The commenter stated this unintended consequence would impose cost and weight penalties beyond former part 23 requirements, which the commenter maintained were not addressed in the regulatory analysis or the preamble to proposed § 23.925(c), or otherwise justified by service experience. The individual commenter recommended the FAA either withdraw proposed § 23.925(c) or clarify its intent.

In response to the significant number of comments the FAA received regarding the proposed requirement that each airplane have an independent power source for restarting the engine after an in-flight shutdown, the FAA withdraws § 23.925(c). The FAA's intent in drafting proposed § 23.925(c) was to ensure a power source, independent from any power generated by a particular engine shutdown in flight, be available for restarting the powerplant. This requirement was originally adopted as former § 23.903 to address ignition systems on turbine engines and to ensure a source of ignition energy for in-flight engine restarting exists in the event of a loss of combustion in all engines during flight. The requirement in § 23.2425(b), which requires the pilot have the capability to stop the powerplant in flight and restart the powerplant within an established operational envelope, establishes the performance-based requirement the prescriptive requirements of proposed § 23.925(c) were intended to address. The FAA's intent was not to require redundant electrical power; rather, the intent was to require power independent from that of the engine-driven electrical power generating system to be available if insufficient power was available at the minimum windmilling restart speed. If an engine power generating system is capable of providing sufficient power to operate all required systems at the minimum windmilling restart speed, or in a normal shutdown state, an independent power source would not be required.

In recognition that an aircraft engine may not be able to be restarted within an airplane's entire flight envelope, the FAA revises proposed § 23.925(b) (now § 23.2425(b)) to require restart capability within an established operational envelope, which in accordance with § 23.2620 (proposed as § 23.1510), must be documented in the AFM.

g. Fuel Systems (Proposed § 23.930/Now § 23.2430)

In the NPRM, proposed § 23.930 (now § 23.2430) would have required that each fuel system provide an independent fuel supply to each powerplant in at least one configuration and avoid ignition from unplanned sources. It would have required that each fuel system provide the fuel required to achieve maximum power or thrust plus a margin for likely variables in all temperature conditions within the operating envelope of the airplane and provide a means to remove the fuel from the airplane. Finally, proposed § 23.930 would have required each fuel system to be capable of retaining fuel when subject to inertia loads under expected operating conditions and prevent hazardous contamination of the fuel supply.

The Associations asserted that proposed § 23.930 does not permit the certification of electric propulsion systems. These commenters recommended the FAA delete the word ''fuel'' from the title of proposed § 23.930 and adopt the provisions of proposed CS 23.530. Additionally, the commenters suggested replacing ''fuel'' with ''energy'' to clarify the requirements of this regulation are applicable to all energy sources and not just traditional petroleum-based fuels.

EASA, while recognizing that the term ''fuel'' covered other energy sources, stated it believed a more independent set of design requirements would be needed to address all energy systems, rather than those that are more appropriate for propulsion systems and APUs. Additionally, EASA specifically recommended adoption of its set of requirements for energy supply systems, set forth in A–NPA 2015–06, which provided useful requirements for a variety of systems, including fuel, electric, and hybrid systems. EASA also noted that its A–NPA 2015–06 created several new subparagraphs to address particular functions of an energy system.

The FAA did not intend to preclude the certification of electric propulsion systems or other non-fossil-fuel-based propulsion systems in part 23. The FAA agrees the use of the term ''fuel'' rather than the term ''energy'' could lead individuals to reach this conclusion. However, the FAA is concerned that adoption of the term ''energy'' in this rule, and throughout this subpart, could lead to confusion, because the term ''energy'' is used in numerous regulations and in guidance material to address requirements for other systems and components (*i.e.,* braking systems and rotating machinery) and also to describe environmental conditions (*i.e.,* those involving lightning). Therefore, the FAA retains the term ''fuel'' in the regulation, but notes the term ''fuel'' in this subpart includes any form of energy used by an engine or powerplant installation, such as provided by carbon-based fuels or electrical potential. Fuel systems will also include the means of energy storage for the power provided (*i.e.,* batteries that provide power to an electric motor) or devices that generate power for propulsion (*i.e.,* solar panels or fuel cells). Furthermore, while the FAA agrees with many of the provisions proposed by EASA, the FAA is electing to retain the requirements for energy systems under a single section, titled ''Fuel system.'' While § 23.2430 and EASA's proposed language may not be identical, the FAA finds § 23.2430 harmonizes with the intent of EASA's requirements.

The FAA notes EASA's recommendation to adopt EASA's proposed language to address powerplant support systems to replace its current regulatory requirements for induction and exhaust section systems. The FAA has decided to retain a specific section to address powerplant induction and exhaust systems. The FAA will address future energy systems that incorporate systems such as converters or battery cooling as part of the powerplant installation. The FAA notes the requirements for those future systems will be adequately addressed in §§ 23.2400, 23.2410, and 23.2430.

ANAC stated that proposed § 23.930 does not address the requirements of former § 23.951(d), which required fuel systems for turbine engine airplanes to meet the fuel venting requirements of part 34. ANAC stated the former requirement applied to airplanes and not engines, and should therefore be specifically included in the rule. ANAC also recommended the reference in the former rule to part 34, which prevents intentional fuel venting, be included in the new rule.

The FAA notes part 23 historically provided only a reference to part 34, and those requirements continue to remain applicable to the certification of any airplane. Sections 21.17 and 21.101 require part 34 to be always included in the certification basis of airplanes. Requirements such as fuel venting will therefore continue to apply to the certification of these airplanes.

Textron suggested deleting the term ''avoid'' and inserting the phrase ''prevent hazardous'' in proposed § 23.930(a)(2), which addressed the avoidance of ignition from unplanned sources. Textron noted that using the term ''prevent'' would be consistent with the use of the term in other sections of part 23.

An individual commenter also raised concerns about the undefined term ''avoid'', and questioned whether the term was an absolute, probability, or minimize requirement, or whether it covers single or multiple failures. Presuming the proposed requirement covered fuel ignition by lightning strikes addressed in former § 23.954, the commenter requested the proposed rule not be more stringent than the former rule, which imposes an absolute requirement to prevent ignition hazards but only for certain types of strikes and strike locations. The commenter noted the FAA did not discuss the rationale, interpretation, or intent of this requirement in the NPRM preamble. The commenter also noted that the draft ASTM standard was identical to former § 23.954, and remarked that it was unclear why proposed § 23.910 did not address this requirement. The commenter agreed with Textron and recommended inserting the term ''hazardous'' before ''ignition'' in paragraph (a)(2) to better clarify the proposed requirement.

Embraer and other commenters raised concerns about use of the term ''unplanned sources'' in proposed § 23.930(a)(2). Embraer noted there are no ''planned'' ignition sources, making compliance with the rule impossible. Embraer proposed revising the requirement to account for ignition sources not shown to be extremely improbable, and proposed the rule require that each fuel system be demonstrated that it is designed and arranged to prevent catastrophic ignition from sources not shown to be extremely improbable; taking into account flammability, critical lightning strikes, and failures within the fuel system. Textron noted the NPRM preamble discussion for ''unplanned sources'' or ''unknown sources'' was impossible to design for because it was too vague.

The FAA agrees the proposed requirement for unplanned sources was vague and could result in numerous interpretations. Section 23.2430(a)(2) is intended to prevent catastrophic effects resulting from ignition of an airplane's fuel source due to lightning, or from corona or streamering at fuel vent outlets, as former § 23.954 required. It is not intended to impose additional requirements to protect the fuel system from other ignition sources. The FAA revises § 23.2430(a)(2) based upon former § 23.954 to more accurately convey this requirement and to ensure its application to any fuel used to power an airplane. This revision also addresses the commenters' concerns regarding the meaning of ''avoid'' and ''unplanned sources'' by using the phrase ''prevent ignition'' and by enumerating the specific ignition sources that must be addressed.

Embraer also stated the phrase ''margin for likely variables'' in proposed § 23.930(a)(3) could generate confusion as to what margins must be observed when providing the fuel required to provide maximum power or thrust. The commenter explained that ''margin'' is usually used to define a rate higher than what is required for an engine's proper operation in the expected envelope and for the expected life of operation, but stated the meaning of the term ''likely variables'' is not clear. The commenter noted that the former rule considered a determination of the worst fuel rate for proper operation. Embraer suggested using text similar to that found in former § 23.951(a).

The FAA agrees with Embraer's comment that proposed § 23.930(a)(3) could generate confusion as to what margins must be observed when providing the fuel required to provide maximum power or thrust. Therefore, the FAA revises paragraph (a)(3) to require the fuel system provide fuel necessary to ensure proper operation of each powerplant and APU, in all likely operating conditions. This requirement ensures adequate fuel can be provided for proper operation of any powerplant or APU. The FAA notes an applicant's means of compliance with this requirement should consider the worst case conditions for fuel flow, including any additional demand due to expected efficiency losses, consumption by other systems, or secondary requirements such as engine cooling.

Embraer stated that it understood proposed § 23.930(a)(4) required a means to remove fuel and referred to fuel storage. Therefore, Embraer suggested the FAA move the requirement in proposed paragraph (a)(4) to § 23.930(b), which addressed fuel storage systems. Embraer suggested that the cross-reference table be updated accordingly for former § 23.971 and § 23.999.

An individual commenter requested the proposed regulations include a requirement for determining or indicating usable or unusable fuel or energy quantities, as was formerly required. This commenter noted that because fuel starvation is ''always'' cited as one of the top reasons for off-field landings in general aviation accidents, it should be adequately addressed by a specific performance requirement in part 23.

The FAA agrees with the recommendation to add a requirement to the final rule to ensure the flightcrew is provided with information on the total useable fuel available. The FAA adds this requirement as § 23.2430(a)(4), corresponding to the requirement in former § 23.1337(b), which required a means to indicate to the flightcrew members the quantity of usable fuel in each tank. The intent of this revision is to require applicants to both determine the usable quantity of fuel that can be stored and provide information to the flightcrew regarding the remaining useable fuel in the airplane.

The FAA has decided not to move proposed paragraph (a)(4) as Embraer suggested. Since different types of fuel systems could be certificated under the rule, the FAA has added the term ''isolate'' in § 23.2430(a)(5). The FAA recognizes that certain fuel sources may not be removable from the system, and that isolating the fuel from the system will provide the appropriate minimum level of safety.

Additionally, the FAA clarifies § 23.2430(a)(5) to require the fuel system be designed to retain fuel under all likely operating conditions and minimize hazards to the occupants during any survivable emergency landing. The FAA also includes a requirement in § 23.2430(a)(6) that these failures be taken into account, consistent with former § 23.967. For the certification of level 4 airplanes, the paragraph also provides that any failure due to an overload of the landing system is taken into account in airplanes equivalent to those currently certificated in the commuter category, consistent with former § 23.721.

An individual commenter asked the FAA to revise proposed § 23.930(a)(6), which would require the fuel system prevent hazardous contamination of the fuel supply, to specify that the requirement was intended to prevent hazardous contamination of fuel delivered to engines. The commenter noted this revision was necessary if, as the preamble indicated, this requirement replaces former § 23.997. The proposed requirement could be interpreted to require prevention of contamination of fuel within the fuel tank, which would be more stringent than the former rule and of questionable practicality. The former rules only required removal of contamination from the fuel being provided to the engine, and not necessarily from the fuel in the tank.

The FAA agrees with the commenter and revises § 23.2430 to require removal of hazardous contamination from the fuel supplied to each powerplant and APU. This requirement is now in new § 23.2430(a)(7).

Embraer recommended the FAA revise proposed § 23.930(b)(1) to require fuel storage systems to also withstand without failure, the vibration, inertial loads, and pressures under expected operating conditions.

The FAA agrees with Embraer that fuel storage systems must be able to withstand loads and pressures under expected operating conditions without failure and has added the term ''without failure'' to paragraph (b)(1). However, the FAA does not add specific references to vibration, inertia, fluid, and structural loads as the FAA believes the use of ''loads under likely operating conditions'' addresses all applicable loads, including those resulting from vibration and other sources.

The FAA revises § 23.2430(b)(2) to require the fuel storage system be isolated from personnel compartments and protected from hazards due to unintended temperature influences. The FAA recognizes that it did not adequately address these requirements in the NPRM. This revision addresses the requirements of former § 23.967(c) and (d), which restricted installation of fuel tanks around engine compartments and firewalls, and required fuel systems to be isolated from personnel compartments. It is also consistent with the provisions of CS 23.2465(b)(2), which requires each energy storage and supply system to be installed in such a way to be protected against hazards due to unintended temperature influence.

Air Tractor requested adding the term ''significant'' after ''prevent'' in proposed § 23.930(b)(2). Embraer concurred with this revision because it would allow for small amounts of fuel loss through vent lines, such as when the tanks are full and there is normal ''sloshing'' during taxi or takeoff, or when fuel expands as it warms. An individual commenter also requested revising proposed § 23.930(b)(2) to specify the fuel storage system must prevent hazardous fuel loss during maneuvers. The commenter believed the proposal would require the prevention of even minor fuel loss from vents, which is more stringent than the former standard. The commenter believed the more stringent standard was of questionable utility and practicality, and noted it was not justified in the preamble.

An individual commenter requested the FAA delete proposed § 23.930(b)(3), which would require each fuel storage system to prevent discharge when transferring fuel, because other proposed regulations would address any potential hazards associated with fuel transfer. The commenter further stated it was unclear if the proposed requirement would apply to fuel returned from the engine to other than the specified tank. This commenter explained that some multiengine airplanes feature fuel-transfer cross feeding, which can result in a fuel discharge if the receiving tank is full. This approach has both advantages and disadvantages, but should not be prohibited by regulation. The commenter also noted this proposal was not justified in the preamble or addressed in the Regulatory Analysis, was more stringent than the former rule, and would require additional hardware or revised architecture for some designs.

The FAA agrees with the recommendation to delete the requirement in proposed paragraph (b)(3) that each fuel storage system prevent discharge when transferring fuel. The FAA recognizes it has approved the design of certain fuel systems under former regulations that may result in a non-hazardous discharge of small amounts fuel when fuel is transferred between fuel tanks or fed from a specific fuel tank and returned to another tank under certain conditions. To ensure the continued acceptability of these systems under the new rule, the FAA has combined proposed paragraph (b)(2) and (b)(3) into paragraph (b)(3) in this final rule. Paragraph (b)(3) now requires the fuel system to be designed to prevent significant loss of stored fuel from any vent system due to fuel transfer between storage or supply systems under likely operating conditions.

One commenter stated the proposed rule did not specifically address the potential of water in the airplane's fuel system, and the commenter proposed it should contain a requirement to include fuel tank water sensors. The commenter noted that water accumulates in fuel tanks in a number of ways, such as when temperature changes or when air enters a tank from which fuel has been consumed.

The FAA notes the specific hazard associated with water in petroleum-based fuels is addressed generally in

§ 23.2430(a)(7), which requires the prevention of hazardous contamination of the fuel supplied to the powerplant. Additionally, the FAA notes that a compound such as water may not necessarily be considered a contaminant or hazard in certain future fuel systems. The commenter's proposal would introduce specific language that may not be appropriate for future fuel systems and has therefore not been adopted.

Finally, the FAA revises § 23.2430(c) to remove the restrictive language applicable only to pressure refueling systems. The rule now applies to fuel storage refilling and recharging systems. This revision will establish more appropriate requirements to accommodate the introduction of new propulsion systems such as electric motors. Accordingly, the FAA adopts performance-based requirements that will require prevention of improper refilling or recharging, prevention of stored fuel contamination during likely operating conditions, and the prevention of the occurrence of any hazard to the airplane or to persons during refilling or recharging.

h. Powerplant Induction and Exhaust Systems (Proposed § 23.935/Now § 23.2435)

In the NPRM, proposed § 23.935 (now § 23.2435) would have required the air induction system to supply air needed for each power unit and its accessories under expected operating conditions, and provide a means to discharge potential harmful material.

EASA recommended removal of the design-specific requirements in proposed § 23.935 because those requirements should be addressed as a means of compliance. Textron requested a complete rewrite of proposed § 23.935, stating the section was ''too high level'' and did not provide adequate performance-based requirements for an applicant to be able to demonstrate compliance. Textron asked the FAA to derive the language for proposed § 23.935 from appendix E of the final Part 23 ARC Report.

The FAA notes EASA's recommendation to remove § 23.935 based on its contention the section appears to be a means of compliance instead of a performance-based requirement. However, the FAA finds the provisions of the rule set forth performance-based requirements for induction and exhaust systems that are appropriate for inclusion in this rule. Rather than stipulating a specific means of compliance, these requirements serve as high-level performance-based requirements for which a number of alternative means of compliance could be developed by applicants.

The FAA partially agrees with Textron's comment that the rule is ''too high level.'' Accordingly, the FAA revises § 23.2435 based on the requirements for powerplant induction and exhaust systems contained in former §§ 23.1091, 23.1121, 23.1123, 23.1125, and the final Part 23 ARC Report. Section 23.2435 now sets forth performance-based requirements that encompass these prescriptive regulations and the Part 23 ARC's proposed requirements. The FAA notes while it is adding all of the ARC's proposed requirements for exhaust and induction systems in this rule, not all of its recommendations for revisions to this section were appropriate. Some of the ARC's recommendations are more appropriately addressed by other sections of this rule. For example, the ARC's proposed requirement for the system that supplies air to the cabin to prevent hazardous quantities of toxic gas from entering the cabin is addressed by § 23.2400(d) while the engine accessory component cooling requirements are addressed by § 23.2400(e), which requires powerplant components to comply with their limitations and installation instructions, or be shown not to create a hazard.

Embraer requested the FAA revise proposed § 23.935 to clarify the design and induction system must prevent distortion as described in former § 23.939(c). Embraer also recommended the FAA revise the proposal to include a requirement that the air induction system for each power unit and its accessories must not, as a result of airflow distortion during normal operation, cause vibration harmful to the power unit.

The FAA notes that former § 23.939(c) addressed distortion as a cause of vibration and required the air inlet not, as a result of distortion during normal operation, cause vibration harmful to the engine. Embraer's general concerns are addressed by § 23.2435(a)(1), which requires the air induction system for each powerplant or auxiliary power unit and its accessories to supply the air required under likely operating conditions. Embraer's specific concern that the air induction system not cause ''vibration harmful to the power unit'' is addressed by the powerplant installation requirements contained in § 23.2400(c)(4), which requires the applicant to ''construct and arrange each powerplant installation to account for . . . vibration and fatigue,'' which occur as a result of distortion.

Air Tractor and ANAC raised concerns about whether proposed § 23.935(b) was intended to address exhaust systems or air induction systems. Air Tractor stated it did not believe the FAA intended proposed § 23.935(b) to mandate the use of an inertial bypass particle separator (as proposed § 23.935(b) could have been interpreted to require), and recommended the FAA clarify proposed § 23.935(b) to indicate the requirement applies only to exhaust systems. ANAC commented that proposed § 23.935(b) should require the exhaust system to ensure safe disposal of exhaust gases, as the former rule required.

The FAA agrees with Air Tractor and ANAC's concern that proposed § 23.935(b) is unclear because it only appears to discuss induction systems (whereas the title of proposed § 23.935 includes exhaust systems). Accordingly, the FAA has modified § 23.2435 to clearly indicate the requirements of paragraph (a) apply to induction systems and the requirements of paragraph (b) apply to exhaust systems. This makes it clear the rule does not require use of an inertial bypass particle separator as a means for the induction system to discharge potential harmful material.

If a complete rewrite of proposed § 23.935 is not adopted, Textron requested clarification as to whether the proposed requirements were intended to address the cooling air requirements for powerplant accessories in former §§ 23.1041 through 23.1047, and the intent of former § 23.1091. If proposed § 23.935 was intended to match the provisions of former § 23.1091, Textron commented that the proposed section was adequate. However, if proposed § 23.2435 was intended to address §§ 23.1091 and 23.1041 through 23.1047, Textron asked for clarification of the proposed section's requirements. Textron also specifically recommended revising the regulatory text to clarify the intent of the proposed requirements were ''to ensure proper operation within established limitations'' of the air induction system for each power unit and its accessories.

The FAA notes the engine cooling requirements are not specifically addressed in § 23.2435, other than in a requirement that the induction system be designed to supply the air required by each powerplant or auxiliary power unit and its accessories under likely operating conditions. However, the powerplant cooling requirements are addressed more directly by § 23.2400(e), which requires powerplant components to comply with their limitations and installation instructions, or be shown not to create a hazard. This requirement ensures an applicant addresses engine cooling.

Additionally, the FAA revises proposed § 23.2435(b) to specifically indicate exhaust systems include exhaust heat exchangers for each powerplant or APU. Specifically referencing these systems as part of the airplane exhaust system continues the FAA's practice of applying exhaust system requirements to exhaust heat exchangers. The FAA also revises requirements for exhaust systems by adding paragraph (b)(2) to ensure these systems are designed to prevent likely hazards from heat, corrosion, or blockage. These requirements address the specific requirements of former § 23.1121(a) and (h) and § 23.1123(a).

i. Powerplant Ice Protection (Proposed § 23.940/Now § 23.2415)

In the NPRM, proposed § 23.940 (now § 23.2415) would have required the airplane design to prevent foreseeable accumulation of ice or snow that would adversely affect powerplant operation. Proposed § 23.940 would have also required the powerplant design to prevent any accumulation of ice or snow that would adversely affect powerplant operation, in those icing conditions for which certification is requested.

Textron recommended withdrawing proposed § 23. 940, as it believed the requirement to protect engines could be adequately addressed in proposed § 23.910 by including language that would ensure safe powerplant operation under all likely operating conditions or enable satisfactory powerplant functioning in icing conditions. Alternatively, Textron proposed consolidating the requirements of proposed § 23.940 by removing paragraph (b) and revising paragraph (a) to require the airplane design prevent ''any accumulation''—rather than ''foreseeable accumulation''—of ice or snow that adversely affects powerplant operation in those icing conditions for which certification is requested.

The FAA does not agrees that eliminating proposed § 23.940 (now § 23.2415) and adding a requirement to proposed § 23.910 (now § 23.2410) would result in designs that would prevent the accumulation of ice or snow that could adversely affect powerplant operations. Including Textron's proposed regulatory language in § 23.2410 as part of the powerplant installation hazard assessment could permit designs that only address ice accretion as part of a powerplant installation assessment, and not airframe ice accretion that may pose an ice shed hazard. Additionally, Textron's proposal could be interpreted to only require the powerplant's performance be evaluated for the environmental icing conditions for which certification is requested, and not for other conditions that may be conducive to ice accretion in reciprocating engine induction systems. In contrast, the FAA finds § 23.2415 establishes specific requirements that will apply to all airplane designs, to include those for which certification in icing conditions was not requested, and adds requirements that will apply to powerplant designs for airplanes intended for certification for flight in icing conditions.

The FAA also finds Textron's recommendation to revise proposed § 23.940(a) and withdraw paragraph (b) would specifically eliminate the applicability of the requirement to the powerplant design. By only setting forth a requirement for the airplane design and not the powerplant design, Textron's proposed revision would neither ensure an independent assessment of the adequacy of the engine design for icing conditions, nor require an evaluation of the engine's tolerance for ice ingestion. Additionally, it would not apply to propellers, which are considered powerplant components. The FAA's intent in paragraph (b) is to require an applicant to assess the adequacy of the engine's certification basis for installation in an airplane, the engine's service history of ice ingestion, and propeller design.

The FAA expects that an acceptable means of compliance would specify an evaluation of the engine's tolerance for ice ingestion that would not be limited to the conditions specified in part 25, appendix C, and that such an evaluation would show that it meets, or exceeds, those standards prescribed in former § 23.903(a)(2).

Textron also commented that proposed § 23.940 does not address ice accretion that could affect the performance of cooling air inlets for the engine and its accessories.

In light of Textron's comment, the FAA is adding the term ''installation'' to proposed § 23.940(b) to clarify the regulation, like former § 23.929, applies to ''other components of complete engine installations,'' which include cooling air inlets. Accordingly, § 23.2415(b) now requires the ''powerplant installation design'' to prevent any accumulation of ice or snow that adversely affects powerplant operation, in those icing conditions for which certification is requested. This change from what was proposed is consistent with the NPRM, which explained that powerplant design in proposed § 23.940(b) refers to the engine, propeller, and other powerplant components such as cooling inlets.

Additionally, the FAA is inserting the phrase ''including the induction and inlet system'' after ''airplane design'' to clarify that § 23.2415(a) is intended to address the engine induction ice protection requirements found in former part 23. This change from what was proposed is consistent with the NPRM, which explained that the airplane design in proposed § 23.940(a) refers to the engine induction system and airframe components on which accumulated ice may shed into the powerplant. The FAA also reiterates that paragraph (a) applies to all airplanes regardless of whether certification for flight in icing conditions is sought, and requires applicants to address ice accretion anywhere on the airplane that may pose a threat to the powerplant if that ice is shed. ''Foreseeable'' accumulation of ice and snow, rather than ''any'' accumulation as recommended by Textron, is used in paragraph (a). The icing and snow conditions to be evaluated are not simply the icing conditions for which the airplane is to be certified, as in paragraph (b). For example, on non-icing certified airplanes, conditions to be evaluated range from carburetor icing on reciprocating powered airplanes to part 25, Appendix C icing on turbine powered airplanes.

j. Powerplant Fire Protection (Proposed § 23.1000/Now § 23.2440)

In the NPRM, proposed § 23.1000 (now § 23.2440) would have required a powerplant be installed in a designated fire zone and would have required an applicant to install a fire detection system in each designated fire zone for levels 3 and 4 airplanes. Proposed § 23.1000 would have also required an applicant to install a fire extinguishing system for levels 2, 3, and 4 airplanes with a powerplant located outside the pilot's view that uses combustible fuel.

Additionally, proposed § 23.1000 would have required each component, line, and fitting carrying flammable fluids, gases, or air subject to fire conditions to be fire resistant, except components storing concentrated flammable material would have to be fireproof or enclosed by a fireproof shield. Proposed § 23.1000 would have also required an applicant to provide a means to shut off fuel or flammable material for each powerplant, while not restricting fuel to remaining units, and prevent inadvertent operation.

EASA noted the proposed regulation contained too many design details, which are better addressed as means of compliance. EASA contended that the sole objective of proposed § 23.1000 should be to require a means to isolate and mitigate hazards to the airplane in the event of a powerplant system fire or overheat in operation.

Although the FAA concedes that some of the proposed requirements are prescriptive in nature, the FAA has determined that inclusion of these requirements for fire protection are critical to safety and should be retained to prevent any potential degradation of safety. Fire, while not a common occurrence, greatly reduces the likelihood of survival when occurring in flight. Detection, isolation, and extinguishing have historically provided an acceptable means for mitigating hazards from powerplant-related fires. Accordingly, the final rule retains what the FAA considers to be sufficient prescriptive requirements to ensure the existing level of fire protection. In response to EASA's comment, as discussed in more detail later, the FAA has added a requirement in § 23.2440(b), requiring each designated fire zone provide a means to isolate and mitigate hazards to the airplane in the event of a powerplant system fire or overheat.

Zee questioned whether the requirement in proposed § 23.1000(a) for all powerplants to be installed in a designated fire zone is appropriate. The commenter noted electric propulsion systems can be designed and installed with no flammable liquids or materials, thus eliminating the need for fire protection. Zee requested the FAA revise proposed paragraph (a) to indicate installation in a fire zone is not required if not applicable. The Associations also recognized the same issue and proposed revising the requirement to only apply to flammable powerplant components. Embraer recommended the FAA delete proposed § 23.1000(a).

ANAC observed that the intent to define ''designated fire zones'' in the proposal is to identify areas of the airplane in which a high degree of safety precautions must be taken, recognizing that fire will occur in these regions because of the presence of both ignition sources and flammable fluid. ANAC contended proposed § 23.1000 could be interpreted as the region where a powerplant is to be installed must first be evaluated for ignition sources and flammable fluids. ANAC noted the proposed requirement could also be interpreted as the powerplant can only be installed in regions that already contain ignition sources and flammable fluids. Embraer contended that former § 23.1181 defined the ''hot'' parts of an engine installation as ignition sources, and considering that there are fuel, oil, and hydraulic fluids being carried around such areas, they should be considered fire zones. Thus the term ''designated'' would apply, obviating further analysis.

The FAA has considered the comments regarding the requirement to install all powerplants in proposed § 23.1000(a) (now § 23.2440(a)) in a designated fire zone. The FAA notes that while virtually every kind of powerplant (to include electric motors) may present a potential fire hazard, some types of powerplants may not present a likely fire hazard or require installation in a designated fire zone. Accordingly, the FAA revises § 23.2440(a) to require a powerplant be installed in a designated fire zone only if it includes a flammable fluid and an ignition source for that fluid. The term ''flammable fluid'' includes any flammable substance such as liquids, gases, or gels that are capable of flowing. This change is intended to alleviate the need to install powerplants that do not present a likely fire hazard in a designated fire zone. The FAA also adds the term ''combustion heater'' to § 23.2440(a), which are required to be located in designated fire zones under former § 23.1181. The devices were inadvertently omitted from consideration under the fire and high-energy protection requirements of proposed subpart D.

ANAC noted the NPRM preamble discussion indicated that fire must be evaluated in the powerplant installation hazard assessment required under proposed § 23.910. ANAC expressed concern the dedicated requirement for powerplant fire protection in proposed § 23.1000 could be interpreted to require evaluation of fire hazards beyond the scope of proposed § 23.910. ANAC recommended the FAA include a requirement for a firewall that ensures a fire originating in any fire zone will not be a hazard to the airplane.

The FAA did not intend to require the use of a hazard assessment process in proposed § 23.1000 (now § 23.2440). The FAA notes the purpose of the firewall discussion in proposed § 23.1000 is to determine if a particular component or system would need to be placed in a designated fire zone. If a component is required to be located in a fire zone by a rule other than § 23.2410, such as § 23.2440(a), that requirement must be complied with regardless of the results of any hazard assessment. The FAA revises § 23.2440(a) to require that a powerplant, APU or combustion heater, that includes a flammable fluid and an ignition source for that fluid, be installed in a designated fire zone. In response to ANAC's recommendation to add a requirement for a firewall that ensures a fire originating in any fire zone will not be a hazard to the airplane, the FAA notes § 23.2440(b) requires each designated fire zone provide a means to isolate and mitigate hazards to the airplane in the event of a powerplant system fire or overheat. Isolation of a designated fire zone is typically accomplished by use of a firewall or other equivalent means.

An individual commenter raised concerns that proposed § 23.1000(b) fails to address critical fire protection requirements and only requires components carrying flammable liquid to be fire resistant. Specifically, the commenter noted that former § 23.1141(f) required powerplant controls required to operate in the event of a fire to be fire resistant, former § 23.1189 required shutoff valves to be outside the fire zone, former § 23.1203 required certain fire detector components to be fire resistant, and former § 23.1201 required fire extinguisher components in the fire zone to be fireproof. To resolve this, the commenter recommended implementation of basic system performance requirements for fire protection, preserving the former fire protection standards, but not compromising future designs. Another commenter noted the proposed rule did not capture some of the specific fire protection requirements for items such as powerplant controls, shutoff valves, fire detectors and extinguishers.

The FAA agrees the proposed language was not sufficiently comprehensive to establish clear requirements necessary for the prevention of hazards resulting from fire. The FAA revises proposed § 23.1000(b) and renumbers it as § 23.2440(c) to ensure adequate fire protection is maintained for those noted components, along with any other components determined critical to safety. The FAA adds paragraph (c)(1) to ensure the design of components and the placement within the airplane not only prevent fire hazards but also account for the effects of fire in adjacent fire zones. This requirement addresses the requirements in former § 23.1183(a) to ensure flammable fluid-carrying components be shielded, or located to safeguard against the ignition of flammable fluid. These requirements are also consistent with the provisions of former § 23.1182.

Embraer recommended the FAA revise proposed § 23.1000(c) to allow for the flow of quantities of fuel that are small enough not to be hazardous to enter into the powerplant. Textron similarly asserted proposed § 23.1000(c) was unnecessary and could be addressed by proposed § 23.910. Textron recommended the FAA revise its proposal to conform with CS 23.510(e), or § 23.906(i) in appendix E of the Part 23 ARC Report.[49] Alternatively, Textron recommended revisions to proposed § 23.1000(c), (d), and (e).

The FAA agrees with Embraer's comment that small amounts of fuel may still enter a powerplant after a shutoff means has been activated. The FAA revises paragraph (c) and paragraph (d) to require that the applicant provide a means to prevent hazardous quantities of flammable fluid from flowing into the designated fire zone. Accordingly, this revision will permit the flow of small amounts of residual flammable fluid if it is shown not to present a hazard, after activation of any shutoff means.

With respect to Textron's comment, the FAA finds the requirements for a means to shut off fuel or flammable material for each powerplant necessary. The FAA has determined § 23.2410 does not adequately address this requirement because § 23.2410 sets forth the requirements for a powerplant hazard assessment in which an applicant could feasibly conclude that a means to shut off fuel flow for each powerplant would not be necessary to comply with the stated requirement. At this time, the FAA does not intend to permit the certification of airplanes without a means to shut off fuel to their powerplants.

The FAA also considered Textron's recommendation to revise proposed § 23.1000 to conform to CS 23.510(e) or the Part 23 ARC's proposed § 23.906(i). The FAA finds the hazard minimization requirements contained in these provisions do not specifically preclude the certification of an airplane without a means to shut off fuel flow to each powerplant, a requirement the FAA considers essential for hazard mitigation. Accordingly the FAA does not adopt that recommendation, and considers such action to be outside the scope of this rulemaking effort.

Textron recommended the FAA revise the introductory text of proposed paragraph (c) to require the applicant to provide a means to shut off both fuel and flammable material for each powerplant. Textron recommended changing ''or'' to ''and''; otherwise, the language would suggest there is no requirement to shut off other flammable fluid flow. Textron also requested the FAA to clarify that the applicant must only demonstrate that the means of shut off, and not each powerplant, meets the requirements of proposed paragraphs (c)(1) and (c)(2).

The FAA agrees with Textron's concern that proposed § 23.1000 could be interpreted to require shutoff of either fuel or flammable material, which could permit a design that does not shutoff all flammable materials to the fire zone. Therefore, the FAA removes the term ''fuel'' from the requirement. Section 23.2440(d) now requires prevention of all hazardous quantities of flammable fluid from entering a fire zone. This is consistent with former § 23.1189(a)(1). During review of the existing shutoff requirements, the FAA also determined a critical flammable fluid shutoff valve fire performance requirement was not included in the proposed rule. Therefore, the requirement of former § 23.1189(a)(4) is included in the final rule as § 23.2440(d)(3).

The FAA notes that proposed § 23.1000(d) included a qualifier that required only powerplants that use a combustible fuel to have a fire extinguishing system. Based on the commenter's concerns, the FAA removes this specific requirement and revises § 23.2440(a) to require any powerplant or APU that includes a flammable fluid source and an ignition source for that fluid be located in a fire zone. This regulatory approach is consistent with former requirements for designated fire zones that contain a flammable fuel and an ignition source where any leakage of flammable fluid would likely result in a fire. Concerns relating to possible electrical engine fires are noted, but not considered likely such that they would require installation in a designated fire zone. Electric motors are commonly used on airplanes, although not for propulsion, and have not required the protection of a designated fire zone.

Additionally, the FAA adds paragraph (d)(3) to the final rule. The revision requires the applicant to provide a means to prevent hazardous quantities of flammable fluids from flowing into, within, or through each designated fire zone located outside the fire zone unless an equal degree of safety is provided with a means inside the fire zone. This revision is based on the provisions of former § 23.1189(a)(4) and intends to ensure the specific requirements of that section are met by an applicant.

Textron also reiterated the concept that fire protection actually applied to all systems and recommended removing proposed § 23.1000(c)(2) and broadening its applicability to all systems by placing the requirement in proposed § 23.1305.

While the FAA understands Textron's comment that fire protection applies to all systems, the FAA notes the fire protection for areas outside of fire zones are addressed by § 23.2325 of the final rule. The requirements for fire protection in fire zones are more extensive than those for other areas of the airplane. The FAA requires designated fire zones, and their corresponding extensive fire protection requirements, for those areas where both nominal ignition sources and flammable fluids must be co-located such that a single failure is likely to result in a fire. Zones of the airplane that are outside a fire zone should not contain both nominal ignition sources and flammable fluids. Because there is a lower likelihood of fire in these areas, they have correspondingly less extensive requirements.

Textron also recommended revising proposed § 23.1000(d) because it believed the proposal would limit the applicability of the requirement for a fire extinguishing system to those powerplants ''outside the pilot's view'' and those powerplants that use ''combustible fuels.'' The commenter believed the intent of the proposal was not clear, and recommended the FAA consider the need for extinguishing systems in hybrid electric configurations where fire extinguishing systems may be needed to address an electrical fire. Textron also did not believe the rule's requirement should be limited to level 3 and 4 airplanes. Textron recommended the FAA retain the provisions of former § 23.1195, which required extinguishing systems for ''all airplanes with engine(s) embedded in the fuselage or in pylons on the aft fuselage.'' Textron also recommended the FAA incorporate additional provisions from the Part 23 ARC Report, which recommended requiring that fire extinguishing systems be installed in all airplanes with engines embedded in the aft fuselage or in pylons on the aft fuselage, and for an APU, if installed. The systems must not cause a hazard to the rest of the airplane.

Textron asserted that fire detection systems should not be mandatory for all level 3 and 4 airplanes as proposed in § 23.1000(e), but rather should be required based upon the type and location of engines used in the airplane. The commenter recommended using the

[49] In each area or component where flammable fluids or vapors might escape by leakage of a fluid system, there must be means to minimize the probability of ignition of the fluids and vapors, and the resultant hazard if ignition does occur and prevent the introduction of hazardous toxic gases into the cabin.

proposed requirements from the Part 23 ARC Report, which describes the top level safety requirements and then would allow the industry standard to provide more specifics as to what engine types and configurations would require a fire detection system. Textron further commented that proposed § 23.1000(e) should be revised to only require fire detection systems for those airplanes that have the characteristics specified in former § 23.1203(a).

An individual commenter also noted that proposed § 23.1000(d) and (e) were inconsistent with the requirements of the former rule and, in some cases, would impose more stringent requirements without providing justification. Specifically, the commenter stated that, as proposed, a level 1 or 2 airplane with the engine located outside the view of the pilot could be required to have a fire extinguisher, but not a fire detector. The commenter also noted a single-engine level 3 or level 4 airplane, such as a Cessna 208 or Pilatus PC–12, was not required to have a fire detection system under the former rule, but would be required to have such a system under the proposed rule. The commenter further noted that the requirements of former § 23.1203 were based on designs determined to be at greater risk for fire (*e.g.,* multiengine turbines and reciprocating engines with turbochargers), which justified inclusion of a fire detection system. The commenter also noted the former rule addressed other designs and required fire extinguishing systems for all commuter category airplanes, whereas the proposed rule lacks these specific requirements. The commenter recommended the FAA revise proposed § 23.1000(d) and (e) to ensure no additional burden would be placed on future designs unless justified and to ensure the former level of fire protection would be retained.

The FAA agrees with the commenters that proposed § 23.1000(d) and (e) were confusing and inconsistent with former fire extinguishing and detection requirements. The FAA revises those paragraphs, now located in § 23.2440(e) and (f), to be consistent with former requirements by removing the language limiting the applicability of the requirements to only level 3 and level 4 airplanes, and basing the need for a fire extinguishing system on the location of a fire zone instead of on the location of the powerplant. However, the FAA retains the specific requirement for a means to extinguish fires within fire zones on level 4 airplanes, because these airplanes are functionally equivalent to airplanes currently certificated in the commuter category. These changes make § 23.2440(e) and (d) consistent with the requirements of former §§ 23.1195, ''Fire extinguishing systems,'' and 23.1203, ''Fire detector system.''

Finally, Air Tractor also recommended adding ''if installed'' after ''fire detection system'' in proposed § 23.1000(f) and (g) to avoid the perception a fire detection system is a requirement.

The FAA notes that, if a particular system is not required and not installed on the airplane, any specific requirements related to that system will not be applicable. Therefore, the FAA does not add the text proposed by Air Tractor to the final rule.

7. Subpart F—Equipment

a. General Discussion

The FAA proposed substantial changes to former subpart F. The thirty-seven former system sections were consolidated into eight sections. An effort was made to maintain the safety intent of the rules while removing the prescriptive nature of these rules which were based on technology available at the time the rule was introduced. This was intended to increase future flexibility to facilitate the installation of systems that enhance safety as new technology becomes available.

EASA recommended the FAA add an additional requirement to proposed subpart F that describes what system and equipment information should be determined. EASA further suggested subpart G cover how this information is displayed.

The FAA finds EASA's recommendation to add a new requirement for system and equipment information unnecessary because this information is already addressed in several requirements, including proposed § 23.1305 (now § 23.2505), Function and installation; proposed § 23.1400 (now § 23.2540), Safety Equipment; proposed § 23.1505 (now § 23.2605), Installation and operation; proposed § 23.1310 (now § 23.2615), Flight, navigation and powerplant instruments; and proposed § 23.1515 (now § 23.1529), Instructions for continued airworthiness. The FAA agrees, however, that subpart G should address how the information is presented.

b. Airplane Level Systems Requirements (Proposed § 23.1300/Now § 23.2500)

In the NPRM, proposed § 23.1300 (now § 23.2500) would have required equipment and systems required for an airplane to operate—

- Safely in the kinds of operations for which certification is requested;
- Be designed and installed to meet the level of safety applicable to the certification and performance levels of the airplane; and
- Perform their intended function throughout the operating and environmental limits specified by an applicant.

Proposed § 23.1300 would have also mandated that non-required airplane equipment and systems, considered separately and in relation to other systems, be designed and installed so their operation or failure would not have an adverse effect on the airplane or its occupants.

NATCA observed the requirements of proposed § 23.1300 and § 23.1305 (now § 23.2505) appeared similar and requested the FAA combine the two sections.

While the FAA agrees there is some similarity between § 23.2500 and § 23.2505, the requirements of § 23.2500 are at the airplane level and create a distinction between ''required'' and ''non-required'' equipment and systems. In contrast, the requirements of § 23.2505 are at the system level and apply to all installed equipment, regardless of whether it is required.

Garmin asked the FAA to clarify whether proposed §§ 23.1300 and 23.1305 are of general applicability and do not supersede other specific part 23 requirements. Garmin noted that CS 23.600(a) includes such clarifying language concerning CS 23.600 and CS 23.605, and that the FAA's decision to omit similar wording from proposed § 23.1300 makes it unclear whether the FAA agrees with EASA in this respect or not.

In light of Garmin's comment, the FAA revises proposed §§ 23.1300 and 23.1305 to clarify the requirements of these sections apply generally to installed equipment and systems. However, the requirements do not apply if another section of part 23 imposes specific requirements on a particular piece of installed equipment or systems. The FAA finds this revision is consistent with the NPRM. The FAA intended proposed §§ 23.1300 and 23.1305 to capture the safety intent of former § 23.1309. Former § 23.1309 was a regulation of general requirements that did not supersede any requirements contained in other part 23 sections. Sections 23.2500 and 23.2505 are harmonized with CS 23.600 and CS 23.605.

Air Tractor stated proposed § 23.1300(a)(l) failed to define a standard for the required level of safety for systems.

The FAA is construing Air Tractor's comment as referring to the qualitative levels of safety for systems, which were previously contained in former § 23.1309(c). These qualitative levels of safety are now contained in § 23.2510 (proposed as § 23.1315), which provides system-level requirements. The FAA notes § 23.2500(a)(1) provides airplane-level requirements, and does not specify the level of safety because the acceptable level of safety varies depending on the certification level of the airplane. Former part 23 is one acceptable means of compliance for the new part 23. Therefore, applicants may use as a means of compliance the levels of safety defined in figure 2 of AC 23.1309–1E, ''System Safety Analysis and Assessments for Part 23 Airplanes'', which were a means of compliance to former § 23.1309 and varied depending on the certification class of airplane. Alternatively, applicants—individuals or organizations—may assist in the development of industry-consensus standards, or propose their own means of compliance to § 23.2500(a)(1).

ANAC commented the phrase ''operating and environmental conditions specified by the applicant'' in proposed § 23.1300(a)(2) could lead to misinterpretation. ANAC asserted these conditions may not be adequate or achieve the minimum requirements for certification. ANAC suggested using the phrase ''conditions for which the airplane is certified.''

The FAA agrees with ANAC and revises the proposed rule language for clarity. Accordingly, § 23.2500(a)(2) now requires the equipment and systems required for an airplane to operate safely, in the kinds of operations for which certification is requested, to be designed and installed to perform their intended function throughout the operating and environmental limits ''for which the airplane is certificated.''

Several commenters commented on the use of the phrase ''non-required'' in proposed § 23.1300(b). EASA stated that the proposed provisions of § 23.1300(a) and (b) raised ambiguity regarding what systems and equipment are ''required.'' EASA recommended clarifying the distinction between ''required'' and ''non-required'' in paragraphs (a) and (b), respectively, by revising the proposed rule language in paragraph (b) to make clear ''non-required'' systems and equipment are those not covered by paragraph (a). The Associations recommended the FAA clarify what non-required systems and equipment include and offered rule language similar to that proposed by EASA. Lastly, ANAC recommended replacing ''non-required'' with ''each'' in proposed § 23.1300(b) because the requirements should apply to all systems and equipment.

The FAA agrees the distinction between proposed § 23.1300(a) and proposed § 23.1300(b), which would have applied to ''non-required'' equipment, was unclear. The FAA adopting EASA's recommended rule language, which clarifies the distinction between the two requirements by linking them together. Accordingly, § 23.2500(b) (proposed as § 23.1300(b)), now requires the systems and equipment not covered by § 23.2500 (a) to be designed and installed so their operation does not have an adverse effect on the airplane or its occupants.

While the FAA agrees with ANAC that both ''required'' and ''non-required'' equipment and systems must be designed and installed so their operation does not have an adverse effect on the airplane or its occupants, the FAA finds it unnecessary to apply new § 23.2500(b) to ''required'' equipment, because § 23.2500(a) (proposed as § 23.1300(a)) already covers this requirement. Required equipment and systems that are designed and installed to meet the level of safety applicable to the certification and performance level of the airplane, in accordance with § 23.2500(a)(1), and that perform their intended function, in accordance with § 23.2500(a)(2), will not have an adverse effect on the airplane or its occupants. Furthermore, the FAA is intentionally making a distinction between ''required'' and ''non-required'' equipment in § 23.2500(a) and (b) because ''non-required'' equipment and systems should not always be required to perform their intended function throughout the entire operating and environmental limits of the airplane.

Air Tractor suggested the FAA compare former § 23.1309 and proposed § 23.1300(b). They noted the proposed rule may make it easier to certify non-required equipment; however, the proposed rule still seemed to require a Functional Hazard Assessment (FHA) and System Safety Assessment (SSA). Air Tractor suggested the FAA relieve the undue burden associated with the required system safety analysis for non-required equipment and systems.

The FAA has determined some method of assessment is necessary to ensure that equipment and systems installed on an airplane meet an acceptable safety level. The safety assessment must show that a logical and acceptable inverse relationship exists between the average probability per flight hour and the severity of failure conditions effects. The depth and scope of the safety assessment will depend on the types of functions performed by the systems, the severity of failure conditions, and whether the system is complex. For simple and conventional systems with well-established designs, the safety assessment may be satisfied by a qualitative assessment such as the single-failure concept and experience based on service-proven designs and engineering judgment. Former guidance for complex systems relied on industry standards such as ARP 4761, ''Guidelines and Methods for conducting the Safety Assessment Process on Civil Airborne Systems and Equipment,'' and ARP 4754A, ''Guidelines for Development of Civil Aircraft and Systems,'' as well as AC 23.1309–1E, to define an acceptable means of compliance. As explained in the NPRM, former part 23 and associated guidance may be used as one means of compliance with the new part 23. Alternatively, applicants may rely on industry consensus standards, or develop their own methods of compliance appropriate to the various airworthiness certification levels.

Garmin stated it was unclear what the phrase ''or failure does not have an adverse affect'' in proposed § 23.1300(b) means and that failures would be covered under proposed § 23.1315. Garmin implied that proposed § 23.1300(b) was redundant with proposed § 23.1315, which already addressed the failure of a non-required system as it would have provided the basis for assessing the implications of any failure for installed equipment. The commenter requested that the FAA delete ''or failure'' from the proposed rule.

The FAA agrees with Garmin and deletes the words ''or failure'' from the proposed rule language. Section 23.2510 (proposed as § 23.1315) addresses failure conditions of all equipment. Therefore, proposed §§ 23.1300 and 23.1315 would have been redundant by requiring the same showing of compliance. Additionally, the phrase ''failure does not have an adverse effect on the airplane or its occupants'' could have been misinterpreted as requiring the failure to have no effect on the airplane. For example, if the equipment was installed to provide a benefit, although not required, it could have been wrongly interpreted that the failure of that benefit would have an ''adverse effect'' on the airplane.

c. Function and Installation (Proposed § 23.1305/Now § 23.2505)

In the NPRM, proposed § 23.1305 (now § 23.2505) would have required each item of installed equipment to perform its intended function, be installed according to limitations specified for that equipment, and the equipment be labeled, if applicable, as to its identification, function, or operation limitations, or any combination of these factors. Proposed § 23.1305 would have required a discernable means of providing system operating parameters required to operate the airplane, including warnings, cautions, and normal indications to the responsible flight crewmember. Proposed § 23.1305 would have also required information concerning an unsafe operating condition be provided in a clear and timely manner to the crewmember responsible for taking corrective action.

In light of comments received, the FAA revises proposed § 23.1305 to withdraw paragraph (a)(2), merge paragraph (a) and (a)(1) into new paragraph (a), and relocate paragraphs (a)(3) through (c) to new § 23.2605 in subpart G. This section discusses these changes in more detail.

The Associations, Textron, and ANAC commented on proposed § 23.1305(a)(1). Textron commented that proposed § 23.1305(a) appears to be redundant with proposed § 23.1300(a) and asked the FAA to clarify whether proposed § 23.1305(a)(1) would apply to the non-required equipment addressed in proposed § 23.1300(b).

ANAC recommended that the FAA remove proposed § 23.1305(a)(1) because the requirement is adequately addressed in § 23.1300(a)(2) for required equipment. ANAC explained that proposed § 23.1305(a)(1) would contradict the requirement for non-required equipment in proposed § 23.1300(b). The Associations, noted that one of the reasons for distinguishing ''required'' and ''non-required'' equipment in proposed § 23.1300 was to alleviate the issues with requiring non-required equipment to prove their intended function. The commenters contended the rule should only require non-required equipment and systems (which are not required for safe flight) to verify their operation or failure does not interfere with required equipment. The commenters recommended confining the proposed requirement of § 23.1305(a) to ''required'' systems and equipment.

The FAA considered the comments to proposed § 23.1305(a)(1) and recognizes the confusion between §§ 23.1300 (now § 25.2500) and 23.1305. The FAA notes § 23.2505 applies to both required and non-required equipment. All equipment, when installed, should function as intended to maintain a minimum level of safety. The requirement of § 23.2505 is not addressed by § 23.2500(a)(2) as § 23.2505 applies to both required and non-required equipment when the equipment is installed on the airplane. Section 23.2500(a)(2) applies only to required equipment in operation. The FAA finds § 23.2505(a) does not contradict the requirement of § 23.2500(b), which applies to non-required equipment during airplane operations once in service. As explained in the NPRM, § 23.2500(b) would not require non-required equipment and systems to function properly during all airplane operations once in service, provided all potential failure conditions do not affect safe operation of the airplane. However, the non-required equipment or system would have to function in the manner expected by the manufacturer's operating manual for the equipment or system when installed. To clarify the FAA's intent and better harmonize with EASA, the FAA is merging proposed paragraph (a) with (a)(1) to revise § 23.2505 to require each item of equipment, when installed, to function as intended.

The Associations also maintained that proposed § 23.1305(a)(2) and (3) were unnecessary because installed equipment needs to operate safely despite any markings.[50] The commenters recommended the FAA not adopt paragraphs (a)(2) and (a)(3). Alternatively, EASA recommended moving the pilot interface issues of proposed § 23.1305(a)(3) through (c) to subpart G, which covers flightcrew interface. Textron recommended the FAA move the labeling requirement to proposed § 23.1300(a)(3). Transport Canada recommended clarifying proposed § 23.1305(a)(3) to provide the criteria to determine the applicability of the labeling requirement.

The FAA withdraws proposed § 23.1305(a)(2) as it is redundant of paragraph (a)(1). In order to function as intended, the equipment would have to meet its limitations. As previously noted, the FAA has revised proposed § 23.1305 by merging paragraph (a) with (a)(1). The FAA agrees with EASA's recommendation to move certain flightcrew interface requirements to subpart G and is relocating the requirement of proposed § 23.1305(a)(3) to subpart G, § 23.2605(a) in this rule. The commenters are correct that while a system needs to operate safely despite any markings, markings related to identification, function, and limitations are necessary to aid the aircrew and other personnel to safely operate the systems. The requirement for equipment to be labeled, if applicable, dates back to CAR 3.652 effective December 7, 1949. If further criteria to determine the applicability of the labeling requirement are found to be necessary, additional guidance will be developed either by the FAA or in an industry consensus standard.

After further analysis, the FAA finds the proposed requirements to provide system operating parameters, including warnings and cautions, were not adequately covered in proposed subpart G. Based on this and EASA's comments, the FAA relocates the pilot interface requirements of proposed § 23.1305(b) and (c) to new § 23.2605 in subpart G to adequately address these issues.

Garmin, Textron, and ANAC commented on the second sentence of proposed § 23.1305(c). Garmin recommended the FAA delete the phrase ''presentation of'', as it could be interpreted as requiring a light or other visual alert. Textron recommended the FAA replace the phrase ''clear enough to avoid likely crewmember errors'' with the phrase ''designed to minimize crewmember errors.'' ANAC contended the term ''likely'' is ambiguous and recommended the FAA replace the phrase ''to avoid likely crewmember errors'' with the phrase ''to minimize crewmember errors, which could create additional hazards.''

The FAA agrees with the commenters as the FAA did not intend to limit the presentation to visual displays only. Warning information can include visual, aural, tactile, or any combination. The FAA deletes ''presentation of'' in the proposed § 23.1305(c). Although both ''minimize'' and ''likely'' may be ambiguous, as was the concern from ANAC, the term ''minimize''—associated with the mitigation of hazards in the rule language—can be traced back to CAR 3, effective December 7, 1949. Although using a new term such as ''likely'' may be interpreted as a new requirement or standard for the minimization of errors, this was not the FAA's intent. Therefore, the FAA replaces the term ''minimize flightcrew errors'' in place of ''avoid likely crewmember errors'' in § 23.2600(b).

Embraer noted that the cross-reference table in the proposal stated that the intent of former § 23.1023 is addressed in proposed § 23.935(b)(1); however, there is no § 23.935(b)(1) in the proposed rule. To address this mistake, Embraer suggested including a similar

[50] The commenters actually stated they believe proposed § 23.1305(a)(1) and (2) were unnecessary. However, based on the rest of their comments and the recommendation to delete paragraphs (a)(2) and(a)(3) (and retain (a)(1)), the FAA assumes the commenters meant to state that § 23.1305(a)(2) and (3) are unnecessary.

requirement from former § 23.1023 in proposed § 23.1305, which would apply to any equipment. Specifically, Embraer recommended an addition to proposed § 23.1305(a)(4) stating equipment be able to withstand without failure, the vibration, inertia and loads (including fluid pressure loads) to which it would be subjected in operation.

Embraer stated that it understood that part 33 would not address all the concerns if the radiator is installed by the airframer, and noted that its same comment applies to former §§ 23.1013 and 23.1015.

The FAA has corrected and updated the table to accurately reference the relationship between the former rule and the final rule. Also, the FAA does not adopt Embraer's recommendation to add a requirement to § 23.2505 to address specific environmental conditions equipment must be able to withstand. The FAA notes Embraer was describing a specific failure mode, which is covered by §§ 23.2500(a)(2) and 23.2510.

d. Flight, Navigation, and Powerplant Instruments (Proposed § 23.1310/Now § 23.2615)

In the NPRM, proposed § 23.1310 (now § 23.2615) would have required installed systems to provide the flightcrew member who sets or monitors flight parameters for the flight, navigation, and powerplant information necessary to do so during each phase of flight. Proposed § 23.1310 would have required this information include parameters and trends, as needed for normal, abnormal, and emergency operation, and limitations, unless an applicant showed the limitation would not be exceeded in all intended operations. Proposed § 23.1310 would have prohibited indication systems that integrate the display of flight or powerplant parameters to operate the airplane or are required by the operating rules of this chapter, from inhibiting the primary display of flight or powerplant parameters needed by any flightcrew member in any normal mode of operation. Proposed § 23.1310 would have required these indication systems be designed and installed so information essential for continued safe flight and landing would be available to the flightcrew in a timely manner after any single failure or probable combination of failures.

In light of comments received, the FAA renumbers § 23.1310 to § 23.2615, and moves this section to Subpart G. The section for § 23.2615 in Subpart G discusses these changes in more detail.

e. Equipment, Systems, and Installation (Proposed § 23.1315/Now § 23.2510)

In the NPRM, proposed § 23.1315 (now § 23.2510) would have required an applicant—

- To examine the design and installation of airplane systems and equipment, separately and in relation to other airplane systems and equipment, for any airplane system or equipment whose failure or abnormal operation was not specifically addressed by another requirement in this part;
- To determine if a failure of these systems and equipment would prevent continued safe flight and landing, and if any other failure would significantly reduce the capability of the airplane or the ability of the flightcrew to cope with adverse operating conditions; and
- To design and install these systems and equipment, examined separately and in relation to other airplane systems and equipment, such that each catastrophic failure condition is extremely improbable, each hazardous failure condition is extremely remote, and each major failure condition was remote.

In light of comments received, the FAA revises proposed § 23.1315 (now § 23.2510) by withdrawing paragraph (a), merging paragraph (b) into the introductory sentence, and renaming paragraphs (b)(1), (b)(2) and (b)(3) as § 23.2510(a), (b) and (c), respectively. This section discusses these changes in more detail.

Garmin commented that proposed § 23.1315 should be located with the other general rules applicable to all systems and equipment.

The FAA agrees with Garmin's comment and is placing the regulation with the other general rules at the beginning of subpart F.

Textron commented the intent of proposed § 23.1315 is not as clearly written as CS 23.600 and 23.605 and an AC will be needed to determine the meaning of the proposed rule. The commenter recommended using the wording of CS 23.600 and 23.605. In contrast, The Associations preferred the FAA's proposed § 23.1315 to the EASA's A–NPA language, which they stated may unduly tie means of compliance to an objective-based rule. EASA suggested that proposed § 23.1315 show the inverse relationship between probability and severity in an illustration.

To clarify the intent of the rule, the FAA revises the proposed rule language to require each system and equipment to be designed and installed such that ''there is a logical and acceptable inverse relationship between the average probability and the severity of failure condition.'' This change is consistent with the NPRM, which explained that proposed § 23.1315 (now § 23.2510) would require an engineering safety analysis to identify possible failures, interactions, and consequences, and require an inverse relationship between the probability of failures and the severity of consequences. The logical inverse relationship should be proportionate and flexible with respect to risk levels. The FAA notes that if the FAA provided more detail and graphics in the rule, future interpretation of the rule may be more restrictive than intended. The FAA finds the additional information provided in EASA's A–NPA is more suitable for guidance similar to AC 23.1309–1E and is not adding this to the rule.

The Associations recommended the FAA add a new paragraph to proposed § 23.1315 that would allow the FAA to accept a higher failure probability for functionality that enhances the safety of the airplane beyond the required minimum functionality. The commenters noted such a provision would allow for safety-enhanced equipment to be treated in a less stringent manner that accounts for the significant benefits it could have. The commenters explained this would ensure the lowest cost of this equipment without sacrificing the safety-enhancing benefits. Garmin similarly noted that system safety analysis and design assurance are focused on system and equipment failures rather than the safety benefit such systems and equipment can provide. For example, TSO–C151, ''Terrain Awareness and Warning System (TAWS),'' equipment specifies a major failure classification, but no credit is given for the offsetting safety benefit provided for installation of TAWS with its corresponding reduction in Controlled Flight into Terrain (CFIT) accidents. Garmin asked the FAA to consider adopting a requirement that allows for design assurance certitude for systems that provide an increased safety benefit.

The FAA has determined adding a new requirement to proposed § 23.1315 (now § 23.2510) would create a special class of equipment in the rule, which is contrary to the FAA's intent. The objective of this rulemaking is to provide clear safety objectives without prescribing design solutions. The objective of proposed § 23.1315 is to require each system and equipment to be designed and installed such that there is a logical and acceptable inverse relationship between the average probability and the severity of failure conditions. This applies to all equipment whether required or non-required, safety-enhancing or not. The rule does not specify a required numeric probability of failure. The rule is written to allow a proportionate and flexible numerical value to the probabilities regarding risk levels of the equipment and airplane. System safety assessment standards will be relied on to provide a suitable approach for the different risk levels, similar to what is currently found in AC 23.1309–1E for the various classes of airplanes. Section 23.2510 provides a proportionate and flexible structure for future technology implementation.

Garmin and the Associations recommended the FAA use the term ''failure condition'' rather than ''failure'' to ensure the rule addresses the broader impacts of failures, rather than just those that occur within the equipment that may have failed. Garmin explained that by using ''failure condition,'' the rule would address combinations of failures in the system and equipment and other systems and equipment. ANAC stated the use of ''failure'' in paragraph (a) and use of ''failure condition'' in paragraph (b) may add confusion.

The FAA agrees with the commenters and revises proposed § 23.1315 (now § 23.2510) to use ''failure condition'' throughout the section.

Textron noted some simple systems were exempt from former § 23.1309. Textron asked if there was a list of systems exempt from proposed § 23.1315 (now § 23.2510), or if the FAA intended to apply the regulation to all systems. Textron specifically asked for confirmation that propulsion, fuel systems, fire protection systems, exits, landing gear, flight navigation, powerplant instruments, system power generation, storage, and distribution and flight controls were exempt from proposed § 23.1315 (now § 23.2510), since they each have their own rules dealing with failures.

This final rule does not contain a list of systems exempt from proposed § 23.2510 (proposed as § 23.1315). Consistent with former § 23.1309, proposed § 23.1315 (now § 23.2510) applies generally to installed equipment and systems, except that § 23.2510 does not apply if another section of part 23 imposes requirements for specific equipment or systems. The FAA is not providing a list of systems exempt from the rule, as Textron requested, because such a list would be based on today's technology and would be overly prescriptive and inflexible over time. This would conflict with the goal of allowing coverage for future unforeseen technological advancements.

Textron asked the FAA to clarify the intent of the safety requirements in proposed § 23.1315. In particular, Textron noted that paragraph (a) simply stated ''determine'', while paragraph (b) stated ''design and install'' to achieve safety goals that have no connection with those stated in paragraph (a). Textron asked for clarification of the relationship between the two paragraphs, as well as the overall intent of the rule. Textron recommended using the language in CS 23.605(a), which would have required each equipment and system to be designed and installed so there is a logical and acceptable inverse relationship between the average probability and the severity of failure condition effects. ANAC similarly noted that no clear safety objective was stated in proposed § 23.1315(a); rather, an applicant needed only determine if conditions (1) and (2) were examined. Embraer suggested the FAA remove proposed § 23.1315(a), asserting that the intent of proposed § 23.1315(b) would be sufficient to meet compliance.

EASA asserted the terminology in proposed § 23.1315(a) may be confusing. Phrases such as ''continued safe flight and landing'' and ''significantly reduce the capacity of the airplane'' or ''the ability of the flightcrew to cope with adverse operating conditions,'' are not as clear as terms ''catastrophic,'' ''hazardous,'' and ''major'' in describing the failure condition.

In light of these comments, the FAA withdraws proposed paragraph (a). Proposed § 23.1315(a) could have been interpreted as an element of the means of compliance to paragraph (b) in that the determinations of the potential consequences of failures is necessary to establish whether the probability of their occurrence is acceptable. Additionally, the FAA adopts Textron's recommendation and revises the proposed rule language to require each system and equipment to be designed and installed so there is a logical and acceptable inverse relationship between the average probability and the severity of failure condition effects. To comply with § 23.2510(a), applicants must account for airplane systems and equipment, separately and in relation to other airplane systems and equipment.

Textron indicated that the terms used in proposed § 23.1315(b) were not defined in the regulations.

The FAA did not define the terms ''catastrophic failure condition,'' ''hazardous failure condition,'' and ''major failure condition'' in the regulations because the terms are better addressed in guidance. These terms are currently defined in AC 23.1309–1E. Furthermore, the rule language is consistent with the historical rule language of former § 23.1309.[51]

ANAC commented that proposed § 23.1315(b) implied specific classification and probability terms that may be considered prescriptive. The commenter noted that, as written, this may prevent an applicant from using a means of compliance that employs different hazard categories or terminology.

The FAA notes the terms used in proposed § 23.1315 (now § 23.2510) are already defined in guidance (*i.e.,* AC 23.1309–1E) and originated from former § 23.1309, and should not prevent an applicant from using a means of compliance that employs different hazard categories or terminology. The FAA may accept a means of compliance standard that uses different hazard categories or terminology, if they align with the failure condition effects in paragraphs (a) through (c) so the requirements of proposed § 23.1315 (now § 23.2510) are met.

Rockwell Collins noted that former § 23.1309(c)(1) required each catastrophic failure condition to be extremely improbable and not result from a single failure. However, proposed § 23.1315(b)(1), which was intended to capture the safety intent of former § 23.1309, would have required only that each catastrophic failure condition be extremely improbable. It would not have prohibited single-point catastrophic failures. Rockwell Collins asked the FAA to retain the phrase ''and not result from a single failure'' in the regulation, because the commenter believed the FAA's intent was not to propose changes with regard to single-point catastrophic failures.

The FAA notes the ARC recommended the FAA require systems and equipment to be designed and installed so there is a logical acceptable inverse relationship between the average probability and the severity of failure condition effects whether the result of a single failure or multiple failures. With the advancement of technology and increased integration of systems, it is virtually impossible to eliminate all theoretical potential single-points of failure. The rule will allow in some cases, as is true today with some portions of the airplane, to have the potential of single-point failures if the risk and probability of such failure is acceptable. The FAA adopts the rule language as proposed in § 23.1315(b)(1).

Noting that key pieces of FAA guidance are critical to design and certification, Kestrel asked whether AC

[51] *See* 55 FR 43306, October 26, 1990.

23.1309 would remain the primary guidance for SSA. If not, Kestrel asked what the recommended guidance would be.

Guidance for proposed § 23.1315 may consist of existing FAA guidance, such as AC 23.1309, future FAA-generated guidance, and FAA-accepted industry standards.

Textron noted the NPRM stated applicants who use the means of compliance described in the existing special conditions would be able to use data developed for compliance with proposed § 23.1315. Textron recommended the FAA revise the statement to clarify the FAA was referring to special conditions for part 25 airplanes.

The statement in the NPRM is correct. Applicants who use the means of compliance described in the existing special conditions for parts 23, 25, 27, or 29 may use data developed for compliance with § 23.2510.

f. Electrical and Electronic System Lightning Protection (Proposed § 23.1320/Now § 23.2515)

In the NPRM, proposed § 23.1320(a) would have required, for an airplane approved for IFR operations, that each electrical or electronic system that performs a function, the failure of which would prevent the continued safe flight and landing of the airplane, be designed and installed such that—

- The airplane system level function continues to perform during and after the time the airplane is exposed to lightning; and
- The system automatically recovers normal operation of that function in a timely manner after the airplane is exposed to lightning, unless the system's recovery conflicts with other operational or functional requirements of the system.

Proposed § 23.1320(b) would have required each electrical and electronic system that performed a function, the failure of which would reduce the capability of the airplane or the ability of the flightcrew to respond to an adverse operation condition, to be designed and installed such that the function recovers normal operation in a timely manner after the airplane is exposed to lightning.

Several commenters raised concerns with the term ''system'' in proposed § 23.1320(a)(1). BendixKing explained that the proposed phrase ''airplane system level function'' may lead to multiple interpretations of the regulation. BendixKing asked the FAA to delete ''system'' from the proposed rule language because the rule addresses failure at the airplane level. The Associations recommended the FAA require the function, rather than the airplane system level function, to comply with the requirement in paragraph (a)(1).

Garmin stated that there has been much discussion in the GAMA HIRF (High-Intensity Radiated Fields) ad-hoc meetings regarding the interpretation of the term ''system.'' Garmin explained the rule language could be interpreted as requiring all redundant systems, which perform the same function, to meet the lightning requirements. Garmin explained that not all redundant systems should be required to meet the catastrophic requirements to prevent potentially catastrophic failure; proposed § 23.1320(a) should apply to the function level only. Garmin recommended alternative regulatory language would prevent catastrophic, major, or hazardous failure conditions at the airplane level.

The FAA agrees proposed § 23.1320(a)(1) (now § 23.2515(a)(1)) could have been misinterpreted due to the confusion surrounding the phrase ''airplane system level function.'' The FAA intended to require the function at the airplane level to meet the requirements of paragraph (a)(1), consistent with proposed § 23.1325(a)(1) (now § 23.2520). Thus, the FAA intended proposed § 23.1320(a)(1) to require the function at the airplane level not to be adversely affected during and after the time the airplane is exposed to lightning. This means if multiple systems perform the same function, only one of those systems is required to provide the function under § 23.2515(a)(1). Therefore, not all redundant systems are required to meet the requirements of § 23.2515(a)(1). The FAA deletes the term ''system'' from the phrase ''airplane system level function,'' as several commenters recommended to ensure the FAA's intent is clear. The FAA revises the rule language to make clear that the requirements of proposed § 23.1320(a)(1) (now § 23.2515(a)(1)) apply to the function at the airplane level.

Garmin noted that the proposed § 23.1320 rule language was essentially the same as former § 23.1306, which was overly burdensome for low-end part 23 airplanes. Garmin stated that proposed § 23.1320 is contrary to the goal of the part 23 reorganization and explained the objective should be to prevent catastrophic, hazardous, and major failure conditions for the airplane. Garmin suggested revising proposed § 23.1320 to be more general and to allow the ASTM standards to provide the necessary means of compliance, which should consist of a tiered compliance approach for different airplane certification levels.

The FAA does not agree to make § 23.2515 more general. Section 23.2515 is intended to address catastrophic, hazardous, and major failure condition at the airplane level due to the effects of lightning on systems. Critical functions that would prevent continued safe flight and landing (catastrophic) should remain available to the crew throughout a lightning exposure. How to maintain the function, whether with redundant systems or non-susceptible systems, is a means of compliance and is not specified. Likewise, systems that perform a function, the failure of which would significantly reduce the capability of the airplane (hazardous), must recover normal operation of that function. A means of compliance is not specified and could include redundancy. The FAA has revised the rule to state more clearly that the concern for catastrophic failure conditions is at the airplane level. Furthermore, the rule already allows a tiered compliance approach based on the environment the airplane is likely to see.

Several commenters raised concerns with applying proposed § 23.1320 to airplanes approved for IFR operations. The Associations noted the FAA has recently approved required equipment for use in IFR airplanes, without the need for lightning testing based on the history of lightning strikes in the general aviation fleet. However, these commenters indicated the proposed rule would have prohibited airplanes with a low probability of lightning strikes from benefiting from such an approach. These commenters asked the FAA to revise the proposed rule language to ensure the rule does not apply to airplanes with a low probability of lightning strike.

Garmin noted that former § 23.1306 required both VFR and IFR airplanes to meet lightning requirements for systems with catastrophic failure conditions. However, while proposed § 23.1320 would have removed the requirement for VFR airplanes, the burden for industry is primarily IFR airplanes as there are very few VFR airplanes, if any, that have systems with catastrophic failure conditions. Garmin recommended revising the proposed rule language by removing the language that would have made proposed § 23.1320 applicable to airplanes approved for IFR operations.

EASA also asked the FAA to remove the language that would have made proposed § 23.1320 applicable to airplanes approved for IFR operations. EASA explained that this revision would permit credit for reliable systems that allow for avoidance of thunderstorms, as these systems would make exposure to lightning unlikely.

In light of these comments, the FAA recognizes the proposed rule language would not have adequately relieved the burden of former § 23.1306, which required all airplanes regardless of their design or operational limitations meet the same requirements for lightning regardless of the potential threat. As explained in the NPRM, the FAA intended to relieve this burden by applying the lightning requirements to airplanes with the greatest threat of lightning. The FAA proposed to meet this objective by making the rule applicable to airplanes approved for IFR operations. Because airplanes approved for IFR operations may also have a low probability of lightning exposure, the proposed rule language did not meet the FAA's objective. Accordingly, the FAA adds an exception to the rule language for applicants who can show that exposure to lightning is unlikely. This change from what was proposed is more consistent with the FAA's intent as it relieves an airplane approved for IFR operations from complying with § 23.2515 if it is shown the airplane has a low probability of lighting exposure. The method of compliance is not specified in the rule and could be system, operational, or environment based.

Garmin and the Associations recommended the FAA revise proposed § 23.1320(b) to make the requirement only applicable to levels 3 and 4 airplanes approved for IFR operations.

The FAA disagrees. Section 23.2520(b) is a general safety objective with compliance tailored to the specific design intent. Exposure to lightning is an environmental threat not directly associated with airplane certification levels and therefore could apply to all airplanes. The intent is to set requirements appropriately to the design. Therefore, the FAA adds an exception to the rule language for applicants who can show that exposure to lightning is unlikely.

Daher, Textron, and the Associations suggested the FAA, in proposed § 23.1320(a)(1) (now § 23.2515(a)(1)), require the function to not be ''adversely affected'' during and after the time the airplane is exposed to lightning, but require the function to ''continue to perform.'' Daher and Textron explained that requiring the function to not be ''adversely affected'' would be more consistent with the language of proposed § 23.1325 (now § 23.2520). The Associations asserted that this revision would permit equipment installations that may be affected by lightning, provided the loss of equipment does not result in catastrophic events. Textron further noted this revision would ensure harmony with EASA's proposed CS 23.620.

In response to these comments, the FAA revises the proposed rule language to require the function at the airplane level to not be ''adversely affected'' during and after the time the airplane is exposed to lighting. As explained in the NPRM, the FAA intended proposed § 23.1320(a)(1) (now § 23.2515(a)(1)) to capture the safety intent of former § 23.1306. Former § 23.1306(a)(1) required the function to not be ''adversely affected'' during and after the time the airplane is exposed to lightning. Because the proposed language could be interpreted as an increase in burden, which would not meet the intent of former § 23.1306, the FAA is reverting back to the former rule language. It should be noted that ''adversely affected'' was not previously limited to catastrophic events as suggested by the commenters, but included hazardous and major failure conditions as well.

Textron questioned if crew action could be involved in the recovery of the function or must recovery be automatic. Textron asked the FAA to clarify whether proposed § 23.1320(a)(2) would permit crew action in recovery of the function. Garmin recommended the FAA not adopt proposed § 23.1320(a)(2).

Based on Textron's comment, the FAA clarifies paragraph (a)(2) by removing the term ''automatic'' from the proposed rule to allow either flightcrew action or automatic recovery. One of the goals of the proposal was to remove prescriptive design solution for the airworthiness standards and replace them with performance-based rules. Automatic reset of a system is a design solution, while the safety objective is the function be usable to the flightcrew in a timely manner such that the intermittent loss or malfunction does not have an adverse effect on the safety of the flight. Therefore, the recovery of the function may be automatic or manual. While Garmin recommended that the FAA not adopt proposed § 23.1320(b) (now § 23.2515(b)), the FAA believes the safety intent of former § 23.1306, which addressed catastrophic and hazardous failure condition due to the effects of lightning on systems, must be retained.

Transport Canada noted that proposed § 23.1320(a)(2) would benefit from inclusion of a specific safety objective. The commenter suggested revising the proposed rule language to require the system to automatically recover normal operation of the function in such time as to allow a safety objective to be achieved.

The FAA notes the safety objective of paragraph (a)(2) is ''the timely recovery of the system's function.'' Additionally, the rule language existed in former § 23.1306(a)(2). Based on this, the FAA does not adopt the change proposed by Transport Canada in the final rule.

Textron requested the FAA insert ''significantly'' before ''reduce'' in proposed § 23.1320(b), because any reduction in capacity would trigger this rule.

The FAA agrees with Textron and revises the language in proposed § 23.1320(b) (now § 23.2515(b)) accordingly. This change is consistent with former § 23.1306, which used the phrase ''significantly reduce.'' Also, this change is necessary because without the term ''significantly'', the language could be interpreted as imposing requirements on each electrical and electronic system that performs a function, the failure of which would reduce—no matter how minimal—the capability of the airplane or the ability of the flightcrew to respond to an adverse operating condition. This would increase the burden from former part 23, which was not the FAA's intent.

g. High-Intensity Radiated Fields (HIRF) Protection (Proposed § 23.1325/Now § 23.2520)

In the NPRM, proposed § 23.1325 (now § 23.2520) would have required electrical and electronic systems that perform a function whose failure would prevent the continued safe flight and landing of the airplane, to be designed and installed such that—the airplane system level function is not adversely affected during and after the time the airplane is exposed to the HIRF environment. Proposed § 23.1325 would have also required these systems automatically recover normal operation of that function in a timely manner after the airplane is exposed to the HIRF environment, unless the system's recovery conflicts with other operational or functional requirements of the system.

For airplanes approved for IFR operations, proposed § 23.1325(b) would have required the applicant to design and install each electrical and electronic system that performs a function—the failure of which would reduce the capability of the airplane or the ability to the flightcrew to respond to an adverse operating condition—so the function recovers normal operation in a timely manner after the airplane is exposed to the HIRF environment.

Several commenters raised concerns about the term ''system'' in proposed § 23.1325(a)(1). Textron stated the phrase ''airplane system level'' [52] could be interpreted to mean that if multiple systems provide a redundant function, each system needs to work through the threat although only one is required. Textron asked the FAA to clarify if proposed § 23.1325(a)(1) was intended to require a means to provide the airplane level function for continued safe flight and landing. BendixKing similarly commented that the failure being addressed in proposed § 23.1325(a)(1) is at the airplane level, but the proposed phrase ''airplane system level function'' would lead to multiple interpretations of the regulation. Textron and BendixKing suggested deleting the term ''system'' from proposed § 23.1325(a)(1) to clarify the requirement applies to the airplane level.

Garmin noted there has been much discussion in the GAMA HIRF ad-hoc meetings regarding the definition of a ''system.'' Garmin asked the FAA whether ''system'' means each individual redundant system or all redundant systems. Garmin explained that proposed § 23.1325(a)(2) could be interpreted to impose additional requirements to the extent that all redundant systems must meet the catastrophic failure requirements of paragraph (a). Garmin suggested that not all redundant systems should be required to meet the catastrophic requirements and proposed § 23.1325(a) should apply only to the function level. Garmin recommended alternative regulatory language that reflected its comments.

The FAA agrees that proposed § 23.1325(a)(1) (now § 23.2520(a)(1)) could be misinterpreted due to the confusion surrounding the phrase ''airplane system level function.'' As explained in the NPRM, the FAA intended the proposed rule language to clarify the failure consequence of interest is at the airplane level. Thus, the FAA intended paragraph (a)(1) to require the function at the airplane level not to be adversely affected during and after the time the airplane is exposed to the HIRF environment. This means if multiple systems perform the same function, only one of those systems is required to provide the function under paragraph (a)(1). Therefore, in response to Garmin's comment, the FAA notes not all redundant systems are required to meet the requirements of paragraph (a)(1). To clearly reflect the intent of proposed § 23.1325(a)(1) (now § 23.2520(a)(1)), the FAA deletes the term ''system'' from the phrase ''airplane system level function,'' as recommended by Textron and BendixKing, and revises the proposed rule language to clarify that the requirements of paragraph (a)(1) apply to the function at the airplane level.

Furthermore, in light of Garmin's comment, the FAA revises the proposed rule language in § 23.1325(a) (now § 23.2520(a)) to clarify that ''each'' electric and electronic system that performs a function—the failure of which would prevent the continued safe flight and landing of the airplane—must be designed and installed such that the requirements of § 23.2520(a)(1) and § 23.2520(a)(2) of this section are met.

Garmin recommended the FAA delete proposed § 23.1325(a)(2) and explained that proposed § 23.1325(a)(2) is unnecessary because proposed § 23.1325(a)(1) already prohibits systems from preventing safe flight and landing after a HIRF event. The commenter maintained paragraph (a)(1) would be sufficient to ensure a tiered means of compliance could be developed based on the criticality of the HIRF event. Garmin stated that proposed § 23.1325(a)(2) contains design information, which is contrary to the goal of the part 23 reorganization, and explained the objective should be to prevent catastrophic, hazardous, and major failure conditions for the airplane. Garmin suggested revising proposed § 23.1325 to be more general and allow the ASTM standards to provide the necessary means of compliance.

The FAA disagrees with the commenter's recommendation to delete proposed § 23.1325(a)(2) and to make paragraph (a) more general. The FAA agrees with a tiered means of compliance approach for hazardous and major failure conditions, which are addressed in § 23.2520(b). However, for catastrophic failure conditions addressed in § 23.2520(a), the FAA finds it necessary to require each system that performs a function, the failure of which would prevent the continued safe flight and landing of the airplane, to be able to recover normal operation of the function. Paragraph § 23.2520(a)(2) is not design specific; it captures the safety intent of former § 23.1308(a) at a high level, allowing for means of compliance other than appendix J to part 23—''HIRF Environments and Equipment HIRF Test Levels''.

Textron asked the FAA to clarify whether proposed § 23.1325(a)(2) would permit flightcrew action in recovery of the function.

The FAA is removing the term ''automatically'' from the proposed rule language to clarify that flightcrew action is permitted in recovering the normal operation of the system's function. The FAA intended proposed § 23.1325 to capture the safety intent of former § 23.1308, which required the system to ''automatically'' recover normal operation of the function in a timely manner. Automatic reset of a system is a design solution. The safety objective of former § 23.1308(a) is that the function be usable to the flightcrew in a timely manner such that the intermittent loss or malfunction does not have an adverse effect on the safety of the flight. The FAA finds that permitting the flightcrew to manually recover normal operation of the system's function in a timely manner would maintain the level of safety found in former § 23.1308(a). Therefore, the recovery of the function may be automatic or manual under § 23.2520(a)(2).

The Associations commented that current policy and guidance may apply HIRF requirements differently to part 23 products than in other areas and suggested that the IFR discriminator in paragraph (b) may not be as valid as using airworthiness level. The commenters recommended the FAA restrict paragraph (b) to level 3 and 4 airplanes that are approved for IFR operations.

Mooney International (Mooney) questioned the intent of including IFR-related HIRF requirements in paragraph (b). Mooney contended that HIRF is related to environments from ground-based transmission of RF energy from radars, radios, etc., which is unrelated to IFR environmental operations.

The FAA has considered the comments on inconsistent application of HIRF requirements, but notes the hazardous and major failure conditions of paragraph (b) should apply to airplanes certificated for IFR operations regardless of airworthiness level. The different types of operations an airplane may be certificated for are Day VFR, Night VFR, and IFR. Airplanes certified for only VFR operations are restricted from operating under IFR, which includes flight into IMC. IFR-certified airplanes, however, are not prohibited from flight into IMC. The severity of a HIRF event is greater in IMC. Therefore, the FAA finds it necessary to apply the hazardous and major failure conditions to all airplanes certified for IFR operations. Furthermore, while the FAA is not restricting the application of paragraph (b) to only level 3 and 4 airplanes, paragraph (b) allows for a

[52] Safety requirements exist at the airplane, system, and item level. SAE International, ARP 475A *Guidelines for Development of Civil Aircraft Systems,* 4.1.3 Introduction to Hierarchical Safety Requirements Generated from Safety Analyses (2010).

tiered means of compliance approach based on airworthiness level and the associated risk. The FAA replaced the prescriptive requirements, which were further defined in former appendix J to part 23, with the wording ''exposed to the HIRF environment.'' The intent is to allow for the exposure environment to match the risk associated with each airplane level. Therefore, the threat will be appropriately scaled to the airworthiness level as the data and risk supports.

Garmin suggested revising the proposed rule language of paragraph (b) to require each electrical and electronic system to be designed and installed, rather than requiring the applicant to design and install each system.

The FAA adopts Garmin's recommendation, which makes the language of paragraph (b) parallel the language of paragraph (a).

Embraer suggested the FAA adopt the same HIRF environments and test levels that are described in former appendix J to part 23, which were associated with former § 23.1308.

The FAA finds the prescriptive environments and test levels found in former appendix J to part 23 are more appropriately addressed as a means of compliance to proposed § 23.1325 (now § 23.2520). This allows the test levels to change as the environment changes without new regulatory action. Additionally, one prescriptive level for all airplanes does not allow for a tiered compliance approach, which was an objective of this rule.

h. System Power Generation, Storage, and Distribution (Proposed § 23.1330/ Now § 23.2525)

In the NPRM, proposed § 23.1330 (now § 23.2525) would have required the power generation, storage, and distribution for any system be designed and installed to supply the power required for operation of connected loads during all likely operating conditions. Proposed § 23.1330 would have required the design installation ensure no single failure or malfunction would prevent the system from supplying the essential loads required for continued safe flight and landing. Finally, proposed § 23.1330 would have required the design and installation have enough capacity to supply essential loads, should the primary power source fail, (for at least 30 minutes for airplanes certificated with a maximum altitude of 25,000 feet or less and at least 60 minutes for airplanes certificated with a maximum altitude over 25,000 feet.

Textron requested the FAA make slight revisions to proposed § 23.1330(a) to harmonize the wording with CS 23.630. Specifically, Textron recommended requiring the power generation, storage, and distribution for any system be designed and installed to supply the power required for operation of connected loads during all intended operating conditions rather than ''all likely operating conditions'' because it would provide a clear boundary for demonstration of compliance. In the alternative, Textron suggested removing proposed paragraph (a) because the requirement is already covered more broadly in proposed § 23.1300(a)(2).

The FAA agrees with Textron's recommendation to replace ''likely'' with ''intended'' to harmonize with EASA and make clear the boundary for demonstration of compliance. Therefore, the FAA did not consider Textron's alternative recommendation to remove paragraph (a). The FAA notes that proposed § 23.1330(a) (now § 23.2525) is not redundant with proposed § 23.1300(a)(2) (now § 23.2500). Section 23.2500 is a rule of general applicability and does not supersede more specific rules. It is appropriate for system power generation, storage, and distribution to be addressed by a specific rule.

Air Tractor noted that proposed § 23.1330(b) appears more restrictive than former § 23.1310 in regards to single-point failures. The commenter further noted this may require there be no single failure points between the power supply and the essential load bus.

The FAA did not intend for proposed § 23.1330(b) (now § 23.2525(b)) to be more restrictive than the requirements under former part 23. The FAA revises proposed § 23.1330(b) for clarity by adding ''of any one power supply, distribution system, or other utilization system.'' This sets limits as to what needs to be considered when examining single-point failures.

Several commenters, including EASA, Kestrel, Daher, and the Associations raised concerns about the minimum flight times (*i.e.,* 30 minutes and 60 minutes) set forth in proposed § 23.1330(c). The commenters generally focused on allowing the means of compliance to define the appropriate minimum flight times and basing the minimum flight times on airplane performance. Daher suggested that ASTM standards should provide minimum flight times for battery systems. The Associations raised concerns the requirement in proposed § 23.1330(c)(1) may be excessive for airplanes with a maximum ceiling much lower than 25,000 feet. The Associations requested the FAA provide a reasonable window of essential power required for these lower flying airplanes for which electrical power will be controlled in a very reliable but efficient manner due to the nature of their design. Similarly, BendixKing noted that 25,000 feet and 30 minutes capacity requirement to supply essential loads may be restrictive to newer ''simple'' airplanes, which operate only at 10,000 feet and require only 10–15 minutes. Garmin noted the wording of the proposed rule would require some new electrical-powered airplanes, which may have flight durations of less than 30 or 60 minutes, to carry the power supply regardless.

In response to numerous comments opposing the specific flights times outlined in proposed § 23.1330(c)(1) and (c)(2) (now § 23.2525(c)), the FAA agrees the language would have been overly prescriptive and incompatible with new technologies. The FAA revises proposed § 23.1330(c) to remove the specific time requirements and add the safety intent requiring enough capacity for the time needed to complete the functions required for continued safe flight and landing.

Kestrel questioned whether the language ''design and installation have enough capacity to supply essential loads'' permitted use of both the engine start battery and the emergency battery in combination to supply essential loads in the event of loss of the primary electrical power generating systems, without the need for an alternate means of compliance. The commenter noted this is typically addressed using an ELOS finding to former § 23.1353(h).

Kestrel also raised concerns about the possible misinterpretation of the phrase ''if the primary source fails'' in proposed § 23.1330(c). Kestrel said it was aware of at least one such instance, resulting in the issuance of an STC based on the understanding this meant failure of the primary generator and proper operation of the backup alternator. Kestrel asked FAA to revise the wording to prevent this possible misinterpretation.

Both of Kestrel's comments relate to a specific design solution and method of compliance that should be addressed with the use of industry developed consensus standards or other accepted means of compliance. In the past, the engine start battery could be used to meet the required load capacity based on an ELOS finding (as pointed out be Kestrel). The requirements found in this ELOS finding to former § 23.1353(h) could be documented in a consensus standard as an acceptable means of compliance to the regulation. The same applies to the definition of the ''primary source.'' The intent is not to increase design requirements, but to make showing of compliance more flexible.

Textron requested the FAA limit the applicability of proposed § 23.1330(c) to electrical systems by changing the title proposed § 23.1330 to ''Electrical system power generation, storage, and distribution.''

The FAA disagrees with Textron's proposal as the Part 23 ARC discussed this issue, with a consensus agreeing the rule should apply to current technologies such as batteries and new technologies that may apply in the future. The language proposed by the FAA would implement the ARC's recommendation, and the FAA makes no changes to that language in the final rule based on Textron's proposal.

i. External and Cockpit Lighting (Proposed § 23.1335/Now § 23.2530)

In the NPRM, proposed § 23.1335 (now § 23.2530) would have required an applicant to design and install all lights to prevent adverse effects on the performance of flightcrew duties. Proposed § 23.1335 would have required position and anti-collision lights, if installed, to have the intensities, flash rate, colors, fields of coverage, and other characteristics to provide sufficient time for another airplane to avoid a collision. Proposed § 23.1335 would have required position lights, if installed, to include a red light on the left side of the airplane, a green light on the right side of the airplane, spaced laterally as far apart as practicable, and a white light facing aft, located on an aft portion of the airplane or on the wing tips. Proposed § 23.1335 would have required that an applicant to design and install any taxi and landing lights, if required by operational rules, so they provide sufficient light for night operations. Finally, for seaplanes or amphibian airplanes, proposed § 23.1335 would have required riding lights to provide a white light visible in clear atmospheric conditions.

Textron commented on proposed § 23.1335(a), explaining it would have been difficult to design and install lights to ''prevent adverse effects'' on the performance of flightcrew duties in all cases. Therefore, Textron recommended the FAA require lights to be installed to ''minimize,'' rather than ''prevent,'' the possibility they will adversely affect the satisfactory performance of the flightcrew's duties.[53]

The FAA agrees the term ''prevent'' would be difficult to comply with in all cases. The FAA also interprets the term ''prevent'' to be more restrictive than the former requirements, which used descriptive terms such as ''no dangerous glare'' in former § 23.1383(a) and ''not seriously affected'' in former § 23.1383(b). The term ''minimize'' more accurately reflects the former requirements of part 23. For these reasons, the FAA revises the proposed rule language to require the applicant to design and install all lights to minimize any adverse effects on the performance of flightcrew duties.

Kestrel commented that the proposed wording, ''as far as space allows,'' in proposed § 23.1335(c) could be interpreted to mean that integrated wingtip navigation lights are no longer permitted, and the only way to meet the requirement is to install external navigation lights outboard of the wingtips. Kestrel recommended reverting to the language used in former § 23.1385, which stated that navigation lights should be ''spaced laterally as far apart as practicable.''

The FAA agrees with the commenter. The FAA intended proposed § 23.1335(c) (now § 23.2530(c)) to capture the safety intent of former § 23.1385(c) without an increase in burden for certification. Former § 23.1385(c) required the left and right position lights to consist of a red and a green light ''spaced laterally as far apart as practicable.'' The FAA is reverting back to this language for the reasons identified by the commenter. Accordingly, § 23.2530(c) now requires any position lights, if required by part 91, to include a red light on the left side of the airplane and a green light on the right side of the airplane, spaced laterally as far apart as practicable.

Kestrel and Air Tractor commented on proposed § 23.1335(d), which would have required the installation of taxi and landing lights. Kestrel asked the FAA to align proposed paragraph (d) with former § 23.1383, which did not require the installation of both taxi and landing lights, but instead required ''sufficient light for each phase of night operations.'' Air Tractor suggested the FAA add rule language to paragraph (d) to make it applicable to taxi and landing lights, ''if installed,'' because the regulations do not require night operations.

The FAA did not intend to require the design and installation of taxi and landing lights in proposed § 23.1335(d) (now § 23.2530(d)). As explained in the NPRM, the FAA intended proposed § 23.1335(d) to capture the safety intent of former § 23.1383, which required each taxi and landing light to be designed and installed so that it provided enough light for night operations. The FAA revises the proposed rule language to more clearly reflect its intent. Accordingly, § 23.2530(d) now requires any taxi and landing lights to be designed and installed so they provide sufficient light for night operations.

The Associations and ICON recommended the FAA not adopt proposed § 23.1335(e). The Associations noted that the requirement is already addressed in regulations concerning maritime vessels, and could create a conflict should those maritime regulations be changed. The Associations also noted that there is no safety benefit in duplicate coverage. ICON commented that the FAA proposed to add a requirement for a riding light on seaplanes. ICON stated that the operational requirement for a vehicle to display a white light on the water is not an FAA requirement and should not be mandated as a vehicle design requirement by the FAA. ICON recommended the FAA let the agency controlling the body of water impose this operating rule on seaplanes. ICON further noted it should not be a design requirement because a pilot may choose to comply with the requirement by using a portable light rather than an installed device on an airplane.

The FAA considered the commenters recommendations but notes proposed § 23.1335(e) (now § 23.2530(e)) is not a new requirement. As explained in the NPRM, proposed § 23.1335(e) captures the safety intent of former § 23.1399. Former § 23.1399 required each riding (anchor) light required for a seaplane or amphibian, to be installed so it can show a white light for at least two miles at night under clear atmospheric conditions; and show the maximum unbroken light practicable when the airplane is moored or drifting on the water. Former § 23.1399 was adopted on February 1, 1965, as a recodification of CAR 3.704.[54] The FAA's intent was to remove the prescriptive requirements of former § 23.1399 to means of compliance and imposing the safety requirement as a performance-based standard in paragraph (e). Therefore, the FAA adopts paragraph (e) as proposed.

While the commenters did not cite a specific regulation concerning vessels, the FAA has determined the commenters are referring to Title 33 of the CFR (33 CFR), Navigation and Navigable Waters. 33 CFR part 83 contains rules applicable to all vessels upon the inland waters of the United States,[55] and defines a vessel as including every description of water craft— including seaplanes—used or

[53] This wording was proposed in the ARC final report for § 23.1383.

[54] *See* 29 FR 17955 (1964).

[55] *See* 33 CFR 83.01.

capable of being used as a means of transportation on the water.[56] Thus, while a seaplane is anchored or afloat upon the inland waters of the United States, it is subject to part 83. Although § 83.30 contains light requirements for anchored vessels, the FAA finds it necessary to require seaplanes to have a riding light that provides a white light visible in clear atmospheric conditions. The objective of § 83.30 is to ensure vessels see other vessels. The objective of § 23.2530(e) is to ensure seaplanes are able to see other seaplanes in the interest of safety, not to provide duplicate coverage. There is no apparent conflict between part 83 and § 23.2530(e), nor has there been a known conflict in the last fifty years. Furthermore, § 83.31 states that where it is impractical for a seaplane to exhibit lights and shapes of the characteristics or in the positions prescribed in subpart C of part 83, which contains § 83.30, that seaplane shall exhibit lights and shapes as closely similar in characteristics and position as possible.

Also, former § 23.1399(b) stated that externally-hung lights may be used. While the FAA removed this prescriptive requirement from the regulations, it may still be used as an acceptable means of compliance to § 23.2530(e).

Finally, Embraer suggested the FAA adopt guidance material and standards, such as ACs and Agency Process Recommendations, as reference to the certification project, provided these documents are compatible with the former part 23 requirements.

The FAA notes that current published guidance, previously accepted industry standards, and the prescriptive requirements found in former part 23 will remain acceptable means of compliance for this final rule. The FAA will continue to develop guidance as deemed necessary, but intends to use industry-developed standards if they are found acceptable. The FAA is actively engaged with industry consensus groups developing suitable standards for this final rule.

j. Safety Equipment (Proposed § 23.1400/Now § 23.2535)

In the NPRM, proposed § 23.1400 (now § 23.2535) would have required safety and survival equipment, required by the operating rules of this chapter, to be reliable, readily accessible, easily identifiable, and clearly marked to identify its method of operation.

Air Tractor noted that the requirement for safety and survival equipment to be reliable may require some kind of testing or certification of fire extinguishers. The commenter questioned whether the current Underwriter's Laboratory (UL) rating of fire extinguishers would be sufficient.

The FAA finds the UL rating for fire extinguishers will be an acceptable means of compliance under § 23.2535, as it was an acceptable method of compliance under former § 23.1411. As explained in the NPRM, the FAA intended proposed § 23.1400 (now § 23.2535) to capture the safety intent of former § 23.1411. While the FAA removed the prescriptive language from former § 23.1411, it did not intend to change the current method of compliance for the required safety and survival equipment.

k. Flight In Icing Conditions (Proposed § 23.1405/Now § 23.2540)

In the NPRM, proposed § 23.1405 (now § 23.2540) would have required an applicant to demonstrate its ice protection system would provide for safe operation, if certification for flight in icing conditions is requested.[57] Proposed § 23.1405 would have required these airplanes to be protected from stalling when the autopilot is operating in a vertical mode. Proposed § 23.1405 would have also required this demonstration be conducted in atmospheric icing conditions specified in part 1 of appendix C to part 25 of this chapter, and any additional icing conditions for which certification is requested.

In light of comments received, the FAA revises § 23.2540 to move proposed paragraphs (a) and (b) to the introductory paragraph, and renumber proposed paragraphs (a)(1) and (2) as new paragraphs (a) and (b). This section discusses these changes in more detail.

The NTSB stated that adopting proposed §§ 23.230 (now § 23.2165) and 23.1405 will likely result in Safety Recommendation A–96–54 being classified ''Closed—Acceptable Action.'' The NTSB agreed with the FAA's statement in the NPRM that proposed § 23.1405 would address Safety Recommendations A–07–14 and–15.

The Associations suggested a better correlation between proposed §§ 23.230 and 23.1405 and added it may be appropriate to combine these sections.

In light of this comment, the FAA is restructuring proposed § 23.1405 to be consistent with § 23.2165. Proposed § 23.1405(a) and § 23.1405(b) were combined into the introductory sentence of § 23.2540 and modified to read similarly to § 23.2165. Accordingly, § 23.2540 now requires an applicant who requests certification for flight in icing conditions defined in part 1 of appendix C to part 25, or an applicant who requests certification for flight in these icing conditions and any additional atmospheric icing conditions, to show compliance with paragraphs (a) and (b) in the icing conditions for which certification is requested.[58]

The FAA is not, however, combining proposed §§ 23.230 and 23.1405. The FAA agrees with the Part 23 Icing ARC's and the Part 23 ARC's recommendations to separate the performance and flight characteristics requirements for flight in icing conditions from the system requirements for flight in icing conditions.[59] The FAA notes § 23.2165 contains the requirement to safely avoid or exit icing conditions for which certification is not requested, whereas § 23.2540 does not contain such a requirement for systems. The FAA finds it appropriate to keep these sections separate as the distinction between the sections means that systems, such as the windshield or air data, do not have to be evaluated in icing conditions for which the airplane is not requesting certification.

Textron and Kestrel commented on ice crystal conditions. Textron noted that the proposed rule would not have defined ice crystal conditions and asked the FAA where the term would be defined. Kestrel asked if the requirements of TSO C16a, ''Electrically Heated Pitot and Pitot-Static Tubes'', would be an acceptable means of compliance to the ice crystal requirements of proposed § 23.1405.

The FAA notes the phrase ''any additional atmospheric icing conditions'' in proposed § 23.1405 includes ''ice crystal conditions''. However, the FAA is not defining ''ice crystal conditions'' in the final rule because it is more appropriately addressed in means of compliance.

The FAA finds TSO C16a will be an acceptable means of compliance when it is revised to include SAE airworthiness standard AS 5562, ''Ice and Rain Minimum Qualification Standards for Pitot and Pitot-static Probes''. The FAA notes SAE AS 5562 is an acceptable means of compliance to the ice crystal requirements for pitot and static systems. The FAA points out, however, that SAE AS 5562 does not include ice crystal requirements for certain angle-of-

[56] *See* 33 CFR 83.03.

[57] Part 23 Icing ARC recommendations, including recommendations on activation and operation of ice protection systems, would have been used as a means of compliance to proposed § 23.1405(a)(1).

[58] *See* section III, B. Part 23, Airworthiness Standards, Subpart B of this preamble (explaining the clarifying change made to proposed § 23.230(a)).

[59] *See* docket number FAA–2015–1621.

attack instruments, such as sensors that utilize differential static pressure.

Kestrel questioned if the FAA would permit ice protection systems to be operational on an airplane not certified for Flight Into Known Ice (FIKI), as it does today via the guidelines established in Appendix 4 of AC 23.1419–2D for ''non-hazard'' systems. Kestrel noted that it was unclear whether the FAA intends to continue the use of the ''non-hazard'' classification because the NPRM does not explicitly mention ''non-hazard'' systems. Kestrel believed that operational ice protection systems on non-FIKI-certified airplane do not need a special ''non-hazard'' classification. Kestrel suggested ice protections systems could be considered supplemental systems, which are addressed by the installation and inadvertent operation requirements of proposed §§ 23.1300 and 23.1315.

Prior to this final rule, the FAA certified ''non-hazard'' systems in accordance with former §§ 23.1301 and 23.1309(a)(2), (b), (c), and (d). As explained in the NPRM, the FAA intended proposed §§ 23.1300(b) (now § 23.2500(b)), 23.1305 (now § 23.2505), and 23.1315 (now § 23.2510) to capture the safety intent of the applicable portions of former § 23.1301 and § 23.1309. Therefore, the FAA intends to certify these ''non-hazard'' systems in accordance with §§ 23.2500(b), 23.2505, and 23.2510.

The FAA received several comments on proposed § 23.1405(a)(2). Garmin stated that proposed § 23.1405(a)(2) should apply regardless of whether an airplane is certified for flight in icing conditions. Garmin recommended the FAA either move the proposed requirement to proposed § 23.215 (now § 23.2150) or delete it.

The FAA agrees that an airplane must be protected from stalling when the autopilot is operating, regardless of whether the airplane is certified for flight in icing conditions. However, proposed § 23.1405(a)(2) (now § 23.2540(b)) should not apply to airplanes where the applicant is not requesting certification for flight in icing conditions. The stall warning requirements of § 23.2150 will provide low-airspeed awareness, with or without the autopilot engaged, for new airplanes not certified for icing. The FAA finds § 23.2165(a) will provide stall warning for new airplanes where the applicant is requesting certification for flight in icing conditions. For new airplanes, the FAA acknowledges that a stall warning system that complies with §§ 23.2150 and 23.2165(a) will comply with § 23.2540(b). Section 23.2540(b) will also be added to the certification basis of certain STCs and amended TCs on icing certified airplanes, as discussed below in this section.

Textron and Rockwell Collins commented on the prescriptiveness of proposed § 23.1405(a)(2). Textron added that proposed § 23.1405(a)(2), which was in place only for changed product rule considerations, appeared to be a band-aid solution and not in line with higher-level goals for the new rules. Textron suggested the FAA delete proposed paragraph (a)(2).

The FAA finds that proposed § 23.1405(a)(2), with the exception of specifying ''vertical mode,'' is performance-based and consistent with the higher-level goals of the proposal, because the standard does not specify how to achieve protection from a stall. The FAA expects means of compliance to include the Icing ARC's recommendations. The FAA deletes the reference to ''vertical mode'' from § 23.2540(b) to make it less prescriptive, since it is expected the icing means of compliance will recognize that only vertical modes may result in airspeed loss. The FAA renumbers this section as part of the final rule. Proposed § 23.1405(a)(2) is now § 23.2540(b).

Additionally, in response to Textron's comment, proposed § 23.1405(a)(2) (now § 23.2540(b)) is intended to increase the safety of the existing fleet. While § 23.2540(a) and (b) apply to new airplanes, the FAA intends § 23.2540(b) to specifically target older airplanes adding an autopilot for the first time, modifying certain autopilots on airplanes with a negative service history in icing, or making significant changes that affect performance or flight characteristics and affect the autopilot. As stated in the NPRM, under the changed product rule, § 23.2540(b) will be added to the certification basis of these types of STCs and amended TCs for icing certified airplanes. This will result in a targeted increase in safety without requiring compliance to an entire later amendment, including § 23.2540(a). Compliance with § 23.2540(a) would require the applicant to address areas unaffected by an autopilot STC. The Part 23 Icing ARC Report (Icing ARC Report) provides examples of modifications in which new § 23.2540(b) will be applicable. Numerous icing accidents have shown that unrecognized airspeed loss can occur with autopilots in altitude hold or vertical speed modes. Means of compliance other than modifications to the airplanes' stall warning system may be acceptable under § 23.2540(b) for these STCs and amended TCs. The Task 9, ''Determine if implementation of NTSB Safety Recommendation A–10–12 is feasible for part 23 airplanes for operations in icing conditions,'' discussion in the Icing ARC Report provides additional background.

Rockwell Collins stated that proposed § 23.1405(a)(2) could be interpreted as requiring the autopilot to protect the airplane from stalling.

To address the commenter's concern, the FAA revises the proposed rule language (now § 23.2540(b)) to clarify that the airplane design must provide protection from stalling when the autopilot is operating.

The NTSB disagreed that proposed § 23.1405(a)(2) would address Safety Recommendation A–10–12, which concerns low-airspeed alerting systems. The NTSB stated that this safety recommendation would be more appropriately addressed in proposed § 23.1500, ''Flightcrew Interface.''

The FAA notes, as explained in the NPRM, proposed § 23.1405(a)(2) was based on NTSB safety recommendation A–10–12. This implied proposed § 23.1405(a)(2) responded to recommendation A–10–12. The FAA acknowledges § 23.2540(b) is not the type of stall protection the NTSB recommended because it does not require the installation of low-airspeed alert systems. Instead, § 23.2540(b) addresses a different and more urgent safety problem by requiring airplanes with autopilots to provide an adequate stall warning in icing conditions. Furthermore, § 23.2540(b) is an airworthiness standard that establishes a minimum level of safety for all airplanes under part 23. If the FAA were to adopt a requirement in part 23 that required applicants to install a low-speed alert system in their airplanes, that requirement would apply to all airplanes. The FAA did not propose such a requirement because safety recommendation A–10–12 applies only to commercial airplanes under part 91 subpart K, and parts 121, and 135. To properly respond to NTSB safety recommendation A–10–12, the FAA would have to change the operating rules, which is outside the scope of this rulemaking.

Embraer and Garmin both commented on the term ''demonstration.'' Embraer recommended the FAA change ''in atmospheric icing conditions'' in proposed paragraph (b) to ''considering atmospheric icing conditions''. Embraer stated that its proposal aimed to make a broad statement, implying that there may be several means of addressing the icing conditions as shown in figures 1 through 6 of Appendix C to Part 25. The commenter asserted the original text in the NPRM might be understood as requiring only a flight test demonstration. Garmin commented on the importance of clarifying this term because the FAA Aircraft Certification Office has almost always insisted that ''demonstration'' means the applicant must perform it on an airplane.

In light of these comments, the FAA is using the phrase ''must show'' rather than ''must demonstrate'' in the introductory sentence of § 23.2540, which is consistent with the changes made to § 23.2165. This change is also consistent with the NPRM, which explained that demonstration, as a means of compliance, may include design and/or analysis and does not mean flight tests are required. However, for the foreseeable future, the FAA does expect means of compliance to include icing flight tests for applicants seeking icing certification for new TCs.

l. Pressurized System Elements (Proposed § 23.1410/Now § 23.2545)

In the NPRM, proposed § 23.1410(a), (c) and (d) (now § 23.2545) would have required the minimum burst pressure of—

• Hydraulic systems be at least 2.5 times the design operating pressure with the proof pressure at least 1.5 times the maximum operating pressure;

• Pressurization system elements be at least 2.0 times, and proof pressure be at least 1.5 times, the maximum normal operating pressure; and

• Pneumatic system elements be at least 3.0 times, and proof pressure be at least 1.5 times, the maximum normal operating pressure.

Proposed § 23.1410(e) would have required that other pressurized system elements to have pressure margins that take into account system design and operating conditions. Additionally, proposed § 23.1410(b) would have required engine driven accessories essential to safe operation to be distributed among multiple engines, on multiengine airplanes.

In light of comments received, the FAA withdraws proposed § 23.1410(a) through (e) and adopts new language for § 23.2545. This section discusses these changes in more detail.

Garmin commented that proposed § 23.1410 was still extremely prescriptive and suggested the FAA revise the rule to a higher safety objective, and burst and proof pressures should be in a consensus standard. Garmin proposed alternative, less prescriptive language. ANAC similarly stated that parts of proposed § 23.1410 were too prescriptive and suggested that it might be more appropriate to set the ''minimum burst'' and ''proof pressure'' values for the hydraulic, pressurization, and pneumatic systems using consensus standards. ANAC also proposed alternative language.

The FAA agrees with ANAC's recommendation to set the proof and burst factors for hydraulic, pneumatic and pressurization systems in consensus standards or means of compliance. This is consistent with the FAA's goal of moving from prescriptive regulations to performance-based regulations. The FAA did not use Garmin's suggested language because it did not clearly state that the requirement was for ''proof'' and ''burst'' pressure, and would have applied to ''pressurized system elements''. This may be more limited than using the phrase ''pressurized system''. ANAC's suggested language was also not used because it was not inclusive of all pressurized systems. Consensus standards or means of compliance can be used to document the appropriate proof and burst factors, the operating pressure to be factored, pass/fail criteria for tests, and other information included in former § 23.1435(a)(4), (b), § 23.1438, and AC 23–17C.

Textron noted it is unclear what the difference is between the terminology used to describe the system pressures upon which the factors in proposed § 23.1410(a), (c), (d), and (e) are applied (*i.e.,* ''design operation pressure,'' ''maximum operating pressure,'' and ''maximum normal operating pressure.''). ANAC made a similar observation, as it noted the phrase ''maximum operating pressure'' in proposed § 23.1410(a) and the phrase ''maximum normal operating pressure'' in proposed § 23.1410(b) and (c) might share the same interpretation. ANAC recommended a harmonization between these paragraphs in order to avoid misinterpretations for the consensus standards, while Textron suggested that using the ASTM to identify those differences would be more in keeping with the move from prescriptive to performance-based standards. ANAC also recommended merging proposed § 23.1410(a), (c), and (d).

The FAA agrees with merging proposed § 23.1410 (a), (c) and (d) because they are similar and related. In addition, the FAA has decided to merge proposed § 23.1410(e) with these requirements to address all systems containing fluids under pressure. Therefore, the FAA withdraws proposed paragraphs (a), (c), (d), and (e) and adopts new language in § 23.2545 that requires pressurized systems to withstand appropriate proof and burst pressures.

ANAC, Textron, and an individual commenter addressed proposed § 23.1410(b). ANAC recommended the provision be deleted. In addition to being prescriptive, ANAC noted the provision is already addressed in proposed § 23.1315, which evaluates in a more systematic way the design and installation of a system or component according to their failure condition that is directly related to the airplane safe operation. Additionally, Textron said the provision is misplaced and should be moved to proposed subpart E, § 23.900 or § 23.910 (now § 23.2410). An individual commenter also recommended moving the provision to § 23.900.

Based on the comments, the FAA has decided that the safety intent of this requirement is adequately addressed in § 23.2510 and § 23.2410. Section 23.2510 requires equipment separation and redundancy based on the severity of equipment failures. Section 23.2410 requires powerplant failures, including engine driven accessory failures, to be considered and mitigated—effectively requiring safety critical engine driven accessories to be distributed on multiengine airplanes. Therefore, the FAA withdraws proposed § 23.1410(b) from the final rule; hence, there is no reason to place it elsewhere.

m. Equipment Containing High-Energy Rotors (§ 23.2550)

The requirements of former § 23.1461 were not fully incorporated into proposed § 23.755(a)(3), so the FAA creates a new § 23.2550 to correct this omission. The preamble section for § 23.2320 discusses this change in more detail.

8. Subpart G—Flightcrew Interface and Other Information

a. General Discussion

In the NPRM, the FAA proposed substantial changes to former subpart G based on its assessment that many of the regulations contained in this subpart contain prescriptive requirements that are more appropriate for inclusion as means of compliance to the new part 23 performance-based regulations. The FAA noted this approach would provide at least the same level of safety as current prescriptive requirements while providing greater flexibility for future designs. The FAA also expanded the scope of the subpart to address flightcrew interface requirements.

Zee agreed with the FAA's proposal to expand subpart G to address not only current operating limitations and information, but also flightcrew interface. Zee noted that, based on current technology, the FAA anticipates new airplanes will heavily rely on automation and systems that require new and novel pilot or flightcrew interface methods and procedures. The commenter noted further that more automated systems could dramatically reduce cockpit workload, which would be a great boon for the public who has shied away from personal aviation transportation due to increasing operational complexities of traditional airplanes.

EASA commented that information from various other subparts in proposed part 23 should be included in subpart G to provide requirements on how the information should be provided. EASA noted that proposed subpart G could include requirements for subjects such as flightcrew interface; function and installation, flight, navigation, powerplant instruments, cockpit controls, instrument markings, control markings and placards, airplane flight manual, and instructions for continued airworthiness. EASA also noted these subjects were under consideration by EASA for inclusion as separate sections in a future proposal to revise CS 23.

The FAA finds its proposed actions respond to the concerns of Zee, EASA, and others within the industry to better address the issue of flightcrew interface. The FAA recognizes that flightcrew interface issues have become increasingly more important as a result of recent technological developments in flight, navigation, surveillance, and powerplant control systems. The FAA partially agrees with EASA's comment that information from various other subparts in proposed part 23 should be included in subpart G. However, the FAA finds the full extent of the material EASA proposes for inclusion would establish requirements that would be too prescriptive in nature and therefore not in accord with the overall objective of this rulemaking to replace the detailed prescriptive requirements with more general performance-based standards. The FAA does, however, acknowledge that certain sections of EASA A–NPA 2015–06 and NPA 2016–05 may better address those requirements where the FAA's proposed language may have been too general in nature and not sufficiently detailed to permit adequate means of compliance to be developed. In a number of instances, the FAA has adopted either the specific regulatory language used by EASA or similar equivalent language to better address those safety concerns and achieve greater harmonization. The specific instances where the FAA has adopted these revisions are discussed in the preamble to the sections in which those changes have been made.

The FAA notes that EASA proposed the inclusion of three sections in its revision of CS 23, subpart G, which added substantial detail to that subpart. The FAA did not include corresponding sections within its proposed subpart G. Proposed CS 23.2605, ''Installation and operation information'', and proposed CS 23.2610, ''Flight, navigation, and powerplant instruments'', however, did correspond to proposed § 23.1305 and proposed § 23.1310, respectively, in subpart F of the NPRM. Proposed CS 23.2615, ''Cockpit controls,'' was also in EASA's proposed subpart G, but did not have a corresponding section in the NPRM.

The FAA agrees that placing the requirements contained in these sections into subpart G is more appropriate than addressing those requirements in subpart F, as these requirements more directly relate to flightcrew interface issues. Accordingly, the FAA is relocating proposed § 23.1305 to subpart G, § 23.2605, ''Installation and operation,'' and proposed § 23.1310 to § 23.2615, ''Flight, navigation, and powerplant instruments.'' While adopting the general safety intent embodied in EASA's proposed regulations, the FAA is not including the complete level of detail specified in those regulations because the FAA considers the additional information more appropriate as a means of compliance. While the FAA believes that cockpit controls should be addressed under subpart G, the FAA did not include a separate section in the final rule equivalent to proposed CS 23.2615 because the FAA has determined these requirements are more appropriate as a means of compliance to § 23.2600.

b. Flightcrew Interface (Proposed § 23.1500/Now § 23.2600)

In the NPRM, proposed § 23.1500 (now § 23.2600) would have required the pilot compartment and its equipment to allow each pilot to perform their duties, including taxi, takeoff, climb, cruise, descent approach and landing. The pilot compartment and its equipment would also have to allow a pilot to perform any maneuvers within the operating envelope of the airplane, without excessive concentration, skill, alertness, or fatigue. Proposed § 23.1500 would have required an applicant to install flight, navigation, surveillance, and powerplant controls and displays so qualified flightcrew could monitor and perform all tasks associated with the intended functions of systems and equipment so as to make the possibility that a flightcrew error could result in a catastrophic event highly unlikely.

Textron noted that proposed § 23.1500 has ''minimal wording'' as compared to CS 23.460 and recommended the FAA harmonize proposed § 23.1500 with EASA's proposed provisions.

Textron also specifically recommended the FAA add the requirement in former § 23.671(b) for controls to be arranged and identified to provide convenience in operation and to prevent the possibility of confusion and subsequent inadvertent operation, to proposed § 23.1500.

The FAA has reviewed EASA A–NPA 2014–12 and NPA 2016–05 and finds the level of detail included in the crew interface requirements in both documents may be overly restrictive. The FAA finds § 23.2600 adequately address pilot compartment requirements and the requirements for the provision of necessary information and indications to the flightcrew. The FAA is not revising § 23.2600 as EASA recommended, because the FAA is concerned that adding the extensive level of detail that EASA is considering for inclusion in subpart G would neither enhance the FAA's ability to respond to the introduction of new technology nor foster future innovation. The FAA notes the adoption of the EASA's recommended requirements would only serve to create issues similar to those that the FAA is attempting to address with this significant revision of part 23 airworthiness standards. However, the FAA recognizes Textron's concerns and agrees that cockpit controls should not only be convenient to operate, but also prevent the possibility of confusion and subsequent inadvertent operation. Nevertheless, the FAA finds the regulatory intent of former § 23.671 will be achieved because Textron's concerns will be addressed in any means of compliance developed and submitted for acceptance to demonstrate compliance with § 23.2600.

Air Tractor raised concerns that proposed § 23.1500(b) added a requirement that the flightcrew be able to monitor and perform ''all'' tasks associated with the intended functions of systems and equipment. Air Tractor recommended the FAA insert the term ''required'' after ''all'' to ensure the proposal would not require the performance and monitoring of non-required tasks. An individual commenter at the FAA's public meeting also shared concerns regarding use of the term ''all'' and asked if its use would preclude systems from monitoring tasks the flightcrew does not have to continuously monitor.

The FAA agrees that use of the term ''all'' is too encompassing in this section and could be misinterpreted to impose requirements that would exceed the safety intent of the rule. However, the FAA finds adding the term ''required'' would make the rule's requirements narrower than the FAA intended. The FAA notes that airplanes are currently equipped with systems and equipment that are not necessarily required, yet the flightcrew must be able have the ability to monitor and perform all tasks associated with the intended functions of those systems and equipment to operate the airplane safely. Accordingly, the FAA has determined that including the term ''defined'' in § 23.2600(b) will address both the concerns of Air Tractor and the FAA, and also allow for the installation of systems and equipment that can be used to monitor a function or parameter for the flightcrew. The FAA notes this term is currently used in § 25.1302(a), which addresses flightcrew interface with systems and equipment installed in transport category airplanes. While the FAA recognizes that many of the requirements in § 25.1302 are inappropriate for the certification of airplanes under part 23, the FAA finds its use of the concept of ''defined tasks'' is appropriate for application to part 23 flightcrew interface requirements.

An individual commenter asserted that proposed § 23.1500(b) is ''convoluted and subject to varying interpretations.'' The commenter noted that one such interpretation could be the flightcrew would not be required to monitor and perform tasks and prevent errors that go beyond the intended functions of the installed systems and equipment. Accordingly, the commenter asserted that if there is no equipment installed to prevent CFIT, such as TAWS, there would be no requirement for monitoring and performing tasks and preventing errors associated with terrain clearance. The commenter also stated the rule could be interpreted to mean the tasks, monitoring, and error prevention requirements are those associated with a particular flight phase and flight conditions. For example, the commenter noted that there must be equipment to prevent CFIT (*e.g.,* TAWS or other), at least for IFR-certified airplanes, and it must meet the stated requirements. The commenter noted that many situations and types of equipment could be affected by the proposal and maintained that if these interpretations were accurate, there would be obvious cost, weight, practicability, and other implications that were not adequately addressed in the preamble or Regulatory Analysis.

In the NPRM, the FAA stated that it proposed to expand subpart G to address not only current operating limitations and information, but also the concept of flightcrew interface. The FAA further noted that it was proposing to address the pilot interface issues found in subparts D and F in proposed § 23.1500. Otherwise, subpart G retained the safety intent of the requirements in the former rules. This section does not impose additional equipment requirements, as suggested by the commenter's example, but it does require consideration of the flightcrew interface and human factors in the design and installation of equipment. The FAA notes the commenter's concern that the flightcrew would not be required to monitor and perform tasks, such as terrain avoidance, that are not directly addressed by installed systems and equipment.

Several commenters raised concerns regarding the use of the term ''highly unlikely'' in proposed § 23.1500(b) that addresses the ability of the system and equipment design to avoid the possibility that a flightcrew error could result in a catastrophic event. One individual commenter specifically noted that ''highly unlikely'' is a new and undefined term. The commenter recognized that prevention of errors undoubtedly would increase safety, but noted there is a limit to how much system and equipment design error prevention is justified and practicable in any airplane, not just those certificated under the provisions of part 23. This commenter also contended it would be difficult to comply with a stringent reading of ''highly unlikely'' and asserted a review of accident history would reveal this. Garmin, Air Tractor, and BendixKing submitted similar comments regarding the potential for this proposed requirement to increase the burden on applicants. Each of these commenters proposed alternative regulatory language addressing their concerns.

The Associations commented that the intent of this proposed requirement is to prevent likely flightcrew errors with flight, navigation, surveillance, and powerplant controls and displays and proposed language to meet this intent. Textron also noted the proposed requirement failed to exclude skill related errors, errors as a result of malicious intent, recklessness, and actions taken under duress. Textron contended that system designs should not be responsible for all possible flightcrew errors, but only for reasonable errors. Textron recommended proposed alternative regulatory language addressing its concern.

Astronautics said the term ''highly unlikely,'' as it relates to ''catastrophic,'' would cause confusion in the context of failure condition categorization and likelihood of occurrence. The commenter suggested replacing the term ''highly unlikely'' with recognized terms that categorize failure hazards and probabilities. Astronautics also suggested recognizing a flightcrew error may have differing degrees of severity by revising the proposed rule to include consideration of the three different degrees of failure in proposed § 23.1315(b).

The FAA agrees with many of the commenters concerns regarding the use of the term ''highly unlikely'' in addressing the probability of preventing flightcrew errors resulting from system and equipment designs that could lead to catastrophic events. The FAA also recognizes the difficulty in assessing complex flightcrew interface issues associated with the approval of control and display designs. Prior to the adoption of this rule, the FAA utilized very prescriptive requirements with associated guidance material based on its need to address traditional controls, displays, and flight operations in the certification process. Although the FAA expects that this prescriptive language for the evaluation of traditional controls and displays will serve as a means of compliance with the new performance-based requirements, the FAA determines the new performance-based requirements will also allow for alternative approaches to meeting flightcrew interface requirements for non-traditional airplanes, operations, and non-traditional controls and displays.

As the FAA noted in the NPRM preamble, the smart use of automation and phase-of-flight-based displays could reduce pilot workload and increase pilot awareness. Accordingly, the FAA finds new technology can help the pilot in numerous ways, all with the effect of reducing pilot workload, which should help reduce accidents based on pilot error. The FAA intended to remove many of the barriers to the introduction of new technology while still retaining a clear performance-based requirement to which an applicant could demonstrate compliance. The FAA recognizes the potential for misinterpretation of the requirements with this new approach; however, the FAA's intent is not to increase the requirements set forth in former regulations, unless specifically stated in the preamble. The FAA expects the use of performance-based requirements to address flightcrew interface issues will result in the accelerated development of industry standards that will be used to improve the manner in which pilots interface not only with information that has been traditionally provided to them but also with new information. Section 23.2600 is not intended to add any burden on the applicant and is expected to reduce time to market for new system and equipment designs, thereby, resulting in reduced costs.

As several commenters noted, the terms ''highly unlikely'' and ''catastrophic'' have specific meanings with respect to the certification of systems that typically are not used when addressing human interactions. Based on the commenters' recommendations, the FAA finds the best approach to adequately address flightcrew interface issues is to revise § 23.2600 using language similar to that contained in former § 23.1309(d), which states that systems and controls must be designed to minimize crew errors which could create additional hazards. This avoids the problems associated with the use of language more appropriate for evaluation of system and equipment failures.

Shortly after the close of the comment period, EASA published NPA 2016–05, which proposed requirements to address an oversight in the NPRM regarding the pilot visibility requirements originally contained in subpart D. The FAA has adopted EASA's proposed language both in paragraphs (a) and (c) to correct this oversight in the FAA's proposal, to ensure that pilot compartment visibility requirements are addressed. Adopting these requirements serves to ensure that pilot view requirements, and particularly those requirements that could result from the loss of vision through a windshield panel in a level 4 airplane, are addressed. The FAA finds that these revisions impose no requirements in excess of those specified in the former § 23.775 and will maintain the level of safety set forth in part 23, through amendment 23–62, as originally intended in the proposal. As discussed in the context of proposed § 23.755, the requirement for level 4 airplanes that the flightcrew interface design must allow for continued safe flight and landing after the loss of vision through any one of the windshield panels has been moved to § 23.2600(c).

c. Installation and Operation (Proposed § 23.1305/Now § 23.2605)

In the NPRM, proposed § 23.1305 (now § 23.2605) would have required each item of installed equipment—

- To perform its intended function;
- Be installed according to limitations specified for that equipment; and
- The equipment be labeled, if applicable, due to the size, location, or lack of clarity as to its intended function, as to its identification, function, or operation limitations, or any combination of these factors.

Proposed § 23.1305 would have required a discernable means of providing system operating parameters required to operate the airplane, including warnings, cautions, and normal indications to the responsible crewmember. Proposed § 23.1305 would have also required information concerning an unsafe operating condition be provided in a clear and timely manner to the crewmember responsible for taking corrective action.

In light of comments received, the FAA revises proposed § 23.1305 by moving paragraphs (a)(2) through (c) to new § 23.2605. This section discusses these changes in more detail.

The function and installation rule language in proposed § 23.1305 was originally located in subpart F, Equipment. The logic behind the location of these requirements was that requirements for the display and control of a specific function would be in subpart G, while requirements for the hardware or software for the display or control are would be in subpart F. For this reason, proposed § 23.1305, ''Function and installation,'' included specific paragraphs from the requirements of former §§ 23.1301, 23.1303, 23.1305, 23.1309, 23.1322, 23.1323, 23.1326, 23.1327, 23.1329, 23.1331, 23.1335, 23.1337, 23.1351, 23.1353, 23.1357, 23.1361, 23.1365, 23.1367, and 23.1416.

The Associations recommended the FAA delete proposed § 23.1305(a)(2) and (a)(3). The commenters also suggested the FAA delete proposed § 23.1305(b), as the flightcrew interface portion of the proposed rules already addressed the same subject area. Furthermore, EASA recommended moving the flightcrew interface requirements from proposed § 23.1305(a)(2) through (c) to subpart G.

The FAA agrees with the commenters that the paragraphs in proposed § 23.1305 that address display and control for the flightcrew is better located in subpart G. Upon closer review, the FAA agrees with EASA's recommendation as it is consistent with the FAA's intent behind moving requirements from subpart F to subpart G. As proposed, subpart G did not have any sections that directly address these specific paragraphs. For that reason, the FAA adds new § 23.2605, ''Installation and operation'', which contains the language from proposed § 23.1305(a)(2) through (c).

d. Instrument Markings, Control Markings, and Placards (Proposed § 23.1505/Now § 23.2610)

In the NPRM, proposed § 23.1505 (new § 23.2610) would have required each airplane to display in a conspicuous manner any placard and instrument marking necessary for operation. Proposed § 23.2610 would also have required an applicant to clearly mark each cockpit control, other than primary flight controls, as to its function and method of operation and include instrument marking and placard information in the AFM.

Astronautics agreed that an applicant should ensure markings are adequate and meet the marking requirements specified in 14 CFR 45.11, ''Marking of products.'' However, they asserted that the requirement for applicants to mark the controls and instruments themselves, as required by proposed § 23.1505(b), is ''overly broad.'' The proposed requirement fails to account for existing markings such as those required by § 45.15, ''Marking requirements for PMA articles, TSO articles, and critical parts.'' Astronautics noted that some controls, such as knobs and push buttons, are typically integrated parts of TSO articles. The commenter believed that proposed § 23.1505 could be interpreted to require an applicant to add or replace markings on instruments already marked pursuant to a TSO authorization or PMA. Astronautics recommended the FAA revise proposed § 23.1505 to specify that an applicant is not required to alter markings already required under § 45.15.

The FAA agrees with Astronautics that the proposal is overly prescriptive as to how information regarding function and method of operation is to be provided. Accordingly, the FAA removes the requirement from proposed paragraph (b) specifically requiring an applicant to mark cockpit controls and instruments and revises the proposal to require the airplane design clearly indicate the function of each cockpit control (other than primary flight controls). This revision will permit an applicant to utilize markings made pursuant to a TSO authorization or PMA without imposing a repetitive and potentially conflicting requirement.

BendixKing requested the FAA delete the phrase ''. . . and method of operation'' from proposed § 23.1505(b). The commenter believed that the marking of cockpit controls should be limited to labeling the function of the control and that including its method of operation as a marking requirement is neither bounded nor appropriate.

The FAA agrees in part with BendixKing's comment. The FAA concurs that application of the proposed requirement to all cockpit controls (other than primary flight controls) is overbroad and could lead to an applicant including information on cockpit control markings that is excessive, unnecessary, and contrary to the agency's original intent. Accordingly, the FAA revises proposed paragraph (b) to eliminate the proposed requirement that an applicant mark cockpit controls with their method of operation. However, cockpit controls (other than primary flight controls) would continue to be required to clearly indicate their function. As under the former regulations, information on the method of operation of equipment is provided in the airplane flight manual and equipment manuals, which is sufficient to satisfy the objective of the proposal.

Textron requested the FAA be more specific as to what placards (*i.e.,* emergency, passenger safety, or operational placards) need to be included in the AFM pursuant to proposed § 23.1505(c).

The FAA recognizes that information may be provided to pilots and passengers using a variety of methods and considers it unnecessary to specifically prescribe those placards that must be included in the AFM. Additionally, a requirement to include specific placards would be counter to this rule's intent to remove prescriptive requirements from current regulatory text and replace those provisions with performance-based regulations. The FAA finds that variations in airplane designs and the methods of providing information to pilots and passengers may necessitate the need for various types of placard information that would be more appropriate for inclusion as a means of compliance to the regulatory requirements, thereby providing applicants with more flexibility in meeting the underlying safety intent of the rule.

e. Flight, Navigation, and Powerplant Instruments (Proposed § 23.1310/Now § 23.2615)

In the NPRM, proposed § 23.1310 (now § 23.2615) would have required installed systems to provide the flightcrew member who sets or monitors flight parameters for the flight, navigation, and powerplant information necessary to do so during each phase of flight. Proposed § 23.1310 would have required this information include parameters and trends, as needed for normal, abnormal, and emergency operation, and limitations, unless an applicant showed the limitation would not be exceeded in all intended operations. Proposed § 23.1310 would have prohibited indication systems that integrate the display of flight or powerplant parameters to operate the airplane or are required by the operating rules of this chapter, from inhibiting the primary display of flight or powerplant parameters needed by any flightcrew member in any normal mode of operation. Proposed § 23.1310 would have required these indication systems be designed and installed so information essential for continued safe flight and landing would be available to the flightcrew in a timely manner after any single failure or probable combination of failures.

Several commenters raised concerns with proposed § 23.1310(a)(1), which would have required installed systems to provide the flightcrew member with parameters and trends, as needed. Air Tractor questioned whether round gauge instruments produce a trend and whether the FAA would use paragraph (a)(1) to mandate electric gauges. Similarly, Garmin contended that proposed § 23.1310(a)(1) could be interpreted as requiring more information than was formerly required. Garmin noted the pilot often determines the trend by monitoring a gauge, but the trend itself may not be displayed. Garmin asked the FAA to clarify whether it intended paragraph (a)(1) to require trend information to be displayed, or information to be presented in a manner that enables the pilot to monitor the parameter and determine trends. Genesys Aerosystems commented that requiring ''trends'' rather than addressing ''trends'' in guidance materials would lead to more trends being required than needed.

The FAA did not intend proposed § 23.1310(a)(1) to require electric gauges. Traditional analog indicators, such as airspeed indicators or altimeters, have been shown to provide adequate trend indications and will still be acceptable. It may also be possible to have a system that automatically monitors the parameter of interest and warns the pilot of any trend that could lead to a failure. Paragraph (a)(1), however, does not allow a light that comes on at the same time that the failure occurs to replace analog indicators because such a light does not provide trend information prior to a failure. A warning light system that would comply must be sophisticated enough to read transients and trends, and give a useful warning to the pilot of a potential condition.

The FAA agrees the proposed rule language could have been misinterpreted as requiring more information than former part 23. The FAA intended proposed § 23.1310 to capture the safety intent of the former requirements, which was to provide flightcrew members the ability to obtain the information necessary to operate the airplane safely in flight, but not to exceed the safety intent of former part 23. Therefore, proposed § 23.1310(a)(1) was intended to require installed systems to provide adequate information to the flightcrew member to determine trends by monitoring a gauge or display. The FAA did not intend to expressly require an installed system to display the trend itself, because not all systems display trends. The FAA revises the proposed rule language to clarify its intent. Accordingly, § 23.2615(a)(1) now requires the information to be presented in a manner that enables the flightcrew member to monitor parameters and determine trends, as needed, to operate the airplane.

Former § 23.1311(a)(6) required electronic display indicators to incorporate, as appropriate, trend information to the parameter being displayed to the pilot. Section 23.2615(a)(1) is not meant to be an increase in burden from the former requirement and associated guidance regarding when trends are needed.

Kestrel raised concerns that although proposed § 23.1310 is less prescriptive, it did not minimally require the pilot to have available airspeed, altitude, direction, and attitude indicators as former § 23.1303 prescribed. The commenter asked if the FAA envisions a scenario where this information would not be required. Kestrel was also concerned that the phrase ''as needed'' would lead to diverging FAA interpretations of proposed § 23.1310(a)(1). The commenter asked the FAA to clarify its intent regarding the requirement to provide parameters and trends ''as needed.'' If this was not a fixed set of parameters, Kestrel asked for details on how this list would be determined.

As explained in the NPRM, the former regulations that required airspeed, altimeter, and magnetic direction were redundant with the operating rules, specifically §§ 91.205 and 135.149. Furthermore, they required prescriptive design solutions that were assumed to achieve an acceptable level of safety. These prescriptive solutions precluded finding more effective or more economical paths to providing acceptable safety. One of the stated goals of the proposal was to facilitate the introduction of new technologies into small airplanes. Concepts already envisioned with fly-by-wire system may render the instruments that were required by former § 23.1303 irrelevant in the future. New § 23.2615 reflects the intent to allow new technologies in the future, while maintaining a minimum safety requirement by capturing the safety intent of the former regulations and by relying on the operating rules and accepted means of compliance to prescribe the details. This philosophy also applies to the comment on the phrase ''as needed.'' The accepted means of compliance, which may include industry consensus standards, will define which parameters need trends.

Astronautics asked the FAA to insert a comma after ''as needed'' in paragraph (a)(1) to clarify that ''as needed'' is a parenthetical phrase. The FAA agrees and corrects the grammar in the revised rule language.

ANAC suggested the FAA not adopt proposed § 23.1310(a) because it is covered by proposed § 23.1305(b) and (c), which are broader in scope. In light of the performance-based context of the proposed rule, ANAC reasoned that defining specific requirements only for flight, navigation, and powerplant instruments was unnecessary. ANAC also recommended the FAA not adopt proposed § 23.1310(b), which appeared to apply to specific technologies (integrated systems). ANAC noted the intent of paragraph (b) was already addressed in proposed § 23.1305(b) and (c) (requiring timely information), and proposed § 23.1315 (now § 25.2510, requiring the capacity to maintain continued safety flight and landing after single or probable failures).

The FAA notes ANAC's comment on proposed § 23.1310(a) and (b), but paragraphs (a) and (b) are not redundant. Sections 23.2505 and 23.2510 apply generally to installed equipment and systems. However, §§ 23.2505 and 23.2510 do not apply if another section of part 23 imposes requirements for specific installed equipment or systems. The FAA finds that flight, navigation, and powerplant instrumentation are significant enough to warrant their own requirements. Therefore, the FAA adopts § 23.1310 (now§ 23.2615(a) and (b)) as proposed.

ANAC also raised concerns that the phrase ''normal, abnormal, and emergency operation'' in paragraph (a) may be interpreted as a required classification of types of operations, meaning a system safety type analysis may be required for each indicator, classification of each condition, and three separate indications for each condition, which it deemed overly prescriptive. As an alternative to deleting proposed § 23.1310(a)(1), ANAC recommended the FAA revise paragraph (a)(1) to require parameters and trends, as needed, ''to operate the airplane.''

The FAA agrees with ANAC and revises paragraph (a)(1) accordingly.

Genesys Aerosystems commented on proposed § 23.1310(b), which was formerly covered only in guidance material. Genesys Aerosystems contended that paragraph (b) is a bit prescriptive and including it in the regulation could stifle future innovation.

The FAA notes Genesys Aerosystems concern, but this requirement was previously covered under former § 23.1311. Section 23.2615(b) captures the safety intent of former § 23.1311, but removes the prescriptive requirements of former § 23.1311(a)(5), which mandated secondary instruments as the means to providing information to the flightcrew essential for continued safe flight and landing. This would allow future innovations in system architecture and design to provide the flight parameters necessary to maintain safe flight.

EASA recommended moving the pilot interface issues of proposed § 23.1310 to subpart G.

The FAA agrees with this recommendation because flightcrew interface issues are more appropriately addressed in subpart G, which contains requirements on flightcrew interface and other information. Therefore, the FAA moves the entire proposed § 23.1310 to subpart G as new § 23.2615.

f. Airplane Flight Manual (Proposed § 23.1510/Now § 23.2620)

In the NPRM, proposed § 23.1510 (now § 23.2620) would have required an applicant to furnish an AFM with each airplane that contained the operating limitations and procedures, performance information, loading information, and any other information necessary for the operation of the airplane.[60]

Garmin noted that the purpose of the AFM is to provide the pilot with basic information required to safely fly the airplane and stated it appreciates and supports the FAA's proposal to remove the prescriptive detail about the AFM content from § 23.1510. However, Garmin did express concern about use of the phrases ''[o]perating limits and procedures'' in proposed § 23.1510(a) and ''[a]ny other information necessary for the operation of the airplane'' in proposed § 23.1510(d). Garmin noted the possibility for confusion arising from the ambiguity of the terms ''operating'' and ''operation'' in former §§ 23.1581(a)(2), 23.1581(a)(3), 23.1583(k), and 23.1585(j). For example, Garmin pointed out that many current FAA 20-series ACs specify that equipment operation limitations should be included in an AFM.[61] Garmin contended the AFM was never intended as a catch-all for equipment or airspace operating limitations and that equipment operating limitations are more appropriately included in the equipment's pilot guide or operating manual provided by the equipment manufacturer.

Garmin also suggested using the terms ''operating'' and ''operation'' in proposed § 23.1510(a) and (d) could be easily confused with operating rule limitations (*e.g.,* § 91.225 for ADS–B Out) or system-wide operating limitations (*e.g.,* the displayed age of FIS–B weather products), which are not necessary to safely fly the airplane and would be more appropriately captured in the Aeronautical Information Manual (AIM).

Therefore, Garmin recommended proposed § 23.1510(a) state: ''Airplane operating limitations and procedures.'' The Associations recommended the same revision. Garmin also suggested revising the NPRM preamble to state that the AFM is not intended to be used as a catch-all for equipment operating limitations, or to be used for operating rule limitations or system-wide operating limitations, all of which are more appropriately included in guides and manuals.

The FAA agrees with Garmin in that the AFM was never intended as a catch-all for equipment or airspace operating limitations. The requirement for ''operating limitations and procedures'' in the proposed § 23.1510(a) was intended to capture information required to be included in the AFM by former §§ 23.1583 and 23.1585.

The FAA did not intend to expand § 23.2620(a) to encompass information that is not required to be included in the AFM by former §§ 23.1583 and 23.1585. To further clarify its intent, the FAA

[60] The NPRM erroneously stated that proposed § 23.1510 was intended to consolidate current §§ 23.1505 through 23.1527. *See* 81 FR at 13495. However, § 23.1510 was actually intended to consolidate the AFM provisions in former §§ 23.1581 through 23.1589.

[61] As an example, the commenter noted that: AC 20–138D (including change 1 and 2) for positioning and navigation equipment includes 77 instances of ''AFM,'' AC 20–165B for ADS–B Out equipment includes 8 instances of ''AFM,'' AC 20–149B for non-required safety enhancing FIS–B equipment includes 7 instances of ''A/RFM,'' and even AC 20–153B for aeronautical database LOAs includes 2 paragraphs requiring specific AFM content. The commenter noted that these counts do not include instances of ''airplane flight manual'' or other similar phrases.

adopts the commenters' suggestion and amends § 23.2620(a)(1) to specify that this section requires ''airplane'' operating limitations and procedures.

Proposed § 23.1510(a)(4) would have required that ''any other information necessary for the operation of the airplane'' must be included in the AFM. The FAA agrees with the commenters' concern that the proposed language was too broad and could be interpreted as requiring information that has not traditionally been included in the AFM. The intent of this proposed provision was to retain the requirement of former § 23.1581(a)(2), which require the AFM to include other information that is necessary for safe operation because of design, operating, or handling characteristics.'' Because the proposed language was unclear, the final rule will simply codify, without change, the language of former § 23.1581(a)(2) into § 23.2620(a)(4).

Garmin noted that while it was not specifically covered in the NPRM preamble, it appreciated that proposed § 23.2620 no longer appears to require FAA approval of certain information contained in the AFM as required by former § 23.1581(b). Garmin said this would eliminate delays associated with seeking an Aircraft Certification Office engineer's approval of AFM content for the TC or STC process, typically a one-time occurrence; or Flight Standards District Office inspector's approval of AFM content for post-certification installations, which occur frequently. Garmin explained that these approval delays translate into loss of revenue for the applicants. Garmin recommended the preamble specifically indicate there is no intent to require FAA approval of AFM content during certification or for post-certification installation.

NATCA asked the FAA to clarify the Airworthiness Limitations Sections (ALS), as well as portions of the AFM, requiring FAA approval. NATCA indicated this clarification was need as approval of ALS and AFM content are ''inherently governmental functions.'' NATCA noted that all other sections of the continuing operating instructions, maintenance, and some flight manual sections are accepted.

The FAA notes the requirement for the AFM in former § 23.1581 required each portion of the AFM containing information required by the FAA must be approved by the FAA, segregated, identified, and clearly distinguished from each unapproved portion of the AFM. The former requirements also provided an exception for reciprocating-powered airplanes that do not weigh more than 6,000 pounds if certain requirements were met.[62] It was not the FAA's intent to discontinue the former requirement to approve select AFM information. The approval process allows the FAA to review an AFM to ensure it satisfies the applicable requirements; this rule will generally retain the existing requirement that FAA-required information provided in the AFM must be approved by the FAA. For this reason, the FAA has added paragraph (b) to clarify that the FAA will retain our authority to approve specific AFM information.

E. Miscellaneous Amendments (§§ 21.9, 21.17, 21.24, 21.35, 21.50, 21.101, SFAR 23, Appendix E to Part 43, and 91.323)

1. Production of Replacement and Modification Articles (§ 21.9)

In the NPRM, the FAA proposed revising § 21.9 by adding a new paragraph (a)(7) to provide applicants with an alternative method to obtain FAA approval to produce replacement and modification articles that are reasonably likely to be installed on type certificated aircraft. The FAA also proposed revising paragraphs (b) and (c) to specify that these articles would be suitable for use in a type certificated product. Lastly, the FAA also proposed allowing an applicant to submit production information for a specific article, but would not require the producer of the article to apply for approval of the article's design or obtain approval of its quality system. Under the proposed changes, approval to produce a modification or replacement article under proposed § 21.9(a)(7) would not constitute a production approval as defined in § 21.1(b)(6). In the NPRM, the FAA indicated it would limit use of this procedure to articles whose improper operation or failure would not cause a hazard. Additionally, the approval would be granted on a case-by-case basis, specific to the installation proposed, accounting for potential risk and considering the safety continuum.

The FAA specifically solicited comments regarding whether the proposed change would safely facilitate retrofit of low risk articles and whether there are alternative methods to address the perceived retrofit barrier.

All commenters expressed some level of support for the proposed changes to § 21.9. Several commenters asked the FAA to provide guidance to clarify how the proposed changes will work.

The FAA agrees with the commenters that additional details and clarification are needed to further define the process for obtaining approval under § 21.9(a)(7) and will provide the necessary policy and guidance material. Generally, the process for obtaining FAA approval under § 21.9(a)(7) is intended to be scalable in nature in that different degrees of substantiation may be required, depending on the complexity of the article for which approval is sought. For example, a non-required, low-risk article could be simple enough that a design approval and quality system might not be required; however, a more complex article might also require a § 21.8(d) design approval and some form of quality system. Examples of the requirements for more complex projects include FAA policy memorandum AIR100–14–110–PM01, ''Approval of Non-Required Angle-of-Attack (AOA) Indicator Systems, and FAA policy statement PS–AIR–21.8–1602, Approval of Non-Required Safety Enhancing Equipment (NORSEE).'' For simple articles, a reduction in scale could be negotiated with the FAA to provide an appropriate level of safety. Audits of the manufacturer's facility would be at the discretion of the appropriate MIDO. Typically, a MIDO audit would not be required unless there is evidence that indicates improper quality control issues that require a MIDO's involvement, as described in the FAA Policy Statement PS–AIR–21.8–1602.[63]

Astronautics Corporation commented that whether an article is ''required'' or ''non-required'' depends on the kind of operation the applicant requests for certification. Garmin also questioned why the qualifying articles have to be non-required and asked the FAA to consider expanding use of the proposed § 21.9(a)(7) process to include low-risk required articles when the applicant has an approved quality system. Garmin contended that low risk to the aircraft or its occupants should be sufficient criteria to allow application to both required and non-required equipment.

Astronautics Corporation is correct in its observation that the approval means for an article could potentially affect the ''kinds of operation'' authorized for an aircraft. The FAA's intent is not to bypass existing certification process for required equipment, but to provide an alternative process for non-required, low-risk articles. For example, a weather

[62] *Id.* § 23.1581(b)(2). To qualify for this exception, the following requirements must be satisfied: (1) Each part of the AFM containing the Limitations information must be limited to such information, and must be approved, identified, and clearly distinguished from each other part of the AFM; and (2) the remaining required information must be presented in its entirety in a manner acceptable to the FAA.

[63] Policy No. PS–AIR–21.8–1602 has been placed in docket number FAA–20150–1621.

display approved under § 21.9(a)(7) may have extensive information available, but this information would be considered supplemental and could not be used to satisfy operational requirements. If the FAA determines that certain equipment is required for safety, then existing certification processes must be followed to ensure the required safety equipment is functioning properly.

Garmin also asked what would be needed for approval of the installation of articles produced under § 21.9(a)(7) and whether new FAA policy would be needed each time there is a new equipment standard proposed to allow its installation.

Section 21.9(a)(7) concerns only the production of articles, not their installation. The required process for obtaining installation approval remains unchanged by this rule.

Garmin asserted that the term ''low risk'' is subjective and asked the FAA to clarify the intent of this term. Specifically, Garmin asked if a system with a minor failure condition would fall into the low-risk category.

The FAA intends the term ''low risk,'' for the purposes of § 21.9(a)(7), to apply to non-required articles with a hazard classification no greater than minor. In this context, a ''minor'' failure condition would result in only a slight reduction in functional capabilities or safety margins.

Air Tractor asked whether the changes to § 21.9 will apply equally to TC and STC holders and applicants for those certificates, which the commenter said it believed the changes should.

It is the FAA's intent that an article approved under § 21.9(a)(7) can be subsequently approved for installation by a TC or STC holder based on the installation data provided by the TC or STC holder.

Additionally, the FAA has decided not to except articles approved under § 21.9(a)(7) from the prohibition on representing an article as suitable for installation on a type-certificated product found in § 21.9(b) and § 21.9(c); therefore, the FAA is not adopting the NPRM's proposed changes to § 21.9(b) and § 21.9(c). The current § 21.9 creates an exception from this prohibition for articles produced under a TC or an FAA production approval because these articles have approved installation data that justify a representation of suitability. The proposed changes in the NPRM would have allowed articles that are not produced under a TC or production approval to be sold or represented as suitable for installation on type-certificated products without approved installation data. A representation that an article is ''suitable for installation'' could be misinterpreted as ''approved for installation.'' The FAA notes that approval under § 21.9(a)(7) does not constitute approval for installation of the article; however, a person may state that an article approved under § 21.9(a)(7) may be installed in a type-certificated aircraft provided it has been determined suitable for installation by an appropriately-rated mechanic using appropriate means.

2. Designation of Applicable Regulations (§ 21.17)

In the NPRM, the FAA proposed amending § 21.17(a) by removing the reference to § 23.2 because § 23.2 would be deleted by this rule.

NATCA commented that elimination of the reference to retroactive rules, former § 23.2, leaves holes in certification basis for the existing fleet of airplanes. This commenter noted that while § 23.2 is not listed as a basis for certification for many existing airplanes, the provision nevertheless applies due to the date of manufacture of some airplanes. NATCA also raised concerns it would be burdensome to revise Type Certificate Data Sheets (TCDS) to reflect the change; therefore, NATCA requested that this regulation address the addition of seatbelts as a retroactive, date of manufacture, requirement.

The FAA notes NATCA's concern; however, the provisions of current § 23.2 are duplicated in § 91.205 and therefore remain applicable based on date of manufacture. The revision of TCDS will be unnecessary because any reference to current § 23.2 in an existing TCDS will include reference to the applicable amendment and continue to be enforceable.

The NTSB commented that the FAA should retain § 23.2 because it is a regulatory mechanism to apply special retroactive requirements to newly-manufactured items after the item has been issued a TC.

The FAA notes the NTSB's comment, but this rule does not affect the FAA's ability to promulgate other special retroactive requirements using the normal rulemaking process.

The FAA removes § 23.2 and revises § 21.17(a) by removing the reference to § 23.2, as proposed.

Although the NPRM did not propose changes to § 21.17(b), which addresses the designation of applicable regulations to special classes of airplane, NATCA asked whether the FAA would continue to accept EASA's CS–VLA and CS 22 sailplanes and powered sailplanes, as special, stand-alone classes of airplanes, or whether the intent was to include these airplanes in part 23 as EASA proposed.

The FAA intends to continue to allow CS–VLA and CS 22 airplanes to be approved as special, stand-alone classes of airplanes while also allowing eligibility for certification in accordance with part 23 using accepted means of compliance.

3. Issuance of Type Certificate: Primary Category Aircraft (§ 21.24)

In the NPRM, the FAA proposed amending § 21.24 by revising paragraph (a)(1)(i) to modify the phrase ''as defined by § 23.49'' to include reference to amendment 23–62 (76 FR 75736, December 2, 2011), effective on January 31, 2012. The FAA explained that revision would be necessary to maintain a complete definition of stall speed in § 21.24, as the former § 23.49 is removed by this rule.

The Associations said it is unnecessary to amend § 21.24(a)(1)(i) as proposed. These commenters noted there are many references to items such as stall speed that do not need to reference a previous amendment regulation for the steps to determine stall speed. The commenters contended it would be sufficient to include the intent in the preamble discussion.

The FAA agrees the reference to § 23.49, amendment 23–62, in § 21.24 is unnecessary. V_{SO} is defined in § 1.2. The conditions and techniques for determining stall speed have been consistent for decades. Furthermore, AC 23–8C has a thorough discussion on how to do stall testing. Rather than referencing a regulation from a previous amendment, the FAA is revising § 21.24 to refer to V_{SO} stall speed as determined under part 23.

The Associations also asked the FAA to include electric propulsion in the primary category aircraft once the FAA determines acceptable standards by inserting the phrase ''or with electric propulsion systems'' after the phrase ''naturally aspired engine.''

The commenters' request to include electric propulsion systems in the primary category is beyond the scope of this rulemaking. Therefore, the FAA defers the request for consideration in future part 21 rulemaking activity.

NATCA argued the establishment of Primary Category Aircraft in current § 21.24 has been an almost useless addition to part 21, resulting in problems without providing any benefit. As an example, NATCA referenced without elaboration the Seabird Seeker.[64] NATCA also noted that very

[64] It appears the Seabird Seeker is a light utility airplane built by Seabird Aviation Australia that

few airplanes have been certified under existing § 21.24, except perhaps those seeking to obtain EASA approval for CS–LSA (Light Sport Aeroplanes). The commenter said the proposed changes to part 23 support the use of industry specifications as a certification basis within part 23, thereby eliminating the need to retain procedural regulations for Primary Category Aircraft. NATCA recommended FAA focus on harmonizing the standards for Very Light Aircraft and Light Sport Aircraft with bilateral partners, particularly EASA. The commenter observed that United States manufacturers are at a disadvantage to obtain CS–LSA approval in Europe.

NATCA maintained that these types of airplanes are meant to be included in the part 23 rewrite and therefore recommended the FAA remove new type certification under § 21.24 once the part 23 revisions becomes final. Specifically, NATCA recommended the FAA rewrite §§ 21.24 and 21.184 to eliminate Primary Category certifications, or keep with an effective date to account for existing fleet, and create procedural requirements in part 21 and maybe part 23 to recognize something equivalent to EASA's CS–LSA.

The FAA considered NATCA's proposal to remove § 21.24, in effect, eliminating primary category certification. Although Very Light Aircraft and Light Sport Aircraft could be certified under the new part 23, eliminating § 21.24 is beyond the scope of this rulemaking because it would also remove a means of certification for certain rotorcraft that qualify for the primary category. These rotorcraft will not be able to take advantage of the new part 23 because it applies only to the certification of airplanes. Additionally, § 21.24 and the new part 23 do not conflict; they are alternative paths for certification.

Additionally, proposed § 21.24(i) abbreviated ''January'' as ''Jan''. This rule replaces ''Jan'' with ''January''.

4. Flight Tests (§ 21.35)

The NPRM proposed amending § 21.35(b)(2) to delete reference to reciprocating engines and expanding the exempted airplanes to include all low-speed part 23 airplanes 6,000 pounds or less. This proposed change would align the requirements for function and reliability testing with the proposed changes in part 23 that do not distinguish between propulsion types. This change would allow the FAA flexibility to address new propulsion types.

All commenters objected to the use of a 6,000-pound weight limit as a threshold for exemption from testing in proposed § 21.35(b)(2). Each commenter noted that the stated intent of the part 23 revision is, in part, to move away from weight and propulsion type classifications. Each commenter also requested the FAA remove the 6,000-pound weight limit.

Air Tractor proposed eliminating the need for function and reliability testing entirely and suggested the market will sort out function and reliability issues by means of natural economic controls.

The Associations suggested the FAA use a parameter other than maximum weight as a discriminator. Recognizing that the 6,000-pound weight limit appears to be based on the airplane's complexity and considering the acceptable level of risk, these commenters suggested using a low-speed airplane, which is a measure of complexity, and airworthiness level 2 or less, which are newly accepted measures of risk, to provide the same level of safety. The commenters noted this discriminator would also better align with the part 23 design rules. Therefore, the Associations recommended replacing the phrase ''of 6,000 pound or less maximum weight'' with ''meeting part 23 airworthiness level 1 or 2.''

The FAA disagrees with Air Tractor's proposal to eliminate all Function and Reliability (F&R) testing, because elimination of F&R testing for high-speed, complex airplanes, carrying larger numbers of passengers is not in keeping with the FAA's statutory mandate to prescribe minimum standards in the interest of safety for the design and performance of airplanes.

The FAA agrees with Textron and the Associations to remove the 6,000-pound discriminator in favor of values based on complexity and risk. Accordingly, the FAA has decided to replace the exception from F&R testing for airplanes weighing 6,000 pounds and below with an exception for airplanes with performance level of low-speed and certification level of 2 or less. The 6,000-pound discriminator was based on the FAA's assumptions regarding the complexity and risk associated with airplanes of that weight. However, as the commenters point out, their recommended parameters reflect the same assumptions regarding complexity and risk. Although this change may provide an exception for airplanes of up to 19,000 pounds, these airplanes would still be within the allowable risk and complexity parameters.

5. Instructions for Continued Airworthiness and Manufacturer's Maintenance Manuals Having Airworthiness Limitations Sections (§ 21.50)

In the NPRM, proposed § 21.50(b) would have replaced the reference § 23.1529 with § 23.1515 to align with the proposed part 23 numbering convention.

The FAA has decided not to renumber § 23.1529, which requires applicants for a TC or a change to a TC under part 23 to prepare Instructions for Continued Airworthiness; therefore, this section retains the reference to § 23.1529 in this rule. However, the FAA will keep the proposed addition of the phrase ''for Continued Airworthiness'' in the second sentence of § 21.50 to clarify that the second sentence in paragraph (b) refers to Instructions for Continued Airworthiness.

6. Designation of Applicable Regulations (§ 21.101)

The NPRM proposed amending § 21.101(b) to remove reference to § 23.2 because § 23.2 was proposed to be removed from part 23 and the requirements of former § 23.2 are addressed in the operating rules. The NPRM, in order to align § 21.101 with the proposed part 23 certification levels, proposed amending § 21.101(c) to include simple airplanes, level 1, low-speed airplanes, and level 2, low-speed airplanes. The NPRM did not propose to revise § 21.101 to address airplanes certified under former part 23, amendment 23–62, or prior amendments. Section 21.101 will continue to allow for compliance with the certification requirements at amendment 23–62 or earlier when compliance to the latest amendment of part 23 is determined by the FAA to be impractical.

The Associations said the FAA should remove the phrase ''to a simple'' from the first sentence of § 21.101(c), regardless of the later utilization of the term as these aircraft are completely encompassed by low-speed, level 1 airplanes. The FAA agrees and revises the rule language to remove ''to a simple'' from § 21.101(c).

Textron commented that the purpose of the part 23 rewrite is to move away from prescriptive classifications like weight and propulsion type, and therefore asked FAA to remove the 6,000-pound weight-based division in proposed § 21.101(c). Textron also noted the FAA provided no justifications for retaining the 6,000-pound weight-based division. Textron also suggested adding

was prohibited from being sold in the United States until receiving part 23 TC in 2015.

the word ''airplane'' after ''simple'' and after ''level 1 low speed'' for clarity.

The FAA considered Textron's comment. However, the 6,000-pound weight division cannot be removed because it continues to apply to legacy airplanes and modifications to those airplanes. A legacy airplane would only be identified by a certification level if it was re-certified to be fully compliant with the new rule. Therefore, the proposed wording is intended to capture both legacy airplanes and newly type certified airplanes. The FAA agrees that adding the word ''airplane'' after ''level 1 low speed'' in paragraph (c) will improve the sentence's clarity.

NATCA observed that there do not appear to be FAA directives or guidance on how to apply the part 23 rewrite to existing airplanes. As an example, NATCA asked how this rewrite would apply to a Piper Seneca V, an amendment 23–6 airplane. The commenter contended the FAA already struggles with the existing regulations and guidance. NATCA also asked how the proposed changes will be implemented on existing TC and STC products and how the certification basis will be captured. NATCA asked FAA to issue new directives, orders, and ACs specifically addressing application of part 23, relative to the Changed Product Rule, to prevent a situation in which each ACO (and applicant) comes up with their own creative interpretation of the regulation.

The FAA has developed internal training and guidance material to assist FAA employees. Specific to the application of the Changed Product Rule (§ 21.101), there should be minimal variation from existing procedures and guidance material. The certification basis for changed products will be captured by section and amendment in accordance with existing procedures, and section-specific certification levels identified for those amendments issued concurrent with, or subsequent to, this rulemaking.

7. Special Federal Regulation 23 (SFAR No. 23)

This final rule removes SFAR No. 23 as unnecessary because an applicant may no longer certify an airplane to SFAR No. 23. SFAR No. 23 was first superseded by SFAR 41 and then by commuter category in part 23, amendment 23–34. The FAA's intent to remove SFAR No. 23 was reflected in the amendatory language in the NPRM.

8. Altimeter System Test and Inspection (Appendix E to Part 43)

In the NPRM, the FAA proposed to revise paragraph (a)(2) of appendix E to part 43 by removing the reference to § 23.1325,[65] which would cease to exist in the proposed rule, and by requiring each person performing the altimeter system tests and inspections required by § 91.411 to perform a proof test to demonstrate the integrity of the static pressure system in a manner acceptable to the Administrator. This proposed change would have affected owners and operators of part 23 certificated airplanes in controlled airspace under IFR, who must comply with § 91.411.

Kestrel noted that existing appendix E to part 43 references § 23.1325 for leakage tolerances; however, the proposed rule would not have included § 23.1325 and the specified tolerances. Kestrel asked if the FAA plans to address the specified tolerances in guidance, or if it will permit the varying tolerances between similar airplane.

The FAA agrees and will address the leakage tolerances in guidance. As explained in the NPRM, the FAA is revising AC 43–6, *Altitude Reporting Equipment and Transponder System Maintenance and Inspection Practices,* to include a static pressure system proof test acceptable to the Administrator. The revised AC will incorporate the same static leakage standards that were formerly prescribed in § 23.1325. However, as ACs are not the only means of compliance, it is possible that someone could ultimately propose an alternative means that the FAA could find acceptable, which would lead to a difference between similar airplane. But no such methods have been proposed to date.

9. Increased Maximum Certification Weights for Certain Airplanes Operated in Alaska (§ 91.323)

The NPRM proposed amendments to §§ 91.205, 91.313, 91.323, and 91.531. The only section that received comments was § 91.323. increased maximum certification weights for certain airplanes operated in Alaska.

The FAA proposed to amend § 91.323 by removing the reference to § 23.337 because the FAA proposed revising and consolidating § 23.337 with other structural requirements. The FAA proposed adding the relevant prescriptive requirement of § 23.337 to § 91.323(b)(3).

Air Tractor noted that the weight in § 91.323(b)(3) has been changed to reflect a maneuvering load factor that is now independent of the load factor in part 23, but matches the previous § 23.337 definition. The commenter contended that there is now an increased likelihood that the load factor considered under this new rule will not match the load factors that were used in the original certification of the design, because it is possible that some consensus standard will impose some other creative interpretation. The commenter suggested that safety would be better preserved if § 91.323 were required to reference the load factors that were used in the original certification.

Air Tractor's concern is based on an incorrect interpretation of the FAA's proposed amendment to § 91.323. Section 91.323 applies only to aircraft that have been type certificated under Airworthiness Bulletin 7A or under normal category of part 4a of the former Civil Air Regulations (CAR). The FAA's proposed amendment to § 91.323 would not permit any additional aircraft to be operated in accordance with § 91.323. It would only preserve the approval of increased maximum certification weights for airplanes that were designed and built to a higher design requirement than CAR 3 and 14 CFR part 23. Approving an increase in the maximum certificated weight of an airplane pursuant to § 91.323, based on the equation from former § 23.337(a)(1), allows operation at the same weights had the airplane been certificated in accordance with CAR 3.

10. Additional Emergency Equipment (§ 121.310)

In the NPRM, the FAA proposed to amend § 121.310(b)(2)(iii) by updating the reference to § 23.811(b). Current § 121.130(b)(2)(iii) references § 23.811(b) of part 23, amendment 23–62. Because the FAA is replacing part 23, amendment 23–62 with new part 23, the FAA proposed to update the reference to § 23.811(b) by specifying that each passenger emergency exit marking and each locating sign must be manufactured to meet the requirements of § 23.811(b) of this chapter in effect on June 16, 1994. However, upon further reflection, the FAA has decided not to reference a section that will no longer exist in the CFR on August 30, 2017. Instead, the FAA is incorporating the requirements of § 23.811(b) in § 121.310(b)(2)(iii). Accordingly, § 121.310(b)(2)(iii) now requires, for a nontransport category turbopropeller powered airplane type certificated after December 31, 1964, that each passenger emergency exit marking and each locating sign be manufactured to have white letters 1 inch high on a red background 2 inches high, be self-illuminated or independently, internally electrically illuminated, and have a

[65] In the NPRM, the FAA proposed to capture the safety intent of § 23.1325 in proposed §§ 23.1300, 23.1310, and 23.1315.

minimum brightness of at least 160 microlamberts. The color may be reversed if the passenger compartment illumination is essentially the same.

11. Additional Airworthiness Requirements (§ 135.169)

In the NPRM, the FAA proposed to allow a small airplane in the normal category, in § 135.169(b)(8), to operate within the rules governing commuter and on demand operations. Proposed § 135.169(b)(8) would have required the new normal category airplane to use a means of compliance accepted by the Administrator equivalent to the airworthiness standards applicable to the certification of airplanes in the commuter category found in part 23, amendment 23–62.

Upon further reflection, the FAA has decided not to reference part 23, amendment 23–62 in § 135.169(b)(8) because part 23, amendment 23–62 will not exist in the CFR when new normal category airplanes are being type certificated under new part 23. The FAA intended proposed § 135.169(b)(8) to ensure a continued higher level of safety for commercial operations by requiring a new normal category airplane under part 23 to use a means of compliance equivalent to the airworthiness standards that applied to airplanes certified in the commuter category. As explained in the NPRM, this final rule sunsets the commuter category for newly type certificated airplanes and creates a new normal category, certification level 4 airplane as equivalent to the commenter category by applying it to 10–19 passengers. In order to retain the FAA's intent while omitting the reference to part 23 at amendment 23–62, the FAA is revising the proposed rule language to clarify that § 135.169(b)(8) applies to a normal category airplane equivalent to the commuter category. Accordingly, § 135.169(b)(8) now allows consideration of a small airplane that is type certificated in the normal category, as a multi-engine certification level 4 airplane, to operate within the rules governing commuter and on demand operations.

Because new part 23 maintains the level of safety associated with current part 23, except for areas addressing loss of control and icing where a higher level of safety is established, the FAA expects that any multi-engine, level 4 airplane approved for commercial operations with 10 or more passengers will meet, at a minimum, the performance required for airplanes type certificated in the commuter category.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation Summary

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

In conducting these analyses, FAA has determined that this final rule: (1) Has benefits that justify its costs, (2) is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, (3) is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (4) has a significant positive economic impact on small entities; (5) will not create unnecessary obstacles to the foreign commerce of the United States; and (6) will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above. These analyses are summarized below.

1. Total Benefits and Costs of This Rule

The following table shows the estimated benefits and costs of the final rule. Another way to consider the expected net benefit to the society is if the rule saves only one human life by improving stall characteristics and stall warnings, this alone would result in benefits which substantially outweigh the costs.

ESTIMATED BENEFITS AND COSTS

[2015 $ Millions]

	Stall & spin + other costs	Safety benefits + cost savings = total benefits
Total	$0.8 + $3.1 = $3.9	$17.9 + $9.9 = $27.8
Present value at 7%	0.8 + 3.1 = 3.9	6.1 + 4.9 = 11.0
Present value at 3%	0.8 + 3.1 = 3.9	11.1 + 7.1 = 18.3

* These numbers are subject to rounding error.

2. Who is potentially affected by this rule?

The proposal will affect U.S. manufacturers and operators of new part 23 type certificated airplanes.

3. Assumptions

The benefit and cost analysis for the regulatory evaluation is based on the following factors/assumptions:

- The analysis is conducted in constant dollars with 2015 as the base year.
- The final rule will be effective in 2017.
- The primary analysis period for costs and benefits extends for 20 years, from 2017 through 2036. This period was selected because annual costs and benefits will have reached a steady state by 2036.
- Future part 23 type certifications and deliveries are estimated from historical part 23 type certifications and deliveries.
- Costs for the new part 23 type certifications forecasted in the ''Fleet Discussion'' section will all occur in year 1 of the analysis interval.

- Airplane deliveries from the forecasted part 23 type certificates will start in year 5 of the analysis interval. Therefore, accident reduction benefits will begin five years after the rule is in effect.
- The FAA uses a three and seven percent discount rate for the benefits and costs as prescribed by OMB in Circular A–4.
- The baseline for estimating the costs and benefits of the rule will be part 23, through the current amendment level.
- Based on FAA Small Airplane Directorate expert judgment, the FAA estimates 335 FAA part 23 certification engineers will require additional training as a result of this final rule. The FAA assumes that the same number of industry part 23 certification engineers will also require additional training as a result of this final rule.
- The FAA estimates this rulemaking will add 16 hours of training to FAA and industry part 23 certification engineers.
- Since this training program will be on-line, we estimate no travel costs for the engineers.
- FAA pay-band tables and the Bureau of Labor Statistics (BLS) determines the hourly wages used to estimate the costs to the FAA and applicants.
- Using the U.S. Department of Transportation guidance, the wage multiplier for employee benefits is 1.17.

4. Benefits of This Rule

The major safety benefit of this rule is to add stall characteristics and stall warnings that will result in airplane designs that are more resistant to inadvertently departing controlled flight. The largest number of accidents for small airplanes is a stall or departure based loss of control (LOC) in flight. This rule will have cost savings by streamlining the certification process and encouraging new and innovative technology. Streamlining the certification process will reduce the issuance of special conditions, exemptions, and equivalent level of safety findings.

5. Costs of This Rule

The final rules major costs are the engineer training costs and the certification database creation costs. Additional costs will also accrue from the controllability and stall sections that will increase scope over current requirements and manual upgrade costs.

In the following table, we summarize the total estimated compliance costs by category. The FAA notes that since we assumed that all costs occurred in Year 1 of the analysis interval, the 2015-dollar costs equal the present value costs.

TOTAL COST SUMMARY BY CATEGORY
[In 2015 present value dollars]

Type of cost	Total costs in present value at 7 percent
§ 23.2150(c) Controllability	$277,318
§ 23.2150(b) Stall characteristics, stall warning, and spins	500,595
Engineer Training Costs	1,167,379
Certification Database Costs	1,295,290
Manual Upgrade Costs	700,833
Total Costs	3,941,414

* These numbers are subject to rounding error.

B. Final Regulatory Flexibility Determination

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

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

The FAA believes that this final rule could have a significant positive economic impact on a substantial number of entities because we believe this rule could enable the creation of new part 23 type certificates and new manufacturers. The FAA has been working with U.S. and foreign small aircraft manufacturers since 2007 to review the life cycle of part 23 airplanes and determine what needed improvement.

The purpose of this analysis is to provide the reasoning underlying the FAA determination.

Section 604(a) of the Act specifies the content of a FRFA.

Each FRFA must contain:

- A statement of the need for, and objectives of, the rule;
- a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
- a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

1. Reasons Why the Rule Is Needed

The FAA promulgates this action to amend the airworthiness standards for new part 23 type certificated airplanes to reflect the current needs of the small airplane industry, accommodate future trends, address emerging technologies, and enable the creation of new part 23 manufacturers and new type certificated airplanes. The rule's changes to part 23 are necessary to eliminate the current workload of exemptions, special conditions, and equivalent levels of safety findings necessary to certificate new part 23 airplanes. These part 23 changes will also promote safety by enacting new regulations for controllability and stall standards and promote the introduction of new technologies in part 23 airplanes.

2. Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

With regard to assessing the impact on small, numerous firms were left out of the FAA's analysis. Analysis concerning the impact on small firms ultimately included data from only 5 firms, one of which has not been in operation for 8 years, and another that no longer exists, but is struggling to set up business under new ownership. It would seem that the FAA should have knowledge of every company that still has active manufacturing activities (active production certificates), and that the data that was included was exceptionally non-representative of the overall industry. Further, by eliminating from consideration all firms that are not US-owned a distorted view of the true impact on the general aviation industry in our country is presented.

FAA Response: Under the Small Business Regulatory Flexibility Act, for each initial regulatory flexibility analysis, agencies are required to provide a description of and, where feasible, an estimate of the number of small entities to which the proposed rule would apply. Many, if not most, small entities do not provide public data such as publically available employment data in order to determine if a business is small under the SBA guidelines, or publically available revenue data, in order to determine if a business is disproportionately burdened by the proposed or final rulemaking. The FAA does not have the means or authority to require small entities to report their employment or revenue data and therefore we do not have knowledge of every company that still has active manufacturing activities. The small business entities that the FAA analyzed provided data on their employment and revenue either through the U.S. DOT Form 41 rules, SEC rules, or through news releases the companies made public.

The FAA conducted research and found that all five businesses' we examined at the time of our analysis were small and either actively manufacturing aircraft or they were under new ownership and had publically announced they were in the process of working towards setting up an aircraft manufacturing line. The FAA notes the rule also reduces the certification time for small part 23 parts manufacturers. The FAA conclusion that the proposed rule may have a significant positive impact on small entities extends well beyond our sample.

Further, FAA regulations apply to US-owned business and to any foreign owned business that manufactures a product in the U.S. or markets their products/services in the U.S. Foreign owned business' voluntarily complies with the rules and regulations promulgated by the FAA. Thus the FAA expects that the final rule would impact a substantial number of small entities.

The comment regarding numerous firms being left out of the FAA's small business analysis was from a company who certificates most of their aircraft with a restricted category special air worthiness certificate. A restricted category special airworthiness certificate is issued to operate aircraft that have been type certificated in the restricted category. Operation of restricted category aircraft is limited to special purposes identified in the applicable type design. Restricted category aircraft manufacturers do not follow part 23 in its entirety, rather they follow parts of part 21, part 21 subpart H, part 45, section 91.313, part 91 subpart D, section 91.715, and part 375 and can choose whatever other certification bases requirements, based on FAA approval, to certificate their aircraft for the aircraft's special operations. Therefore, since restricted category aircraft manufacturers do not comply part 23 in its entirety for their type certifications, these manufacturers are not included in our analysis.

In addition, many part suppliers may benefit from this performance-based rule through an expected quicker approval process. The objective of this rule is to allow industry more flexibility and lower cost methods to certify future part 23 airplanes at a sufficiently lower certification cost which can be driven by industry innovation and more small entities will have additional opportunities that do not exist today.

3. FAA Response to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule

The Chief Counsel for Advocacy did not file comments for the proposed rule.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

For the initial regulatory flexibility analysis (IRFA), the FAA conducted a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. The IRFA concluded that the proposed rule could have a significant economic impact on a substantial number of entities because we believe this rule could enable the creation of new part 23 type certificates and new manufacturers.

The FAA is unable to estimate the total number of small entities to which the rule will apply because many, if not most, small part 23 aircraft manufacturing entities do not provide public data such as publically available employment data in order to determine if a business is small under the SBA guidelines, and publically available revenue data, in order to determine if a business is disproportionately burdened by the final rulemaking. The FAA also believes that the final rule will enable new part 23 aircraft manufacturing industries, while maintaining a safe operating environment. In addition, many part suppliers may benefit from this performance-based rule through an expected quicker approval process.

5. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The final rule will reduce the number of special conditions, equivalent level of safety (ELOS), and exemptions and therefore will reduce paperwork and processing time for both the FAA and industry. The rule would also maintain the fundamental safety requirements from the current part 23 regulations but allow more flexibility in airplane designs, faster adoption of safety enhancing technology, and reduce the regulatory cost burden. To estimate savings driven by this change, the FAA counted the special conditions, ELOS, and exemption applications submitted to the FAA for part 23 aircraft between 2012 and 2014 and divided the number by two years for an average of 37 applications per year. The Aviation Rulemaking Committee (ARC) report offered a similar average of 37 applications per year. Additionally, the FAA counted the number of pages per application to obtain an average number of pages per application. For special conditions, there were approximately 21 pages, 16 pages for an exemption, and 15 pages per ELOS application. The FAA assumes that the applicant and each FAA office that reviews the application spend 8 hours on research, coordination, and review per page. The ARC also noted ''an ELOS finding or exemption can take the FAA between 4 to 12 months to develop and approve. The applicant spends roughly the same amount of time as the FAA in proposing what they need and responding to FAA questions for SC, exemption, or ELOS. As explained in number four above, the FAA is unable to estimate the total number of small entities to which the rule will apply. The completion of these reports will not require professional skills beyond basic literacy and aviation skills required to work for a part 23 aircraft manufacturer.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The Federal Aviation Administration (FAA) is revising the airworthiness standards for normal, utility, acrobatic, and commuter category part 23 airplanes and believes this action will provide a set of requirements that will allow more flexibility in part 23 airplane designs and faster adoption of safety enhancing technology while maintaining a higher level of safety. The current issue with part 23 is the prescriptive regulatory framework does not readily allow the adoption of new and innovative technology. This rulemaking will solve this issue by putting in place a performance-based regulatory structure that will result in the FAA accepting new means of compliance based upon industry consensus standards.

This rulemaking project will comply with the Congressional mandated Small Airplane Revitalization Act of 2013, which requires the FAA to issue a final rule that revises the certification requirements for small airplanes by creating a regulatory regime that will improve safety and decrease certification costs. This action will increase the FAA's ability to address future technology and be relieving for all part 23 manufacturers regardless of their size and number of employees.

For the initial regulatory flexibility analysis, the FAA analyzed two alternatives and solicited and received no comments on the alternative analysis. The two alternatives the FAA analyzed follows.

Alternative 1

The FAA will continue to issue special conditions, exemptions, and equivalent level of safety findings to certificate part 23 airplanes. As this approach will not follow congressional direction, we choose not to continue with the status quo.

Alternative 2

The FAA will continue to enforce the current regulations that affect stall and controllability. The FAA rejected this alternative because the accident rate for part 23 airplanes identified a safety issue that had to be addressed.

Thus, this rule's benefits small entities by allowing new designs and parts with lower certifications costs.

C. International Trade Impact Assessment

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

D. Unfunded Mandates Assessment

Title II of the *Unfunded Mandates Reform Act of 1995* (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $155.0 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The information requirements for aircraft certification are covered by existing OMB No. 2120–0018. Burdens associated with special conditions, ELOS, and exemptions are not quantified in this collection because the need to seek relief under one of these options is dependent on each applicant and is difficult to quantify. It is expected that this rulemaking will reduce the number of special conditions, ELOS, and exemptions filed, thus reducing paperwork and processing time for both the FAA and industry. It would also maintain the fundamental safety requirements from the current part 23 regulations but allow more flexibility in airplane designs, faster adoption of safety enhancing technology, and reduce the regulatory cost burden.

To estimate savings driven by this change, the FAA counted the special conditions, ELOS, and exemption applications submitted to the FAA for part 23 aircraft between 2012 and 2014 and divided the number by three years for an average of 37 applications per year.[66] Additionally, the FAA counted the number of pages per application to obtain an average number of pages per application. For special conditions, there were approximately 21 pages, 16 pages for an exemption, and 15 pages per ELOS application. The FAA assumes that the applicant and each FAA office that reviews the application spend 8 hours on research, coordination, and review per page. The ARC also noted ''an ELOS finding or exemption can take the FAA between 4 to 12 months to develop and approve. The applicant spends roughly the same amount of time as the FAA in proposing what they need and responding to FAA questions for SC, exemption, or ELOS.''[67]

The number of applications is multiplied by the number of pages and by the hourly wage for the applicant and different FAA offices to account for the cost to the FAA and the applicant. The following table shows annual hours and cost by special condition, exemption, and ELOS.

[66] *https://my.faa.gov/org/linebusiness/avs/offices/air/tools/cert.html.*

[67] Ibid., 54.

	Annual total	
	Man hours	Cost
Savings from Special Conditions (SC)	8,826	$553,962
Savings from Exemptions	1,620	101,596
Savings from Equivalent Level of Safety (ELOS)	5,268	330,691

Using these yearly cost estimates in the table above, over 20 years $6.6 million in man-hours will be spent on applying for and processing special conditions, exemptions, and ELOS. However under the rule, the need to demonstrate compliance through special conditions, exemptions, or ELOS will largely be eliminated. Instead new products will simply need to demonstrate compliance by following consensus standards acceptable to the Administrator, or by submitting their own proposed means of compliance using the process outlined in AC 23.10.[68] As a conservative estimate, the FAA estimates that special conditions, exemptions, and ELOS will be reduced by half for a savings to the FAA and applicant of roughly $3.3 million ($1.6 million present value). The total cost and hour savings by year is shown in the table below.

	FAA SAD		FAA ACO		Applicant		Total	
	Man-hours	Savings	Man-hours	Savings	Man-hours	Savings	Man-hours	Savings
Total	34,920	$2,613,227	34,920	$1,789,953	34,920	$2,171,813	104,760	$6,574,993
0.5*Total	17,460	1,306,613	17,460	904,977	17,460	1,085,907	52,380	3,287,497

These numbers are subject to rounding error.

In addition to this savings, there would also be additional paperwork burden associated with § 23.2150(c). This rulemaking will not require a new control number, but does need an update to the control number that currently covers part 23. A PRA questionnaire has been updated with new requirements from this rule, and submitted to our PRA officer. This provision could result in a change to a limitation or a performance number in the flight manual, which will require an update to the training courseware or flight manual. Industry ARC members believe that this change could cost from $100,119 to $150,179 in 2015 dollars. Therefore, the FAA uses $125,149 (($100,119 + $150,179)/2) as an average cost for this change. This will be a one-time cost per new type certification.

There will also be additional paperwork associated with this requirement that is not part of the costs discussed above. The FAA estimates the paperwork costs for these provisions by multiplying the number of hours the FAA estimates for each page of paperwork, by the number of pages for the training courseware, or flight manual, by the hourly rate of the person responsible for the update. The FAA estimates that this section will add a total of four pages to the training courseware and flight manual. The FAA also estimates that it will take a part 23 certification engineer eight hours to complete the one page required for each new type certification. The eight hours to complete a page includes the research, coordination, and review each document requires. Therefore, the FAA estimates the total paperwork costs for § 23.2150(c) will be about $1,990 in 2015 dollars. The FAA assumes that this section will add costs to only one of the new part 23 turbojet airplane type certificates estimated in the Fleet Discussion section of the regulatory evaluation. The following table shows the total paperwork costs for the changes to § 23.2150(c).

Airplane type	Hours	Changes to flight manual	Paper work	Total
Turbojet	2,044	$125,149	$1,990	$127,139

Conversations with the industry ARC members indicate that there may need to be some changes to the engineering manuals to describe how the accepted means of compliance must be related to the regulations. Depending on the complexity of each company's manual, industry estimates that these changes could run from about $50,060 up to $200,238 in 2015 dollars. This will be a one-time cost per new type certification.

As we received no comments to the paperwork analysis in the NPRM, we use the same assumptions in the final rule regarding manual complexity. The manufacturers of the two new part 23 reciprocating engine airplane type certifications, discussed in the Fleet Discussion section of the regulatory evaluation, will spend $50,060 to make the changes to the engineering manual. We also assume that the one new part 23 turboprop airplane certification and the two new part 23 turbojet airplane certifications, discussed in the Fleet Discussion section of the regulatory evaluation, will use the more complex and costly approach of $200,238.

The FAA notes that either the simple approach or the more complex approach to updating the manuals could also either take place in-house or could be contracted out to a consultant. The following table shows the total paperwork costs for the changes to the engineering manuals in 2015 dollars.

[68] See Section VI. Discussion of the Regulatory Amendments of the preamble for a discussion of how this might be accomplished.

Airplane type	Number of estimated new type certificates	Simple approach	Complex approach	Hours	Total
Recip	2	$50,060	$0	1,610	$100,119
Turboprop	1	0	200,238	3,219	200,238
Turbojet	2	0	200,238	6,439	400,476
Total				11,268	700,833

These numbers are subject to rounding error.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified the following differences with these proposed regulations. The ICAO Standards for small airplanes use weight and propulsion to differentiate between some requirements. The proposed regulations use certification levels and performance to differentiate between some requirements. Furthermore, part 23 will still allow the certification of airplanes up to 19,000 pounds. If this proposal is adopted, the FAA intends to file these differences with ICAO. Executive Order (EO) 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policy and agency responsibilities of Executive Order 13609, Promoting International Regulatory Cooperation. The agency has determined that this action would eliminate differences between U.S. aviation standards and those of other CAAs by aligning the revised part 23 standards with the new CS 23 standards that are being developed concurrently by EASA. Several other CAAs are participating in this effort and intend to either adopt the new part 23 or CS 23 regulations or revise their airworthiness standards to align with these new regulations.

The Part 23 ARC included participants from several foreign CAAs and international members from almost every GA manufacturer of both airplanes and avionics. It also included several Light-Sport Aircraft manufacturers who are interested in certificating their products using the airworthiness standards contained in part 23. The rulemaking and means of compliance are international efforts. Authorities from Europe, Canada, Brazil, China, and New Zealand all are working to produce similar rules. These rules, while not identical, are intended to allow the use of the same set of industry developed means of compliance. Industry has told that FAA that it is very costly to address the differences that some contrived means of compliance imposes. If there is substantial agreement between the major CAAs to use the same industry means of compliance, then U.S. manufactures expect a significant saving for exporting their products.

Furthermore, this project is a harmonization project between the FAA and EASA.

EASA has worked a parallel rulemaking program for CS 23. The FAA provided comments to the EASA A–NPA. EASA and other authorities will have an opportunity to comment on this NPRM when it is published. These efforts will allow the FAA, EASA and other authorities to work toward a harmonized set of regulations when the final rules are published.

G. Environmental Analysis

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

H. Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the Administrator, when modifying 14 CFR regulations in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation, and to establish appropriate regulatory distinctions. Because this rule would apply to GA airworthiness standards, it could, if adopted, affect intrastate aviation in Alaska. The FAA, therefore, specifically requests comments on whether there is justification for applying the proposed rule differently in intrastate operations in Alaska.

V. Executive Order Determination

A. Executive Order 13132, Federalism

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

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

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

VI. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*) for Docket FAA–2015–1621;
2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/*; or
3. Accessing the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/*.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number (FAA–2015–1621) for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

Appendix 1 to the Preamble—Former to New Regulations Cross-Reference Table

The below cross-reference table is intended to permit easy access from former to new regulations. The preamble is organized topical, section-by-section, former to new regulations. This table should assist the reader in following the section discussions contained in the preamble. If the intent of a former regulation was incorporated into multiple new regulations, only the most pertinent new regulations were listed.

Former section	Former title	New section	New title
Subpart A—General			
23.1	Applicability	23.2000	Applicability.
23.2	Special retroactive requirements	23.2	Interim Airworthiness Requirements.
23.3	Airplane categories	23.2005	Certification of normal category airplanes
		23.2010	Accepted means of compliance.
Subpart B—Flight			
23.21	Proof of compliance	23.2100	Weight and center of gravity.
23.23	Load distribution limits	23.2100	Weight and center of gravity.
23.25	Weight limits	23.2100	Weight and center of gravity.
23.29	Empty weight and corresponding center of gravity.	23.2100	Weight and center of gravity.
23.31	Removable ballast	23.2100	Weight and center of gravity.
23.33	Propeller speed and pitch limits	23.2400	Powerplant installation.
23.45	Performance—General	23.2105	Performance data.
23.49	Stalling speed	23.2110	Stall Speed.
23.51	Takeoff speeds	23.2115	Takeoff performance.
23.53	Takeoff performance	23.2115	Takeoff performance.
23.55	Accelerate-stop distance	23.2115	Takeoff performance.
23.57	Takeoff path	23.2115	Takeoff performance.
23.59	Takeoff distance and takeoff run	23.2115	Takeoff performance.
23.61	Takeoff flight path	23.2115	Takeoff performance.
23.63	Climb: General	23.2120	Climb requirements.
23.65	Climb: All engines operating	23.2120	Climb requirements.
23.66	Takeoff climb: one engine inoperative.	23.2125	Climb information.
23.67	Climb: One engine inoperative	23.2120	Climb requirements.
23.69	Enroute climb/descent	23.2125	Climb information.
23.71	Glide: single engine airplanes	23.2125	Climb information.
23.73	Reference landing approach speed.	23.2130	Landing.
23.75	Landing distance	23.2130	Landing.
23.77	Balked landing	23.2120	Climb requirements.
23.141	Flight Characteristics-General	23.2135	Controllability.
23.143	Controllability and Maneuverability—General.	23.2135	Controllability.
23.145	Longitudinal control	23.2135	Controllability.
23.147	Directional and lateral control	23.2135	Controllability.
23.149	Minimum control speed	23.2135	Controllability.
23.151	Acrobatic maneuvers	23.2135	Controllability.
23.153	Control during landings	23.2135	Controllability.
23.155	Elevator control force in maneuvers.	23.2135	Controllability.
23.157	Rate of roll	23.2135	Controllability.
23.161	Trim	23.2140	Trim.
23.171	Stability—General	23.2145	Stability.
23.173	Static longitudinal stability	23.2145	Stability.
23.175	Demonstration of static longitudinal stability.	23.2145	Stability.
23.177	Static directional and lateral stability.	23.2145	Stability.

Former section	Former title	New section	New title
23.179	Instrument stick force measurements.	23.2145	Stability.
23.181	Dynamic stability	23.2145	Stability.
23.201	Wings level stall	23.2150	Stall characteristics, stall warning, and spins.
23.203	Turning Flight and accelerated turning stalls.	23.2150	Stall characteristics, stall warning, and spins.
23.207	Stall Warning	23.2150	Stall characteristics, stall warning, and spins.
23.221	Spinning	23.2150	Stall characteristics, stall warning, and spins.
23.231	Longitudinal stability and control	23.2155	Ground and water handling characteristics.
23.233	Directional stability and control	23.2155	Ground and water handling characteristics.
23.235	Operation on unpaved surfaces	23.2155	Ground and water handling characteristics.
23.237	Operation on water	23.2155	Ground and water handling characteristics.
23.239	Spray characteristics	23.2155	Ground and water handling characteristics.
23.251	Vibration and buffeting	23.2160	Vibration, buffeting, and high-speed characteristics.
23.253	High-speed characteristics	23.2160	Vibration, buffeting, and high-speed characteristics.
23.255	Out of trim characteristics	23.2160	Vibration, buffeting, and high-speed characteristics.
		23.2165	Performance and flight characteristics requirements for flight in icing conditions.
Subpart C—Structure			
23.301	Loads	23.2210, 23.2230	Structural design loads, Limit and ultimate loads.
(a)		23.2230	Limit and ultimate loads.
(b)		23.2210	Structural design loads.
(c)		23.2210	Structural design loads.
(d)		23.2210	Structural design loads.
23.302	Canard or tandem wing configurations.	23.2210	Structural design loads.
23.303	Factors of safety	23.2230	Limit and ultimate loads.
23.305	Strength and deformation	23.2235	Structural strength.
		23.2205	Interaction of systems and structures.
23.307	Proof of structure	23.2235	Structure strength.
23.321	Flight Loads—General	23.2210	Structural design loads.
(a)		23.2210	Structural design loads.
(b)		23.2200	Structural design envelope.
(c)		23.2200	Structural design envelope.
23.331	Symmetrical flight conditions	23.2210	Structural design loads.
23.333	Flight envelope	23.2200	Structural design envelope.
(a)		23.2200	Structural design envelope.
(b)		23.2200	Structural design envelope.
(c)		23.2215	Flight load conditions.
(d)		23.2200	Structural design envelope.
23.335	Design airspeeds	23.2200	Structural design envelope.
23.337	Limit maneuvering load factors	23.2200	Flight load conditions.
(a)		23.2200	Structural design envelope.
(b)		23.2200	Structural design envelope.
(c)		Means of Compliance.	
23.341	Gust load factors	23.2215	Flight load conditions.
23.343	Design fuel loads	23.2200	Structural design envelope.
(a)		23.2200	Structural design envelope.
(b)		23.2200	Structural design envelope.
(c)		Means of Compliance.	
23.345	High lift devices	23.2225	Component loading conditions.
23.347	Unsymmetrical flight loads	23.2215	Flight load conditions.
23.349	Rolling conditions	23.2215	Flight load conditions.
23.351	Yawing conditions	23. 215	Flight load conditions.
23.361	Engine torque	23.2225	Component loading conditions.
23.363	Side load on engine mount	23.2225	Component loading conditions.
23.365	Pressurized cabin loads	23.2225	Flight load conditions.
(e)		23.2240	Structural durability.

Former section	Former title	New section	New title
23.367	Unsymmetrical loads due to engine failure.	23.2215	Flight load conditions.
23.369	Rear lift truss	Means of Compliance.	
23.371	Gyroscopic and aerodynamic loads.	23.2225	Component loading conditions.
23.373	Speed control devices	23.2225	Component loading conditions.
23.391	Control surface loads	23.2225	Component loading conditions.
23.393	Loads parallel to hinge line	23.2225	Component loading conditions.
23.395	Control system loads	23.2225	Component loading conditions.
23.397	Limit control forces and torques	23.2225	Component loading conditions.
23.399	Dual control system	23.2225	Component loading conditions.
23.405	Secondary control system	23.2225	Component loading conditions.
23.407	Trim tab effects	23.2225	Component loading conditions.
23.409	Tabs	23.2225	Component loading conditions.
23.415	Ground gust conditions	23.2225	Component loading conditions.
23.421	Balancing loads	Means of Compliance.	
23.423	Maneuvering loads	23.2215	Flight load conditions.
23.425	Gust loads	23.2215	Flight load conditions.
23.427	Unsymmetrical loads due to engine failure.	23.2215	Flight load conditions.
23.441	Maneuvering loads	23.2215	Flight load conditions.
23.443	Gust loads	23.2215	Flight load conditions.
23.445	Outboard fins or winglets	Means of Compliance.	
23.455	Ailerons	23.2225	Component loading conditions.
23.459	Special devices	23.2225	Component loading conditions.
23.471	Ground Loads—General	23.2220	Ground and water load conditions.
23.473	Ground load conditions and assumptions.	23.2220	Ground and water load conditions.
23.477	Landing gear arrangement	23.2220	Ground and water load conditions.
23.479	Level landing conditions	23.2220	Ground and water load conditions.
23.481	Tail down landing conditions	23.2220	Ground and water load conditions.
23.483	One-wheel landing conditions	23.2220	Ground and water load conditions.
23.485	Side load conditions	23.2220	Ground and water load conditions.
23.493	Braked roll conditions	23.2220	Ground and water load conditions.
23.497	Supplementary conditions for tail wheels.	23.2220	Ground and water load conditions.
23.499	Supplementary conditions for nose wheels.	23.2220	Ground and water load conditions.
23.505	Supplementary conditions for skiplanes.	23.2220	Ground and water load conditions.
23.507	Jacking loads	23.2220	Ground and water load conditions.
23.509	Towing loads	23.2220	Ground and water load conditions.
23.511	Ground load: Unsymmetrical loads on multiple-wheel units.	23.2220	Ground and water load conditions.
23.521	Water load conditions	23.2220	Ground and water load conditions.
23.523	Design weights and center of gravity positions.	23.2220	Ground and water load conditions.
23.525	Application of loads	23.2220	Ground and water load conditions.
23.527	Hull and main float load factors	23.2220	Ground and water load conditions.
23.529	Hull and main float landing conditions.	23.2220	Ground and water load conditions.
23.531	Hull and main float takeoff conditions.	23.2220	Ground and water load conditions.
23.533	Hull and main float bottom pressures.	23.2220	Ground and water load conditions.
23.535	Auxiliary float loads	23.2220	Ground and water load conditions.
23.537	Seawing loads	23.2220	Ground and water load conditions.
23.561	Emergency Landing Conditions—General.	23.2270	Emergency conditions.

Former section	Former title	New section	New title
23.562	Emergency landing dynamic conditions.	23.2270	Emergency conditions.
23.571	Metallic pressurized cabin structures.	23.2240	Structural durability.
23.572	Metallic wing, empennage, and associated structures.	23.2240	Structural durability.
23.573	Damage tolerance and fatigue evaluation of structure.	23.2240	Structural durability.
23.574	Metallic damage tolerance and fatigue evaluation of commuter category airplanes.	23.2240	Structural durability.
23.575	Inspections and other procedures	23.2240	Structural durability.
Subpart D—Design and Construction			
23.601	General	23.2250	Design and construction principles.
23.603	Materials and workmanship	23.2250, 23.2260	Design and construction principles, Materials and processes.
23.605	Fabrication methods	23.2260	Materials and processes.
23.607	Fasteners	23.2250, 23.2255	Design and construction principles, Protection of structure.
23.609	Protection of Structure	23.2255	Protection of structure.
23.611	Accessibility	23.2255	Protection of structure.
23.613	Material strength properties and design values.	23.2260	Materials and processes.
23.619	Special factors	23.2265	Special factors of safety.
23.621	Casting factors	23.2265	Special factors of safety.
23.623	Bearing factors	23.2265	Special factors of safety.
23.625	Fitting factors	23.2265	Special factors of safety.
23.627	Fatigue strength	23.2240	Structural durability.
23.629	Flutter	23.2245	Aeroelasticity.
23.641	Proof of strength	Means of Compliance.	
23.651	Proof of strength	Means of Compliance.	
23.655	Installation	23.2300(a)(2)	Flight control systems.
23.657	Hinges	23.2265	Special factors of safety.
23.659	Mass balance	23.2215, 23.2335	Flight load conditions, Structural strength.
23.671	Control systems—General.		
(a)		23.2300(a)(1) & 23.2600(a)	Flight control systems & Flightcrew interface.
(b)		23.2600, 23.2605	Flightcrew interface, Installation and operation.
23.672	Stability augmentation and automatic and power-operated systems.		
(a)		23.2605(c)	Installation and operation.
(b)		23.2300(a)(2)	Flight control systems.
(c)		23.2510, 23.2300(a)(2)	Installation and operation, Flight control systems.
23.673	Primary flight controls		Definition.
23.675	Stops	23.2300(a)(2)	Flight control systems.
23.677	Trim systems.		
(a)		23.2300(b) & 23.2600	Flight control systems & Flightcrew interface.
(b)		23.2300(a)(2)	Flight control systems.
(c)		23.2245	Aeroelasticity.
(d)		23.2515	Equipment, systems and installations.
23.679	Control system locks.		
(a), (b)		23.2605(c)	Installation and operation.
(c)		23.2300(a)(2)	Flight control systems.
23.681	Limit load static tests.		
(a)		23.2225(b), 23.2235	Component loading conditions, Structural strength.
(b)		23.2265	Special factors of safety.
23.683	Operation tests	23.2250(d), 23.2300(a)(2)	Design and construction principles, Flight control systems.
23.685	Control system details	23.2300(a)(2)	Flight control systems.
23.687	Spring devices	23.2245, 23.2250 & 23.2300(a)(2)	Aeroelasticity. Structural design & Flight control systems.
23.689	Cable systems	23.2250(c)	Design and construction principles.
(a)(3)		23.2255(c)	Protection of structure.

Former section	Former title	New section	New title
23.691	Artificial stall barrier system.		
(a), (b)		23.2250	Design and construction principles.
(c)		23.2605(c)	Installation and operation.
(d), (e), (f)		23.2300(a)(2)	Flight control systems.
(g)		23.2510	Equipment, systems, and installations.
23.693	Joints	23.2265	Special factors of safety.
23.697	Wing flap controls	23.2300(a)	Flight control systems.
23.699	Wing flap position indicator	23.2600(b)	Flightcrew interface.
23.701	Flap interconnection	23.2300(a)(2), 23.2510	Flight control systems & Equipment, systems, and installations.
23.703	Takeoff warning system	23.2605(c)	Installation and operation.
23.721	General	23.2305(a)(2), 23.2430(a)(6)	Landing gear systems, Fuel systems.
23.723	Shock absorption tests	23.2235, 23.2250(c)	Structural strength, Design and construction principles.
23.725	Limit drop tests	23.2235	Structural strength.
23.726	Ground load dynamic tests	23.2235	Structural strength.
23.727	Reserve energy absorption drop tests.	23.2235, 23.2250(c)	Structural strength, Design and construction principles.
23.729	Landing gear extension and retraction system.		
(a)		23.2235	Structural strength.
(b)		23.2305(c)(1)	Landing gear systems.
(c)		23.2305(c)(2)	Landing gear systems.
(d)		23.2505	Function and installation.
(e)		23.2600	Flightcrew interface.
(f)		23.2605(c)	Installation and operation.
(g)		23.2305(a)(2)	
23.731	Wheels	23.2220, 23.2250(c)	Ground and water load conditions, Design and construction principles.
23.733	Tires.		
(a)		23.2250(c)	Design and construction principles.
(b)		23.2610	Instrument markings, control markings, and placards.
(c)		23.2250(c)	Design and construction principles.
23.735	Brakes.		
(a), (b), (c), (e)		23.2305(b)	Landing gear systems.
(b)		23.2250(c)	Design and construction principles.
(d)		23.2510	Equipment, systems, and installations.
23.737	Skis	23.2235	Structural strength.
23.745	Nose/Tail wheel steering	23.2305 & 23.2600(a)	Landing gear systems & Flightcrew interface.
23.751	Main float buoyancy	23.2310	Buoyancy for seaplanes and amphibians.
23.753	Main float design	23.2220	Ground and water load conditions.
23.755	Hulls	23.2310	Buoyancy for seaplanes and amphibians.
23.757	Auxiliary floats	23.2310	Buoyancy for seaplanes and amphibians.
23.771	Pilot compartment.		
(a)		23.2600	Flightcrew interface.
(b)		23.2320(a)(1)	Occupant physical environment.
(c)		23.2320(a)(2)	Occupant physical environment.
23.773	Pilot compartment view	23.2600(a)	Flightcrew interface.
23.775	Windshields and windows.		
(a)		23.2320(a)(3)	Occupant physical environment.
(b), (c), (d)		23.2250	Design and construction principles.
(e)		23.2600(a)	Flightcrew interface.
(f)		23.2540	Flight in icing conditions.
(g)		23.2510	Equipment, systems and installations.
(h)(1)		23.2320(b)	Occupant physical environment.
(h)(2)		23.2600(c)	Flightcrew interface.

Former section	Former title	New section	New title
23.777	Cockpit controls	23.2600, 23.2610	Flightcrew interface, Instrument markings, control markings and placards.
23.779	Motion and effect of cockpit controls.	23.2600	Flightcrew interface.
23.781	Cockpit control knob shape	23.2600	Flightcrew interface.
23.783	Doors.		
(a), (b), (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (d), (f), (g).		23.2315(a)	Means of egress and emergency exits.
(b)		23.2250	Design and construction principles.
(c)(1), (e)		23.2250(e)	Design and construction principles.
(e)(3)		23.2605(c)	Installation and operation.
23.785	Seats, berths, litters, safety belts, and shoulder harnesses.	23.2265 and 23.2270	Special factors of safety, Emergency conditions.
23.787	Baggage and cargo compartments.	23.2270(e) & 23.2315(a)	Emergency conditions & Means of egress and emergency exits.
23.791	Passenger information signs	23.2320(a)(1)	Occupant physical environment.
23.803	Emergency evacuation	23.2315(a)	Means of egress and emergency exits.
23.805	Flightcrew emergency exits	23.2315(a)	Means of egress and emergency exits.
23.807	Emergency exits.		
(a), (b)(1), (b)(2), (b)(3), (b)(4), (d)(1), (d)(3), (d)(4), (c), (e).		23.2315(a)	Means of egress and emergency exits.
(b)(5), (b)(6)		23.2315(b)	Means of egress and emergency exits.
(d)(2)		23.2250(e)	Design and construction principles.
23.811	Emergency exit marking	23.2315(a)	Means of egress and emergency exits.
23.812	Emergency lighting	23.2315(a)	Means of egress and emergency exits.
23.813	Emergency exit access	23.2315(a)	Means of egress and emergency exits.
23.815	Width of aisle	23.2315(a)	Means of egress and emergency exits.
23.831	Ventilation.		
(a), (b), (c)		23.2320(c)	Occupant physical environment.
(c)		23.2600(a)	Flightcrew interface.
(d)		23.2510	Equipment, systems and installations.
23.841	Pressurized cabins.		
(a), (b)(4), (d)(1)		23.2320(c)	Occupant physical environment.
(b)(1), (b)(2), (b)(8), (c), (d)(2), (d)(3).		23.2320(d)	Occupant physical environment.
(b)(3)		23.2320(c), (d)	Occupant physical environment.
(b)(5), (b)(6), (d)(4), (d)(5)		23.2605	Installation and operation.
(b)(7)		23.2610	Instrument markings, control markings, and placards.
(b)(8), (c), (d)(2), (d)(3)		23.2510	Equipment, systems and installations.
(d)(5)		23.2505	Function and installation.
23.843	Pressurization tests.		
(a)		23.2225(c), 23.2236	Component loading conditions, Structural strength.
(b)		23.2320 & 23.2505	Occupant physical environment & Function and installation.
23.851	Fire extinguishers.		
(a) and (b)		23.2325	Fire protection.
(c)		Means Of Compliance.	
23.853	Passenger and crew compartment interiors.		
(a), (d)(3)(i), (d)(3)(iii), (d)(3)(iv), (e), (f).		23.2325	Fire protection.
(b)(c) and (d)(1)(2)		Means Of Compliance.	
23.855	Cargo and baggage compartment fire protection.	23.2325	Fire protection.
23.856	Thermal/acoustic insulation materials.	23.2325	Fire protection.
23.859	Combustion heater fire protection.		
(a)		23.2325(h)	Fire protection.

Former section	Former title	New section	New title
(b) thru (i)		23.2250(c)	Design and construction principles.
23.863	Flammable fluid fire protection	23.2325(g)	Fire protection.
23.865	Fire protection of flight controls, engine mounts, and other flight structure.	23.23330	Fire protection in designated fire zones and adjacent areas.
23.867	Electrical bonding and protection against lightning and static electricity.	23.2335	Lightning protection.
23.871	Leveling means	Means Of Compliance.	
Subpart E—Powerplant			
23.901(a) and (f)	Installation	23.2400(a)	Powerplant Installation.
(b), (c), and (d)(2)		23.2400(c)	Powerplant Installation.
(d)(1) and (e)		23.2400(e)	Powerplant Installation.
23.903(a)(1)	Engines	23.2400(b)	Powerplant Installation.
(a)(2)		23.2400(c)	Powerplant Installation.
(b)		23.2400(c), 23.2410(a), (b) and 23.2425(a).	Powerplant installation, Powerplant installation hazard assessment; Powerplant operational characteristics.
(c)		23.2410(a) and (c)	Powerplant installation hazard assessment.
(d) thru (g)		23.00(d), 23.2410(a) and 23.2425(b).	Powerplant installation, Powerplant installation hazards assessment, Powerplant operational characteristics.
23.904	Automatic power reserve system	23.2405	Automatic power or thrust control systems.
23.905(a)	Propellers	23.2400(b)	Powerplant installation.
(b)		23.2400(e)	Powerplant installation.
(c)		23.2425(b)	Powerplant operational characteristics.
(d), (e) and (f)		23.2400(c)	Powerplant installation.
(g)		23.2400(c), (e)	Powerplant installation.
(h)		23.2400(c)(3)	Powerplant installation.
23.907	Propeller vibration and fatigue	23.2400(c)(4), (e)	Powerplant installation.
23.909(a)	Turbocharger systems	23.2400(e) and 23.2425(a)	Powerplant installation, Powerplant operational characteristics.
(b)		23.2410(a)	Powerplant installation hazards assessment.
(c)		23.2400(c)(3) and 23.2410(a)	Powerplant installation, Powerplant installation hazards assessment.
(d)		23.2400(c)	Powerplant installation.
(e)		23.2400(e), 23.2420 and 23.2620	Powerplant installation, Powerplant operational characteristics, Airplane flight manual.
23.925	Propeller clearance	23.2400(c)(2)	Powerplant installation.
23.929	Engine installation ice protection	23.2415(b)	Powerplant ice protection.
23.933	Reversing systems	23.2420	Reversing systems.
23.934	Turbojet and turbofan engine thrust reverser systems tests.	23.2400(c), (e) and 23.2425(a)	Powerplant installation, Powerplant operational characteristics.
23.937	Turbopropeller-drag limiting systems.	23.10(a)	Powerplant installation hazard assessment.
23.939	Powerplant operating characteristics.	23.2400(c)(4), (e) and 23.2425(a)	Powerplant installation, Powerplant operational characteristics.
23.943	Negative acceleration	23.2400(c)(1), (c)(3) and 23.2425(a).	Powerplant installation, Powerplant operational characteristics.
23.951 (a), (b) and (c)	Fuel System—General	23.2400(c)(1), (3) and 23.2430(a)(3).	Powerplant installation, Fuel systems.
(d)			Intent covered under Part 34.
23.953	Fuel system independence	23.2410(a), (c), 23.2430(a)(1) and 23.2440(d).	Powerplant installation hazards assessment, Fuel systems, Powerplant fire protection.
23.954	Fuel system lightning protection	23.2430(a)(2)	Fuel systems.
23.955	Fuel flow	23.2400(c)(1), (3), 23.2410(a) and 23.2430(a)(3), (4).	Powerplant installation, Powerplant installation hazard assessment, Fuel systems.

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23.957(a)	Flow between interconnected tanks.	23.2430(a)(2), (b)(3)	Fuel systems.
(b)		23.2400(c)(1), (3), 23.2430(b)(3)	Powerplant installation, Fuel systems—.
23.959	Unusable fuel supply	23.2430(a)(4) and 23.2410(a)	Fuel systems and Powerplant installation hazard assessment.
23.961	Fuel system hot weather operation.	23.2430(a)(3)	Fuel systems.
23.963(a)	Fuel tank: general	23.2430(a)(1)	Fuel systems.
(b) and (c)		23.2400(c)	Powerplant installation.
(d)		23.2430(b)(4)	Fuel systems.
(e)		23.2430(a)(4)	Fuel systems.
23.965	Fuel tank tests	23.2430(b)(1)	Fuel systems.
23.967	Fuel tank installation.		
(a)		23.2400(c) and 23.2430(a), (b)	Powerplant installation, Fuel systems.
(b)		23.2400(d)	Fuel systems.
(c) and (d)		23.2430(b)(2)	Fuel systems.
(e)		23.2430(a)(6)	Fuel systems.
23.969	Fuel tank expansion space	23.2430(b)(3)	Fuel systems.
23.971	Fuel tank sump	23.2430(a)(7)	Fuel systems.
23.973	Fuel tank filler connection	23.2430(c)	Fuel systems.
23.975	Fuel tank vents and carburetor vapor vents.	23.2400(c)(1), (3), 23.2415 and 23.2430(a)(3), (b)(3).	Powerplant installation, Powerplant ice protection, Fuel systems.
23.977	Fuel tank outlet	23.2430(a)(7)	Fuel systems.
23.979	Pressure fueling systems	23.2400(c) and 23.2430(c)	Powerplant installation, Fuel systems.
23.991(a), (b) and (d)	Fuel pumps	23.2410(a) and 23.2430(a)(1), (3)	Powerplant installation hazard assessment, Fuel systems.
(a), (b), (c)		23.2430(a)(1), (3) and 23.2410(a)	Fuel systems.
(c)		23.2605	Installation and operation.
23.993	Fuel system lines and fittings	23.2430(a)(6)	Fuel systems.
23.994	Fuel system components	23.2430(a)(6)	Fuel systems.
23.995	Fuel valves and controls	23.2440(d)	Powerplant fire protection.
23.997(a)	Fuel strainer or filter	23.2400(c)(3)	Fuel systems.
(b)		23.2430(a)(7)	Fuel systems.
(c)		23.2400(c)(1)	Powerplant installation.
(d)		23.2400(e) and 23.2430(a)(7)	Powerplant installation, Fuel systems.
(e)		23.2430(a)(3)	Fuel systems.
23.999	Fuel system drains	23.2400(c)(3), 23.2430(a)(5)	Powerplant installation, Fuel systems.
23.1001(a) thru (f)	Fuel jettisoning system	23.2400(c)(1), (3) and 23.2430(b)(5).	Powerplant installation, Fuel systems.
(g)		23.2610	Instrument markings, controls markings, and placards.
(h)		23.2410(a)	Powerplant installation hazard assessment.
23.1011	General	23.2400(c), (e) and 23.2410(a)	Powerplant installation and Powerplant installation hazard assessment.
23.1013	Oil tanks	23.2400(c)	Powerplant installation.
23.1015	Oil tank tests	23.2400(c)	Powerplant installation.
23.1017	Oil lines and fittings	23.2400(c)	Powerplant installation.
23.1019	Oil strainer or filter	23.2400(c), (e) and 23.2600(b)	Powerplant installation.
23.1021	Oil system drains	23.2400(c)	Powerplant installation.
23.1023	Oil radiators	23.2400(c)	Powerplant installation.
23.1027	Propeller feathering system	23.2400(c) and 23.2410(a)	Powerplant installation and Hazard assessment.
23.1041	Cooling—General	23.2400(c) and (e)	Powerplant installation.
23.1043	Cooling tests	23.2400(c), (e)	Powerplant installation.
23.1045	Cooling test procedures for turbine engine powered airplanes.	23.2400(c), (e)	Powerplant installation.
23.1047	Cooling test procedures for reciprocating engine powered airplanes.	23.2400(c), (e)	Powerplant installation.
23.1061	Installation	23.2400(c)	Powerplant installation.
23.1063	Coolant tank tests	23.2400(c)	Powerplant installation.
23.1091	Air induction system	23.2435(a)	Powerplant induction and exhaust systems.
23.1093	Induction system icing protection	23.2415(a)	Powerplant ice protection.
23.1095	Carburetor deicing fluid flow rate	23.2415(a)	Powerplant ice protection.

Former section	Former title	New section	New title
23.1097	Carburetor deicing fluid system capacity.	23.2400(c) and 23.2415(a)	Powerplant installation and Powerplant ice protection.
23.1099	Carburetor deicing fluid system detail design.	23.2400(c) and 23.2415(a)	Powerplant installation and Powerplant ice protection.
23.1101(a)	Induction air preheater design	23.2400(c), 23.2435(b)	Powerplant installation and Powerplant induction and exhaust systems.
(b) and (c)		23.2400(c)	Powerplant installation.
23.1103(a) thru (d)	Induction system ducts	23.2400(c) and 23.2435(a)	Powerplant installation and Powerplant induction and exhaust systems.
(e) and (f)		23.2400(c) and 23.2440(c)	Powerplant installation and Powerplant fire protection.
23.1105	Induction system screens	23.2400(c) and 23.2415(a)	Powerplant installation and Powerplant ice protection.
23.1107	Induction system filters	23.2400(c)	Powerplant installation.
23.1109	Turbocharger bleed air system	23.2400(c)(1), (3) and 23.2410(a)	Powerplant installation and Powerplant installation hazard assessment.
23.1111(a) and (c)	Turbine engine bleed air system	23.2400(c)(3)	Powerplant installation.
(b)		23.2400(c) and 23.2435(a)	Powerplant installation and Powerplant induction and exhaust systems.
23.1121	Exhaust System—General	23.2400(c), (d) and 23.2435(b)	Powerplant installation and Powerplant induction and exhaust systems.
23.1123	Exhaust system	23.2435(b)	Powerplant induction and exhaust systems.
23.1125	Exhaust heat exchangers	23.2400(c) and 23.2435(b)	Powerplant installation and Powerplant induction and exhaust systems.
23.1141(a)	Powerplant controls: General	23.2600	Flightcrew interface.
(b), (c) and (d)		23.2400(c) and 23.2500	Powerplant installation and Airplane level systems requirements.
(e)		23.2410(a)	Powerplant installation hazard assessment.
(f)		23.2440(c)(2)	Powerplant fire protection.
(g)		23.2600 and 23.2615	Flightcrew interface and Flight, Navigation and Powerplant Instruments.
23.1142	Auxiliary power unit controls	23.2425(b), 23.2600, 23.2605 and 23.2615.	Powerplant operational characteristics, Flightcrew interface, Installation and operation, and Flight, Navigation and Powerplant Instruments.
23.1143(a) thru (f)	Engine controls	23.2600	Flightcrew interface.
(g)		23.2410(a)	Powerplant installation hazard assessment.
23.1145	Ignition switches	23.2425(a) and 23.2600	Powerplant operational characteristics and Flightcrew interface.
23.1147	Mixture controls	23.2410(a) and 23.2600	Powerplant installation hazard assessment and Flightcrew interface.
23.1149	Propeller speed and pitch controls	23.2600	Flightcrew interface.
23.1153	Propeller feathering controls	23.2600	Flightcrew interface.
23.1155	Turbine engine reverse thrust and propeller pitch settings below the flight regime.	23.2600	Flightcrew interface.
23.1157	Carburetor air temperature controls.	23.2600	Flightcrew interface.
23.1163	Powerplant accessories	23.2400(c), (e) and 23.2410(a)	Powerplant installation and Powerplant installation hazard assessment.
23.1165	Engine ignition systems	23.2400(c), 23.2425(b) and 23.2605.	Powerplant installation, Powerplant operational characteristics, and Installation and operation.
23.1181	Designated fire zones: Regions included.	23.2440(a)	Powerplant fire protection.
23.1182	Nacelle areas behind firewalls	23.2440(c)	Powerplant fire protection.
23.1183	Lines, fittings, and components	23.2440(c)	Powerplant fire protection.
23.1189	Shutoff means	23.2440(d)	Powerplant fire protection.
23.1191	Firewalls	23.2440(a), (b) and (c)	Powerplant fire protection.

Former section	Former title	New section	New title
23.1192	Engine accessory compartment diaphragm.	23.2440(a) and (b)	Powerplant fire protection.
23.1193	Cowling and nacelle	23.2400(c), 23.2440(a) and (b)	Powerplant installation, Powerplant fire protection.
23.1195	Fire extinguishing systems	23.2440(f)	Powerplant fire protection.
23.1197	Fire extinguishing agents	23.2400(d) and 23.2440(f)	Powerplant fire protection.
23.1199	Extinguishing agent containers	23.2400(c)	Powerplant installation.
23.1201	Fire extinguishing system materials.	23.2400(c), 23.2440(c) and 23.2500.	Powerplant installation, Powerplant fire protection, and Airplane systems level requirements.
23.1203(a)	Fire detector system	23.2440(e)	Powerplant fire protection.
(a)		23.2440(e)	Powerplant fire protection.
(b) and (c)		23.2400(c)	Powerplant installation.
(d)		23.2600	Flight crew interface.
(e)		23.2440(c) and 23.2500	Powerplant fire protection and Airplane systems level requirements.
Subpart F—Equipment			
23.1301	Function and installation.		
(a)		23.2250(a), 23.2500(a), 23.2505	Design and construction principles, Airplane level systems requirements, Function and installation.
(b)		23.2605	Installation and operation.
(c)		23.2505	Function and installation.
23.1303	Flight and navigation instruments	23.2500, 23.2615, 23.2 and 23.2525.	Airplane level systems requirements; Flight, navigation, and powerplant instruments; Function and installation; System power generation, storage, and distribution.
23.1305	Powerplant instruments	23.2500, 23.2615 and 23.2605	Airplane level systems requirements; Flight, navigation, and powerplant instruments; Installation and operation.
23.1306	Electrical and electronic system lightning protection.	23.2515	Electrical and electronic system lightning protection.
23.1307	Miscellaneous equipment	23.2500 and 23.2610	Airplane level systems requirements; Flight, navigation, and powerplant instruments.
23.1308	High-Intensity Radiated Fields (HIRF) protection.	23.2520	High-intensity Radiated Fields (HIRF) protection.
23.1309	Equipment, systems, and installations.	23.2510	Equipment, systems, and installations.
(a)(1)		23.2500(a)	Airplane level systems requirements.
(a)(2)		23.2500(b)	Airplane level systems requirements.
(b)			—Deleted—.
(c)		23.2510	Equipment, systems, and installations.
(d)		23.2605	Installation and operation.
23.1310	Power source capacity and distribution.	23.2525	System power generation, storage, and distribution.
23.1311	Electronic display instrument systems.	23.2500 and 23.2615	Airplane level systems requirements; Flight, navigation, and powerplant instruments.
23.1321	Arrangement and visibility	23.2500 and 23.2610	Airplane level systems requirements; Flight, navigation, and powerplant instruments.
23.1322	Warning, caution, and advisory lights.	23.2605	Flight, navigation, and powerplant instruments.
23.1323	Airspeed indicating system	23.2250, 23.2500, 23.2505, 23.2615, and 23.2510.	Design and construction principles; Airplane level systems requirements; Function and installation; Flight, navigation, and powerplant instruments; and Equipment, systems, and installations.
(d)		23.2250, 23.2540(a)	Design and construction principles, Flight in icing conditions.

Former section	Former title	New section	New title
23.1325	Static pressure system	23.2500, 23.2615, and 23.2510	Airplane level systems requirements; Flight, navigation, and powerplant instruments; and Equipment, systems, and installations.
(a), (b), (c), (d), (e)		23.2250	Design and construction principles.
(b)(3) and (g)		23.2540(a)	Flight in icing conditions.
23.1326	Pitot heat indication systems	23.2605	Installation and operation.
23.1327	Magnetic direction indicator	23.2500, 23.2505 and 23.2615	Airplane level systems requirements; Function and installation; Flight, navigation, and powerplant instruments.
23.1329	Automatic pilot system	23.2500, 23.2505, 232510, and 23.2605.	Airplane level systems requirements; Function and installation; Equipment, systems, and installations; Installation and operation.
(a)		23.2500 and 23.2510	Airplane level systems requirements; Equipment, systems, and installations.
(b)		23.2300 and 23.2600	Flight control systems; Flightcrew interface.
(c)		23.2605	Installation and operation.
(d)		23.2300 and 23.2600	Flight control systems; Flightcrew interface.
(e), (f), (g)		23.2500 and 23.2510	Airplane level systems requirements; Equipment, systems, and installations.
(h)		23.2605	Installation and operation.
23.1331	Instruments using a power source.		
(a)		23.2605	Installation and operation.
(b) and (c)		23.2510 and 23.2525	Equipment, systems, and installations; System power generation, storage, and distribution.
23.1335	Flight director systems	23.2500, 23.2505, 23.2510, 23.2600, and 23.2605.	Airplane level systems; Function and installation; Equipment systems and installations; Flightcrew interface; and Installation and operation.
23.1337	Powerplant instruments installation.		
(a)		23.2325	Fire protection.
		23.2430	Fuel systems.
(b)		23.2605	Installation and operation.
		23.2610	Flight, navigation, and powerplant instruments.
		23.2510	Equipment, systems, and installations.
(c)		23.2510	Equipment, systems, and installations.
(d)		23.2605	Installation and operation.
		23.2615	Flight, navigation, and powerplant instruments.
23.1351	Electrical Systems—General.		
(a)		23.2525	System power generation, storage, and distribution.
(b)		23.2500, 23.2525	Airplane level systems requirements: System power generation, storage, and distribution.
(c)		23.2525, 23.2605	System power generation, storage, and distribution; Installation and operation.
(d)		23.2605	Installation and operation.
(e)		23.2500, 23.2325	Airplane level systems requirements: Fire protection.
(f), (g)		23.2500	Airplane level systems requirements.
23.1353	Storage battery design and installation.	23.2525	System power generation, storage, and distribution.

Former section	Former title	New section	New title
23.1357	Circuit protective devices	23.2500, 23.2505, 23.2510, and 23.2525.	Airplane level systems requirements; Function and installation; Equipment, systems, and installations; and System power generation, storage, and distribution.
23.1359	Electrical system fire protection.		
(a)		23.2330, 23.2325	Fire protection in designated fire zones; Fire protection.
(b)		23.2330	Fire protection in designated fire zones.
(c)		23.2325	Fire protection.
23.1361	Master switch arrangement	23.2500 and 23.2505	Airplane level systems requirements; Function and installation.
23.1365	Electrical cables and equipment	23.2505	Function and installation.
(b)		23.2330	Fire protection in designated fire zones.
23.1367	Switches.		
(a) and (b)		23.2505	Function and installation.
(c) and (d)		23.2600	Flightcrew interface.
23.1381	Instrument lights.		
(a) and (b)		23.2600	Flightcrew interface.
(c)		23.2500	Airplane level systems requirements.
23.1383(a), (b), (c)	Taxi and landing lights	23.2530	External and cockpit lighting.
(d)	Taxi and landing lights	23.2325	Fire protection.
23.1385(a), (b), (c)	Position light system installation	23.2530	External and cockpit lighting.
(d)	Position light system installation	23.2325	Fire protection.
23.1387	Position light system dihedral angles.	23.2530	External and cockpit lighting.
23.1389	Position light distribution and intensities.	23.2530	External and cockpit lighting.
23.1391	Minimum intensities in the horizontal plane of position lights.	23.2530	External and cockpit lighting.
23.1393	Minimum intensities in any vertical plane of position lights.	23.2530	External and cockpit lighting.
23.1395	Maximum intensities in overlapping beams of position lights.	23.2530	External and cockpit lighting.
23.1397	Color specifications	23.2530	External and cockpit lighting.
23.1399	Riding light	23.2530	External and cockpit lighting.
23.1401	Anticollision light system.		
(a), (a)(1)		23.2530	External and cockpit lighting.
(a)(2)		Means Of Compliance.	
(b) thru (f)		23.2530	External and cockpit lighting.
23.1411	Safety Equipment-General.		
(a), (b)(1)		23.2535	Safety equipment.
(b)(2)		23.2270	Emergency conditions.
23.1415	Ditching equipment	23.2535	Safety equipment.
(a), (c), (d)		23.2535	Safety equipment.
(b)		Means Of Compliance.	
23.1416	Pneumatic de-icer boot system	23.2500	Airplane level systems requirements.
		23.2505	Function and installation.
(c)		23.2605(b)	Installation and operation.
23.1419	Ice protection	23.2165(a)(1)	Performance and flight characteristics requirements for flight in icing conditions.
		23.2540(a)	Flight in icing conditions.
(d)		23.2600(a)	Flightcrew interface.
23.1431	Electronic equipment	23.2510	Equipment, systems and installations.
23.1435	Hydraulic systems.		
(a)(1)		23.2235	Structural strength.
(a)(2)		23.2600	Flightcrew interface.
(a)(3)(c)		23.2250	Design and construction principles.
(a)(4), (b)		23.2545	Pressurized system elements.
(c)		23.2440(c)	Powerplant fire protection.
23.1437	Accessories for multiengine airplanes.	23.2410 & 23.2515	Powerplant installation hazard assessment and Equipment, systems and installations.
23.1438	Pressurization and pneumatic systems.	23.2545	Pressurized system elements.

Former section	Former title	New section	New title
23.1441	Oxygen equipment and supply	23.2320(e)	Occupant physical environment.
(c)		23.2605(b)	Installation and operation.
23.1443	Minimum mass flow of supplemental oxygen.	23.2320(e)	Occupant physical environment.
23.1445	Oxygen distribution system	23.2320(e)	Occupant physical environment.
(a), (b)		23.2250(c)	Design and construction principles.
23.1447	Equipment standards for oxygen dispensing units.	23.2320(e)	Occupant physical environment.
23.1449	Means for determining use of oxygen.	23.2320(e)	Occupant physical environment.
23.1450	Chemical oxygen generators.		
(a)(b)		23.2320(e)	Occupant physical environment.
(c)		23.2610	Instrument markings, control markings, and placards.
23.1451	Fire protection for oxygen equipment.	23.2320(e)	Occupant physical environment.
23.1453	Protection of oxygen equipment from rupture.	23.2320(e) & 23.2545	Occupant physical environment & Pressurized system elements.
23.1457	Cockpit voice recorders	23.1457	No Change.
23.1459	Flight recorders	23.1459	No Change.
23.1461	Equipment containing high-energy rotors.	23.2550	Equipment containing high-energy rotors.
Subpart G—Operating Limitations and Information			
23.1501	General	23.2610	Instrument, control markings, and placards.
23.1505	Airspeed limitations	23.2610	Instrument markings, control markings, and placards.
23.1507	Operating maneuvering speed	23.2610	Instrument markings, control markings, and placards.
23.1511	Flap extended speed	23.2610	Instrument markings, control markings, and placards.
23.1513	Minimum control speed	23.2610	Instrument markings, control markings, and placards.
23.1519	Weight and center of gravity	23.2610	Instrument markings, control markings, and placards.
23.1521	Powerplant limitations	23.2610	Instrument markings, control markings, and placards.
23.1522	Auxiliary power unit limitations	23.2610	Instrument markings, control markings, and placards.
23.1523	Minimum flight crew	23.2610	Instrument markings, control markings, and placards.
23.1524	Maximum passenger seating configuration.	23.2610	Instrument markings, control markings, and placards.
23.1525	Kinds of operation	23.2610	Airplane level system requirements.
		23.2610	Instrument markings, control markings, and placards.
23.1527	Maximum operating altitude	23.2610	Instrument markings, control markings, and placards.
23.1529	Instructions for continued airworthiness.	23.1529	Instructions for continued airworthiness.
23.1541	Marking and Placards—General	23.2610	Instrument markings, control markings, and placards.
23.1543	Instrument marking: General	23.2610	Instrument markings, control markings, and placards.
23.1545	Airspeed indicator	23.2610	Instrument markings, control markings, and placards.
23.1547	Magnetic direction indicator	23.2610	Instrument markings, control markings, and placards.
23.1549	Powerplant and auxiliary power unit instruments.	23.2610	Instrument markings, control markings, and placards.
23.1551	Oil quantity indicator	23.2610	Instrument markings, control markings, and placards.
23.1553	Fuel quantity indicator	23.2610	Instrument markings, control markings, and placards.
23.1555	Control markings	23.2610	Instrument markings, control markings, and placards.
23.1557	Miscellaneous marking and placards.	23.2610	Instrument markings, control markings, and placards.
23.1559	Operating limitations placard	23.2610	Instrument markings, control markings, and placards.

Former section	Former title	New section	New title
23.1561	Safety equipment	23.2610	Instrument markings, control markings, and placards.
23.1563	Airspeed placards	23.2610	Instrument markings, control markings, and placards.
23.1567	Flight maneuver placard	23.2610	Instrument markings, control markings, and placards.
23.1581	Airplane Flight Manual and Approved Manual Material—General.	23.2620	Airplane flight manual.
23.1583	Operating limitations	23.2620	Airplane flight manual.
23.1585	Operating procedures	23.2620	Airplane flight manual.
23.1587	Performance information	23.2620	Airplane flight manual.
23.1589	Loading information	23.2620	Airplane flight manual.
Appendix A	Simplified Design Load Criteria	Means Of Compliance.	
Appendix B	[Reserved].		
Appendix C	Basic Landing Conditions	Means Of Compliance.	
Appendix D	Wheel Spin-Up and Spring-Back Loads.	Means Of Compliance.	
Appendix E	[Reserved].		
Appendix F	Test Procedure	Means Of Compliance.	
Appendix G	Instructions for Continued Airworthiness.	Appendix A	Instructions for Continued Airworthiness.
Appendix H	Installation of An Automatic Power Reserve (APR) System.	Means Of Compliance.	
Appendix I	Seaplane Loads	Means Of Compliance.	
Appendix J	HIRF Environments and Equipment HIRF Test Levels.	Means Of Compliance.	

Appendix 2 to the Preamble—Abbreviations and Acronyms Frequently Used in This Document

AC Advisory Circular
AD Airworthiness Directive
AFM Airplane Flight Manual
A–NPA Advance Notice of Proposed Amendment
ARC Aviation Rulemaking Committee
ASTM ASTM International
FCAA Foreign Civil Aviation Authority
CAR 3 Civil Aviation Regulations, Part 3
Cf Confer (to identify a source or a usage citation for a word or phrase)
CPS Certification Process Study
CS Certification Specification
CS–VLA Certification Specification-Very Light Aeroplanes
DER Designated Engineering Representative
EASA European Aviation Safety Agency
ELOS Equivalent Level of Safety
FR Federal Register
GA General Aviation
HIRF High-Intensity Radiated Field
IFR Instrument Flight Rules
IMC Instrument Meteorological Conditions
KCAS Knots Calibrated Airspeeds
LOC Loss of Control
NATCA National Air Traffic Controllers Association
NPA Notice of Proposed Amendment
NPRM Notice of Proposed Rulemaking
NTSB National Transportation Safety Board
OMB Office of Management and Budget
SAE SAE International
SARA Small Airplane Revitalization Act of 2013
SLD Supercooled Large Droplet
STC Supplemental Type Certificate
TC Type Certificate
TCDS Type Certificate Data Sheet
V_A Design Maneuvering Speed
V_C Design Cruising Speed
V_D Design Dive Speed
V_{MC} Minimum Control Speed
V_{MO}/M_{MO} Maximum Operating Limit Speed
V_{NO} Maximum Structural Cruising Speed
VFR Visual Flight Rules
V_{SO} Stalling speed or the minimum steady flight speed in the landing configuration

List of Subjects

14 CFR Part 21

Aircraft, Aviation safety, Recording and recordkeeping requirements.

14 CFR Part 23

Aircraft, Aviation Safety, Signs and symbols.

14 CFR Part 35

Aircraft, Aviation safety.

14 CFR Part 43

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

14 CFR Part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Reporting and recordkeeping requirements.

14 CFR Part 121

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

14 CFR Part 135

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

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

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND ARTICLES

■ 1. The authority citation for part 21 is revised to read as follows:

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(f), 106(g), 40105, 40113, 44701–44702, 44704, 44707, 44709, 44711, 44713, 44715, 45303.

■ 2. In § 21.9, revise paragraphs (a)(5), (a)(6), and add paragraph (a)(7) to read as follows:

§ 21.9 Replacement and modification articles.

(a) * * *

(5) Produced by an owner or operator for maintaining or altering that owner or operator's product;

(6) Fabricated by an appropriately rated certificate holder with a quality system, and consumed in the repair or alteration of a product or article in accordance with part 43 of this chapter; or

(7) Produced in any other manner approved by the FAA.

* * * * *

■ 3. In § 21.17, revise paragraph (a) introductory text to read as follows:

§ 21.17 Designation of applicable regulations.

(a) Except as provided in §§ 25.2, 27.2, 29.2, and in parts 26, 34, and 36 of this subchapter, an applicant for a type certificate must show that the aircraft, aircraft engine, or propeller concerned meets—

* * * * *

■ 4. In § 21.24, revise paragraph (a)(1)(i) to read as follows:

§ 21.24 Issuance of type certificate: primary category aircraft.

(a) * * *

(1) * * *

(i) Is unpowered; is an airplane powered by a single, naturally aspirated engine with a 61-knot or less V_{so} stall speed as determined under part 23 of this chapter; or is a rotorcraft with a 6-pound per square foot main rotor disc loading limitation, under sea level standard day conditions;

* * * * *

■ 5. In § 21.35, revise paragraph (b)(2) to read as follows:

§ 21.35 Flight tests.

* * * * *

(b) * * *

(2) For aircraft to be certificated under this subchapter, except gliders and low-speed, certification level 1 or 2 airplanes, as defined in part 23 of this chapter, to determine whether there is reasonable assurance that the aircraft, its components, and its equipment are reliable and function properly.

* * * * *

■ 6. In § 21.50, revise paragraph (b) to read as follows:

§ 21.50 Instructions for continued airworthiness and manufacturer's maintenance manuals having airworthiness limitations sections.

* * * * *

(b) The holder of a design approval, including either a type certificate or supplemental type certificate for an aircraft, aircraft engine, or propeller for which application was made after January 28, 1981, must furnish at least one set of complete Instructions for Continued Airworthiness to the owner of each type aircraft, aircraft engine, or propeller upon its delivery, or upon issuance of the first standard airworthiness certificate for the affected aircraft, whichever occurs later. The Instructions for Continued Airworthiness must be prepared in accordance with §§ 23.1529, 25.1529, 25.1729, 27.1529, 29.1529, 31.82, 33.4, 35.4, or part 26 of this subchapter, or as specified in the applicable airworthiness criteria for special classes of aircraft defined in § 21.17(b), as applicable. If the holder of a design approval chooses to designate parts as commercial, it must include in the Instructions for Continued Airworthiness a list of commercial parts submitted in accordance with the provisions of paragraph (c) of this section. Thereafter, the holder of a design approval must make those instructions available to any other person required by this chapter to comply with any of the terms of those instructions. In addition, changes to the Instructions for Continued Airworthiness shall be made available to any person required by this chapter to comply with any of those instructions.

* * * * *

■ 7. In § 21.101 revise paragraphs (b) introductory text, and (c) to read as follows:

§ 21.101 Designation of applicable regulations.

* * * * *

(b) Except as provided in paragraph (g) of this section, if paragraphs (b)(1), (2), or (3) of this section apply, an applicant may show that the change and areas affected by the change comply with an earlier amendment of a regulation required by paragraph (a) of this section, and of any other regulation the FAA finds is directly related. However, the earlier amended regulation may not precede either the corresponding regulation included by reference in the type certificate, or any regulation in §§ 25.2, 27.2, or 29.2 of this chapter that is related to the change. The applicant may show compliance with an earlier amendment of a regulation for any of the following:

* * * * *

(c) An applicant for a change to an aircraft (other than a rotorcraft) of 6,000 pounds or less maximum weight, to a non-turbine rotorcraft of 3,000 pounds or less maximum weight, to a level 1 low-speed airplane, or to a level 2 low-speed airplane may show that the change and areas affected by the change comply with the regulations included in the type certificate. However, if the FAA finds that the change is significant in an area, the FAA may designate compliance with an amendment to the regulation incorporated by reference in the type certificate that applies to the change and any regulation that the FAA finds is directly related, unless the FAA also finds that compliance with that amendment or regulation would not contribute materially to the level of safety of the product or would be impractical.

* * * * *

■ 8. Revise part 23 to read as follows:

PART 23—AIRWORTHINESS STANDARDS: NORMAL CATEGORY AIRPLANES

Sec.

Subpart A—General

Subpart B—Flight

Performance

Flight Characteristics

Subpart C—Structures

Structural Loads

Structural Performance

Design

Structural Occupant Protection

Subpart D—Design and Construction

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44702, 44704, Pub. L. 113–53, 127 Stat. 584 (49 U.S.C. 44704) note.

§ 23.1457 Cockpit voice recorders.

(a) Each cockpit voice recorder required by the operating rules of this chapter must be approved and must be installed so that it will record the following:

(1) Voice communications transmitted from or received in the airplane by radio.

(2) Voice communications of flightcrew members on the flight deck.

(3) Voice communications of flightcrew members on the flight deck, using the airplane's interphone system.

(4) Voice or audio signals identifying navigation or approach aids introduced into a headset or speaker.

(5) Voice communications of flightcrew members using the passenger loudspeaker system, if there is such a system and if the fourth channel is available in accordance with the requirements of paragraph (c)(4)(ii) of this section.

(6) If datalink communication equipment is installed, all datalink communications, using an approved data message set. Datalink messages must be recorded as the output signal from the communications unit that translates the signal into usable data.

(b) The recording requirements of paragraph (a)(2) of this section must be met by installing a cockpit-mounted area microphone, located in the best position for recording voice communications originating at the first and second pilot stations and voice communications of other crewmembers on the flight deck when directed to those stations. The microphone must be so located and, if necessary, the preamplifiers and filters of the recorder must be so adjusted or supplemented, so that the intelligibility of the recorded communications is as high as practicable when recorded under flight cockpit noise conditions and played back. Repeated aural or visual playback of the record may be used in evaluating intelligibility.

(c) Each cockpit voice recorder must be installed so that the part of the communication or audio signals specified in paragraph (a) of this section obtained from each of the following sources is recorded on a separate channel:

(1) For the first channel, from each boom, mask, or handheld microphone, headset, or speaker used at the first pilot station.

(2) For the second channel from each boom, mask, or handheld microphone, headset, or speaker used at the second pilot station.

(3) For the third channel—from the cockpit-mounted area microphone.

(4) For the fourth channel from:

(i) Each boom, mask, or handheld microphone, headset, or speaker used at the station for the third and fourth crewmembers.

(ii) If the stations specified in paragraph (c)(4)(i) of this section are not required or if the signal at such a station is picked up by another channel, each microphone on the flight deck that is used with the passenger loudspeaker system, if its signals are not picked up by another channel.

(5) And that as far as is practicable all sounds received by the microphone listed in paragraphs (c)(1), (2), and (4) of this section must be recorded without interruption irrespective of the position of the interphone-transmitter key switch. The design shall ensure that sidetone for the flightcrew is produced only when the interphone, public address system, or radio transmitters are in use.

(d) Each cockpit voice recorder must be installed so that:

(1)(i) It receives its electrical power from the bus that provides the maximum reliability for operation of the cockpit voice recorder without jeopardizing service to essential or emergency loads.

(ii) It remains powered for as long as possible without jeopardizing emergency operation of the airplane.

(2) There is an automatic means to simultaneously stop the recorder and prevent each erasure feature from functioning, within 10 minutes after crash impact.

(3) There is an aural or visual means for preflight checking of the recorder for proper operation.

(4) Any single electrical failure external to the recorder does not disable both the cockpit voice recorder and the flight data recorder.

(5) It has an independent power source—

(i) That provides 10 ±1 minutes of electrical power to operate both the cockpit voice recorder and cockpit-mounted area microphone;

(ii) That is located as close as practicable to the cockpit voice recorder; and

(iii) To which the cockpit voice recorder and cockpit-mounted area microphone are switched automatically in the event that all other power to the cockpit voice recorder is interrupted either by normal shutdown or by any other loss of power to the electrical power bus.

(6) It is in a separate container from the flight data recorder when both are required. If used to comply with only the cockpit voice recorder requirements, a combination unit may be installed.

(e) The recorder container must be located and mounted to minimize the probability of rupture of the container as a result of crash impact and consequent heat damage to the recorder from fire.

(1) Except as provided in paragraph (e)(2) of this section, the recorder container must be located as far aft as practicable, but need not be outside of the pressurized compartment, and may not be located where aft-mounted engines may crush the container during impact.

(2) If two separate combination digital flight data recorder and cockpit voice

recorder units are installed instead of one cockpit voice recorder and one digital flight data recorder, the combination unit that is installed to comply with the cockpit voice recorder requirements may be located near the cockpit.

(f) If the cockpit voice recorder has a bulk erasure device, the installation must be designed to minimize the probability of inadvertent operation and actuation of the device during crash impact.

(g) Each recorder container must—

(1) Be either bright orange or bright yellow;

(2) Have reflective tape affixed to its external surface to facilitate its location under water; and

(3) Have an underwater locating device, when required by the operating rules of this chapter, on or adjacent to the container, which is secured in such manner that they are not likely to be separated during crash impact.

§ 23.1459 Flight data recorders.

(a) Each flight recorder required by the operating rules of this chapter must be installed so that—

(1) It is supplied with airspeed, altitude, and directional data obtained from sources that meet the aircraft level system requirements and the functionality specified in § 23.2500;

(2) The vertical acceleration sensor is rigidly attached, and located longitudinally either within the approved center of gravity limits of the airplane, or at a distance forward or aft of these limits that does not exceed 25 percent of the airplane's mean aerodynamic chord;

(3)(i) It receives its electrical power from the bus that provides the maximum reliability for operation of the flight data recorder without jeopardizing service to essential or emergency loads;

(ii) It remains powered for as long as possible without jeopardizing emergency operation of the airplane;

(4) There is an aural or visual means for preflight checking of the recorder for proper recording of data in the storage medium;

(5) Except for recorders powered solely by the engine-driven electrical generator system, there is an automatic means to simultaneously stop a recorder that has a data erasure feature and prevent each erasure feature from functioning, within 10 minutes after crash impact;

(6) Any single electrical failure external to the recorder does not disable both the cockpit voice recorder and the flight data recorder; and

(7) It is in a separate container from the cockpit voice recorder when both are required. If used to comply with only the flight data recorder requirements, a combination unit may be installed. If a combination unit is installed as a cockpit voice recorder to comply with § 23.1457(e)(2), a combination unit must be used to comply with this flight data recorder requirement.

(b) Each non-ejectable record container must be located and mounted so as to minimize the probability of container rupture resulting from crash impact and subsequent damage to the record from fire. In meeting this requirement, the record container must be located as far aft as practicable, but need not be aft of the pressurized compartment, and may not be where aft-mounted engines may crush the container upon impact.

(c) A correlation must be established between the flight recorder readings of airspeed, altitude, and heading and the corresponding readings (taking into account correction factors) of the first pilot's instruments. The correlation must cover the airspeed range over which the airplane is to be operated, the range of altitude to which the airplane is limited, and 360 degrees of heading. Correlation may be established on the ground as appropriate.

(d) Each recorder container must—

(1) Be either bright orange or bright yellow;

(2) Have reflective tape affixed to its external surface to facilitate its location under water; and

(3) Have an underwater locating device, when required by the operating rules of this chapter, on or adjacent to the container, which is secured in such a manner that they are not likely to be separated during crash impact.

(e) Any novel or unique design or operational characteristics of the aircraft shall be evaluated to determine if any dedicated parameters must be recorded on flight recorders in addition to or in place of existing requirements.

§ 23.1529 Instructions for continued airworthiness.

The applicant must prepare Instructions for Continued Airworthiness, in accordance with appendix A of this part, that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first airplane or issuance of a standard certificate of airworthiness, whichever occurs later.

Subpart A—General

§ 23.2000 Applicability and definitions.

(a) This part prescribes airworthiness standards for the issuance of type certificates, and changes to those certificates, for airplanes in the normal category.

(b) For the purposes of this part, the following definition applies:

Continued safe flight and landing means an airplane is capable of continued controlled flight and landing, possibly using emergency procedures, without requiring exceptional pilot skill or strength. Upon landing, some airplane damage may occur as a result of a failure condition.

§ 23.2005 Certification of normal category airplanes.

(a) Certification in the normal category applies to airplanes with a passenger-seating configuration of 19 or less and a maximum certificated takeoff weight of 19,000 pounds or less.

(b) Airplane certification levels are:

(1) Level 1—for airplanes with a maximum seating configuration of 0 to 1 passengers.

(2) Level 2—for airplanes with a maximum seating configuration of 2 to 6 passengers.

(3) Level 3—for airplanes with a maximum seating configuration of 7 to 9 passengers.

(4) Level 4—for airplanes with a maximum seating configuration of 10 to 19 passengers.

(c) Airplane performance levels are:

(1) Low speed—for airplanes with a V_{NO} and $V_{MO} \leq 250$ Knots Calibrated Airspeed (KCAS) and a $M_{MO} \leq 0.6$.

(2) High speed—for airplanes with a V_{NO} or $V_{MO} > 250$ KCAS or a $M_{MO} > 0.6$.

(d) Airplanes not certified for aerobatics may be used to perform any maneuver incident to normal flying, including—

(1) Stalls (except whip stalls); and

(2) Lazy eights, chandelles, and steep turns, in which the angle of bank is not more than 60 degrees.

(e) Airplanes certified for aerobatics may be used to perform maneuvers without limitations, other than those limitations established under subpart G of this part.

§ 23.2010 Accepted means of compliance.

(a) An applicant must comply with this part using a means of compliance, which may include consensus standards, accepted by the Administrator.

(b) An applicant requesting acceptance of a means of compliance must provide the means of compliance to the FAA in a form and manner acceptable to the Administrator.

Subpart B—Flight

Performance

§ 23.2100 Weight and center of gravity.

(a) The applicant must determine limits for weights and centers of gravity that provide for the safe operation of the airplane.

(b) The applicant must comply with each requirement of this subpart at critical combinations of weight and center of gravity within the airplane's range of loading conditions using tolerances acceptable to the Administrator.

(c) The condition of the airplane at the time of determining its empty weight and center of gravity must be well defined and easily repeatable.

§ 23.2105 Performance data.

(a) Unless otherwise prescribed, an airplane must meet the performance requirements of this subpart in—

(1) Still air and standard atmospheric conditions at sea level for all airplanes; and

(2) Ambient atmospheric conditions within the operating envelope for levels 1 and 2 high-speed and levels 3 and 4 airplanes.

(b) Unless otherwise prescribed, the applicant must develop the performance data required by this subpart for the following conditions:

(1) Airport altitudes from sea level to 10,000 feet (3,048 meters); and

(2) Temperatures above and below standard day temperature that are within the range of operating limitations, if those temperatures could have a negative effect on performance.

(c) The procedures used for determining takeoff and landing distances must be executable consistently by pilots of average skill in atmospheric conditions expected to be encountered in service.

(d) Performance data determined in accordance with paragraph (b) of this section must account for losses due to atmospheric conditions, cooling needs, and other demands on power sources.

§ 23.2110 Stall speed.

The applicant must determine the airplane stall speed or the minimum steady flight speed for each flight configuration used in normal operations, including takeoff, climb, cruise, descent, approach, and landing. The stall speed or minimum steady flight speed determination must account for the most adverse conditions for each flight configuration with power set at—

(a) Idle or zero thrust for propulsion systems that are used primarily for thrust; and

(b) A nominal thrust for propulsion systems that are used for thrust, flight control, and/or high-lift systems.

§ 23.2115 Takeoff performance.

(a) The applicant must determine airplane takeoff performance accounting for—

(1) Stall speed safety margins;

(2) Minimum control speeds; and

(3) Climb gradients.

(b) For single engine airplanes and levels 1, 2, and 3 low-speed multiengine airplanes, takeoff performance includes the determination of ground roll and initial climb distance to 50 feet (15 meters) above the takeoff surface.

(c) For levels 1, 2, and 3 high-speed multiengine airplanes, and level 4 multiengine airplanes, takeoff performance includes a determination the following distances after a sudden critical loss of thrust—

(1) An aborted takeoff at critical speed;

(2) Ground roll and initial climb to 35 feet (11 meters) above the takeoff surface; and

(3) Net takeoff flight path.

§ 23.2120 Climb requirements.

The design must comply with the following minimum climb performance out of ground effect:

(a) With all engines operating and in the initial climb configuration—

(1) For levels 1 and 2 low-speed airplanes, a climb gradient of 8.3 percent for landplanes and 6.7 percent for seaplanes and amphibians; and

(2) For levels 1 and 2 high-speed airplanes, all level 3 airplanes, and level 4 single-engines a climb gradient after takeoff of 4 percent.

(b) After a critical loss of thrust on multiengine airplanes—

(1) For levels 1 and 2 low-speed airplanes that do not meet single-engine crashworthiness requirements, a climb gradient of 1.5 percent at a pressure altitude of 5,000 feet (1,524 meters) in the cruise configuration(s);

(2) For levels 1 and 2 high-speed airplanes, and level 3 low-speed airplanes, a 1 percent climb gradient at 400 feet (122 meters) above the takeoff surface with the landing gear retracted and flaps in the takeoff configuration(s); and

(3) For level 3 high-speed airplanes and all level 4 airplanes, a 2 percent climb gradient at 400 feet (122 meters) above the takeoff surface with the landing gear retracted and flaps in the approach configuration(s).

(c) For a balked landing, a climb gradient of 3 percent without creating undue pilot workload with the landing gear extended and flaps in the landing configuration(s).

§ 23.2125 Climb information.

(a) The applicant must determine climb performance at each weight, altitude, and ambient temperature within the operating limitations—

(1) For all single-engine airplanes;

(2) For levels 1 and 2 high-speed multiengine airplanes and level 3 multiengine airplanes, following a critical loss of thrust on takeoff in the initial climb configuration; and

(3) For all multiengine airplanes, during the enroute phase of flight with all engines operating and after a critical loss of thrust in the cruise configuration.

(b) The applicant must determine the glide performance for single-engine airplanes after a complete loss of thrust.

§ 23.2130 Landing.

The applicant must determine the following, for standard temperatures at critical combinations of weight and altitude within the operational limits:

(a) The distance, starting from a height of 50 feet (15 meters) above the landing surface, required to land and come to a stop.

(b) The approach and landing speeds, configurations, and procedures, which allow a pilot of average skill to land within the published landing distance consistently and without causing damage or injury, and which allow for a safe transition to the balked landing conditions of this part accounting for:

(1) Stall speed safety margin; and

(2) Minimum control speeds.

Flight Characteristics

§ 23.2135 Controllability.

(a) The airplane must be controllable and maneuverable, without requiring exceptional piloting skill, alertness, or strength, within the operating envelope—

(1) At all loading conditions for which certification is requested;

(2) During all phases of flight;

(3) With likely reversible flight control or propulsion system failure; and

(4) During configuration changes.

(b) The airplane must be able to complete a landing without causing substantial damage or serious injury using the steepest approved approach gradient procedures and providing a reasonable margin below V_{ref} or above approach angle of attack.

(c) V_{MC} is the calibrated airspeed at which, following the sudden critical loss of thrust, it is possible to maintain control of the airplane. For multiengine airplanes, the applicant must determine $V_{MC,}$ if applicable, for the most critical configurations used in takeoff and landing operations.

(d) If the applicant requests certification of an airplane for aerobatics, the applicant must demonstrate those aerobatic maneuvers for which certification is requested and determine entry speeds.

§ 23.2140 Trim.

(a) The airplane must maintain lateral and directional trim without further force upon, or movement of, the primary flight controls or corresponding trim controls by the pilot, or the flight control system, under the following conditions:

(1) For levels 1, 2, and 3 airplanes in cruise.

(2) For level 4 airplanes in normal operations.

(b) The airplane must maintain longitudinal trim without further force upon, or movement of, the primary flight controls or corresponding trim controls by the pilot, or the flight control system, under the following conditions:

(1) Climb.

(2) Level flight.

(3) Descent.

(4) Approach.

(c) Residual control forces must not fatigue or distract the pilot during normal operations of the airplane and likely abnormal or emergency operations, including a critical loss of thrust on multiengine airplanes.

§ 23.2145 Stability.

(a) Airplanes not certified for aerobatics must—

(1) Have static longitudinal, lateral, and directional stability in normal operations;

(2) Have dynamic short period and Dutch roll stability in normal operations; and

(3) Provide stable control force feedback throughout the operating envelope.

(b) No airplane may exhibit any divergent longitudinal stability characteristic so unstable as to increase the pilot's workload or otherwise endanger the airplane and its occupants.

§ 23.2150 Stall characteristics, stall warning, and spins.

(a) The airplane must have controllable stall characteristics in straight flight, turning flight, and accelerated turning flight with a clear and distinctive stall warning that provides sufficient margin to prevent inadvertent stalling.

(b) Single-engine airplanes, not certified for aerobatics, must not have a tendency to inadvertently depart controlled flight.

(c) Levels 1 and 2 multiengine airplanes, not certified for aerobatics, must not have a tendency to inadvertently depart controlled flight from thrust asymmetry after a critical loss of thrust.

(d) Airplanes certified for aerobatics that include spins must have controllable stall characteristics and the ability to recover within one and one-half additional turns after initiation of the first control action from any point in a spin, not exceeding six turns or any greater number of turns for which certification is requested, while remaining within the operating limitations of the airplane.

(e) Spin characteristics in airplanes certified for aerobatics that includes spins must recover without exceeding limitations and may not result in unrecoverable spins—

(1) With any typical use of the flight or engine power controls; or

(2) Due to pilot disorientation or incapacitation.

§ 23.2155 Ground and water handling characteristics.

For airplanes intended for operation on land or water, the airplane must have controllable longitudinal and directional handling characteristics during taxi, takeoff, and landing operations.

§ 23.2160 Vibration, buffeting, and high-speed characteristics.

(a) Vibration and buffeting, for operations up to V_D/M_D, must not interfere with the control of the airplane or cause excessive fatigue to the flightcrew. Stall warning buffet within these limits is allowable.

(b) For high-speed airplanes and all airplanes with a maximum operating altitude greater than 25,000 feet (7,620 meters) pressure altitude, there must be no perceptible buffeting in cruise configuration at 1g and at any speed up to V_{MO}/M_{MO}, except stall buffeting.

(c) For high-speed airplanes, the applicant must determine the positive maneuvering load factors at which the onset of perceptible buffet occurs in the cruise configuration within the operational envelope. Likely inadvertent excursions beyond this boundary must not result in structural damage.

(d) High-speed airplanes must have recovery characteristics that do not result in structural damage or loss of control, beginning at any likely speed up to V_{MO}/M_{MO}, following—

(1) An inadvertent speed increase; and

(2) A high-speed trim upset for airplanes where dynamic pressure can impair the longitudinal trim system operation.

§ 23.2165 Performance and flight characteristics requirements for flight in icing conditions.

(a) An applicant who requests certification for flight in icing conditions defined in part 1 of appendix C to part 25 of this chapter, or an applicant who requests certification for flight in these icing conditions and any additional atmospheric icing conditions, must show the following in the icing conditions for which certification is requested under normal operation of the ice protection system(s):

(1) Compliance with each requirement of this subpart, except those applicable to spins and any that must be demonstrated at speeds in excess of—

(i) 250 knots CAS;

(ii) V_{MO}/M_{MO} or V_{NE}; or

(iii) A speed at which the applicant demonstrates the airframe will be free of ice accretion.

(2) The means by which stall warning is provided to the pilot for flight in icing conditions and non-icing conditions is the same.

(b) If an applicant requests certification for flight in icing conditions, the applicant must provide a means to detect any icing conditions for which certification is not requested and show the airplane's ability to avoid or exit those conditions.

(c) The applicant must develop an operating limitation to prohibit intentional flight, including takeoff and landing, into icing conditions for which the airplane is not certified to operate.

Subpart C—Structures

§ 23.2200 Structural design envelope.

The applicant must determine the structural design envelope, which describes the range and limits of airplane design and operational parameters for which the applicant will show compliance with the requirements of this subpart. The applicant must account for all airplane design and operational parameters that affect structural loads, strength, durability, and aeroelasticity, including:

(a) Structural design airspeeds, landing descent speeds, and any other airspeed limitation at which the applicant must show compliance to the requirements of this subpart. The structural design airspeeds must—

(1) Be sufficiently greater than the stalling speed of the airplane to safeguard against loss of control in turbulent air; and

(2) Provide sufficient margin for the establishment of practical operational limiting airspeeds.

(b) Design maneuvering load factors not less than those, which service history shows, may occur within the structural design envelope.

(c) Inertial properties including weight, center of gravity, and mass moments of inertia, accounting for—

(1) Each critical weight from the airplane empty weight to the maximum weight; and

(2) The weight and distribution of occupants, payload, and fuel.

(d) Characteristics of airplane control systems, including range of motion and tolerances for control surfaces, high lift devices, or other moveable surfaces.

(e) Each critical altitude up to the maximum altitude.

§ 23.2205 Interaction of systems and structures.

For airplanes equipped with systems that modify structural performance, alleviate the impact of this subpart's requirements, or provide a means of compliance with this subpart, the applicant must account for the influence and failure of these systems when showing compliance with the requirements of this subpart.

Structural Loads

§ 23.2210 Structural design loads.

(a) The applicant must:

(1) Determine the applicable structural design loads resulting from likely externally or internally applied pressures, forces, or moments that may occur in flight, ground and water operations, ground and water handling, and while the airplane is parked or moored.

(2) Determine the loads required by paragraph (a)(1) of this section at all critical combinations of parameters, on and within the boundaries of the structural design envelope.

(b) The magnitude and distribution of the applicable structural design loads required by this section must be based on physical principles.

§ 23.2215 Flight load conditions.

The applicant must determine the structural design loads resulting from the following flight conditions:

(a) Atmospheric gusts where the magnitude and gradient of these gusts are based on measured gust statistics.

(b) Symmetric and asymmetric maneuvers.

(c) Asymmetric thrust resulting from the failure of a powerplant unit.

§ 23.2220 Ground and water load conditions.

The applicant must determine the structural design loads resulting from taxi, takeoff, landing, and handling conditions on the applicable surface in normal and adverse attitudes and configurations.

§ 23.2225 Component loading conditions.

The applicant must determine the structural design loads acting on:

(a) Each engine mount and its supporting structure such that both are designed to withstand loads resulting from—

(1) Powerplant operation combined with flight gust and maneuver loads; and

(2) For non-reciprocating powerplants, sudden powerplant stoppage.

(b) Each flight control and high-lift surface, their associated system and supporting structure resulting from—

(1) The inertia of each surface and mass balance attachment;

(2) Flight gusts and maneuvers;

(3) Pilot or automated system inputs;

(4) System induced conditions, including jamming and friction; and

(5) Taxi, takeoff, and landing operations on the applicable surface, including downwind taxi and gusts occurring on the applicable surface.

(c) A pressurized cabin resulting from the pressurization differential—

(1) From zero up to the maximum relief pressure combined with gust and maneuver loads;

(2) From zero up to the maximum relief pressure combined with ground and water loads if the airplane may land with the cabin pressurized; and

(3) At the maximum relief pressure multiplied by 1.33, omitting all other loads.

§ 23.2230 Limit and ultimate loads.

The applicant must determine—

(a) The limit loads, which are equal to the structural design loads unless otherwise specified elsewhere in this part; and

(b) The ultimate loads, which are equal to the limit loads multiplied by a 1.5 factor of safety unless otherwise specified elsewhere in this part.

Structural Performance

§ 23.2235 Structural strength.

The structure must support:

(a) Limit loads without—

(1) Interference with the safe operation of the airplane; and

(2) Detrimental permanent deformation.

(b) Ultimate loads.

§ 23.2240 Structural durability.

(a) The applicant must develop and implement inspections or other procedures to prevent structural failures due to foreseeable causes of strength degradation, which could result in serious or fatal injuries, or extended periods of operation with reduced safety margins. Each of the inspections or other procedures developed under this section must be included in the Airworthiness Limitations Section of the Instructions for Continued Airworthiness required by § 23.1529.

(b) For Level 4 airplanes, the procedures developed for compliance with paragraph (a) of this section must be capable of detecting structural damage before the damage could result in structural failure.

(c) For pressurized airplanes:

(1) The airplane must be capable of continued safe flight and landing following a sudden release of cabin pressure, including sudden releases caused by door and window failures.

(2) For airplanes with maximum operating altitude greater than 41,000 feet, the procedures developed for compliance with paragraph (a) of this section must be capable of detecting damage to the pressurized cabin structure before the damage could result in rapid decompression that would result in serious or fatal injuries.

(d) The airplane must be designed to minimize hazards to the airplane due to structural damage caused by high-energy fragments from an uncontained engine or rotating machinery failure.

§ 23.2245 Aeroelasticity.

(a) The airplane must be free from flutter, control reversal, and divergence—

(1) At all speeds within and sufficiently beyond the structural design envelope;

(2) For any configuration and condition of operation;

(3) Accounting for critical degrees of freedom; and

(4) Accounting for any critical failures or malfunctions.

(b) The applicant must establish tolerances for all quantities that affect flutter.

Design

§ 23.2250 Design and construction principles.

(a) The applicant must design each part, article, and assembly for the expected operating conditions of the airplane.

(b) Design data must adequately define the part, article, or assembly configuration, its design features, and any materials and processes used.

(c) The applicant must determine the suitability of each design detail and part having an important bearing on safety in operations.

(d) The control system must be free from jamming, excessive friction, and excessive deflection when the airplane is subjected to expected limit airloads.

(e) Doors, canopies, and exits must be protected against inadvertent opening in flight, unless shown to create no hazard when opened in flight.

§ 23.2255 Protection of structure.

(a) The applicant must protect each part of the airplane, including small parts such as fasteners, against deterioration or loss of strength due to any cause likely to occur in the expected operational environment.

(b) Each part of the airplane must have adequate provisions for ventilation and drainage.

(c) For each part that requires maintenance, preventive maintenance, or servicing, the applicant must incorporate a means into the aircraft design to allow such actions to be accomplished.

§ 23.2260 Materials and processes.

(a) The applicant must determine the suitability and durability of materials used for parts, articles, and assemblies, accounting for the effects of likely environmental conditions expected in service, the failure of which could prevent continued safe flight and landing.

(b) The methods and processes of fabrication and assembly used must produce consistently sound structures. If a fabrication process requires close control to reach this objective, the applicant must perform the process under an approved process specification.

(c) Except as provided in paragraphs (f) and (g) of this section, the applicant must select design values that ensure material strength with probabilities that account for the criticality of the structural element. Design values must account for the probability of structural failure due to material variability.

(d) If material strength properties are required, a determination of those properties must be based on sufficient tests of material meeting specifications to establish design values on a statistical basis.

(e) If thermal effects are significant on a critical component or structure under normal operating conditions, the applicant must determine those effects on allowable stresses used for design.

(f) Design values, greater than the minimums specified by this section, may be used, where only guaranteed minimum values are normally allowed, if a specimen of each individual item is tested before use to determine that the actual strength properties of that particular item will equal or exceed those used in the design.

(g) An applicant may use other material design values if approved by the Administrator.

§ 23.2265 Special factors of safety.

(a) The applicant must determine a special factor of safety for each critical design value for each part, article, or assembly for which that critical design value is uncertain, and for each part, article, or assembly that is—

(1) Likely to deteriorate in service before normal replacement; or

(2) Subject to appreciable variability because of uncertainties in manufacturing processes or inspection methods.

(b) The applicant must determine a special factor of safety using quality controls and specifications that account for each—

(1) Type of application;

(2) Inspection method;

(3) Structural test requirement;

(4) Sampling percentage; and

(5) Process and material control.

(c) The applicant must multiply the highest pertinent special factor of safety in the design for each part of the structure by each limit and ultimate load, or ultimate load only, if there is no corresponding limit load, such as occurs with emergency condition loading.

Structural Occupant Protection

§ 23.2270 Emergency conditions.

(a) The airplane, even when damaged in an emergency landing, must protect each occupant against injury that would preclude egress when—

(1) Properly using safety equipment and features provided for in the design;

(2) The occupant experiences ultimate static inertia loads likely to occur in an emergency landing; and

(3) Items of mass, including engines or auxiliary power units (APUs), within or aft of the cabin, that could injure an occupant, experience ultimate static inertia loads likely to occur in an emergency landing.

(b) The emergency landing conditions specified in paragraph (a)(1) and (a)(2) of this section, must—

(1) Include dynamic conditions that are likely to occur in an emergency landing; and

(2) Not generate loads experienced by the occupants, which exceed established human injury criteria for human tolerance due to restraint or contact with objects in the airplane.

(c) The airplane must provide protection for all occupants, accounting for likely flight, ground, and emergency landing conditions.

(d) Each occupant protection system must perform its intended function and not create a hazard that could cause a secondary injury to an occupant. The occupant protection system must not prevent occupant egress or interfere with the operation of the airplane when not in use.

(e) Each baggage and cargo compartment must—

(1) Be designed for its maximum weight of contents and for the critical load distributions at the maximum load factors corresponding to the flight and ground load conditions determined under this part;

(2) Have a means to prevent the contents of the compartment from becoming a hazard by impacting occupants or shifting; and

(3) Protect any controls, wiring, lines, equipment, or accessories whose damage or failure would affect safe operations.

Subpart D—Design and Construction

§ 23.2300 Flight control systems.

(a) The applicant must design airplane flight control systems to:

(1) Operate easily, smoothly, and positively enough to allow proper performance of their functions.

(2) Protect against likely hazards.

(b) The applicant must design trim systems, if installed, to:

(1) Protect against inadvertent, incorrect, or abrupt trim operation.

(2) Provide a means to indicate—

(i) The direction of trim control movement relative to airplane motion;

(ii) The trim position with respect to the trim range;

(iii) The neutral position for lateral and directional trim; and

(iv) The range for takeoff for all applicant requested center of gravity ranges and configurations.

§ 23.2305 Landing gear systems.

(a) The landing gear must be designed to—

(1) Provide stable support and control to the airplane during surface operation; and

(2) Account for likely system failures and likely operation environments (including anticipated limitation exceedances and emergency procedures).

(b) All airplanes must have a reliable means of stopping the airplane with sufficient kinetic energy absorption to account for landing. Airplanes that are required to demonstrate aborted takeoff capability must account for this additional kinetic energy.

(c) For airplanes that have a system that actuates the landing gear, there is—

(1) A positive means to keep the landing gear in the landing position; and

(2) An alternative means available to bring the landing gear in the landing position when a non-deployed system position would be a hazard.

§ 23.2310 Buoyancy for seaplanes and amphibians.

Airplanes intended for operations on water, must—

(a) Provide buoyancy of 80 percent in excess of the buoyancy required to support the maximum weight of the airplane in fresh water; and

(b) Have sufficient margin so the airplane will stay afloat at rest in calm water without capsizing in case of a likely float or hull flooding.

Occupant System Design Protection

§ 23.2315 Means of egress and emergency exits.

(a) With the cabin configured for takeoff or landing, the airplane is designed to:

(1) Facilitate rapid and safe evacuation of the airplane in conditions likely to occur following an emergency landing, excluding ditching for level 1, level 2 and single engine level 3 airplanes.

(2) Have means of egress (openings, exits or emergency exits), that can be readily located and opened from the inside and outside. The means of opening must be simple and obvious and marked inside and outside the airplane.

(3) Have easy access to emergency exits when present.

(b) Airplanes approved for aerobatics must have a means to egress the airplane in flight.

§ 23.2320 Occupant physical environment.

(a) The applicant must design the airplane to—

(1) Allow clear communication between the flightcrew and passengers;

(2) Protect the pilot and flight controls from propellers; and

(3) Protect the occupants from serious injury due to damage to windshields, windows, and canopies.

(b) For level 4 airplanes, each windshield and its supporting structure directly in front of the pilot must withstand, without penetration, the impact equivalent to a two-pound bird when the velocity of the airplane is equal to the airplane's maximum approach flap speed.

(c) The airplane must provide each occupant with air at a breathable pressure, free of hazardous concentrations of gases, vapors, and smoke during normal operations and likely failures.

(d) If a pressurization system is installed in the airplane, it must be designed to protect against—

(1) Decompression to an unsafe level; and

(2) Excessive differential pressure.

(e) If an oxygen system is installed in the airplane, it must—

(1) Effectively provide oxygen to each user to prevent the effects of hypoxia; and

(2) Be free from hazards in itself, in its method of operation, and its effect upon other components.

Fire and High Energy Protection

§ 23.2325 Fire protection.

(a) The following materials must be self-extinguishing—

(1) Insulation on electrical wire and electrical cable;

(2) For levels 1, 2, and 3 airplanes, materials in the baggage and cargo compartments inaccessible in flight; and

(3) For level 4 airplanes, materials in the cockpit, cabin, baggage, and cargo compartments.

(b) The following materials must be flame resistant—

(1) For levels 1, 2 and 3 airplanes, materials in each compartment accessible in flight; and

(2) Any equipment associated with any electrical cable installation and that would overheat in the event of circuit overload or fault.

(c) Thermal/acoustic materials in the fuselage, if installed, must not be a flame propagation hazard.

(d) Sources of heat within each baggage and cargo compartment that are capable of igniting adjacent objects must be shielded and insulated to prevent such ignition.

(e) For level 4 airplanes, each baggage and cargo compartment must—

(1) Be located where a fire would be visible to the pilots, or equipped with a fire detection system and warning system; and

(2) Be accessible for the manual extinguishing of a fire, have a built-in fire extinguishing system, or be constructed and sealed to contain any fire within the compartment.

(f) There must be a means to extinguish any fire in the cabin such that—

(1) The pilot, while seated, can easily access the fire extinguishing means; and

(2) For levels 3 and 4 airplanes, passengers have a fire extinguishing means available within the passenger compartment.

(g) Each area where flammable fluids or vapors might escape by leakage of a fluid system must—

(1) Be defined; and

(2) Have a means to minimize the probability of fluid and vapor ignition, and the resultant hazard, if ignition occurs.

(h) Combustion heater installations must be protected from uncontained fire.

§ 23.2330 Fire protection in designated fire zones and adjacent areas.

(a) Flight controls, engine mounts, and other flight structures within or adjacent to designated fire zones must be capable of withstanding the effects of a fire.

(b) Engines in a designated fire zone must remain attached to the airplane in the event of a fire.

(c) In designated fire zones, terminals, equipment, and electrical cables used during emergency procedures must be fire-resistant.

§ 23.2335 Lightning protection.

The airplane must be protected against catastrophic effects from lightning.

Subpart E—Powerplant

§ 23.2400 Powerplant installation.

(a) For the purpose of this subpart, the airplane powerplant installation must include each component necessary for propulsion, which affects propulsion safety, or provides auxiliary power to the airplane.

(b) Each airplane engine and propeller must be type certificated, except for engines and propellers installed on level 1 low-speed airplanes, which may be approved under the airplane type certificate in accordance with a standard accepted by the FAA that contains airworthiness criteria the Administrator has found appropriate and applicable to the specific design and intended use of the engine or propeller and provides a level of safety acceptable to the FAA.

(c) The applicant must construct and arrange each powerplant installation to account for—

(1) Likely operating conditions, including foreign object threats;

(2) Sufficient clearance of moving parts to other airplane parts and their surroundings;

(3) Likely hazards in operation including hazards to ground personnel; and

(4) Vibration and fatigue.

(d) Hazardous accumulations of fluids, vapors, or gases must be isolated from the airplane and personnel compartments, and be safely contained or discharged.

(e) Powerplant components must comply with their component limitations and installation instructions or be shown not to create a hazard.

§ 23.2405 Automatic power or thrust control systems.

(a) An automatic power or thrust control system intended for in-flight use must be designed so no unsafe condition will result during normal operation of the system.

(b) Any single failure or likely combination of failures of an automatic power or thrust control system must not prevent continued safe flight and landing of the airplane.

(c) Inadvertent operation of an automatic power or thrust control system by the flightcrew must be prevented, or if not prevented, must not result in an unsafe condition.

(d) Unless the failure of an automatic power or thrust control system is extremely remote, the system must—

(1) Provide a means for the flightcrew to verify the system is in an operating condition;

(2) Provide a means for the flightcrew to override the automatic function; and

(3) Prevent inadvertent deactivation of the system.

§ 23.2410 Powerplant installation hazard assessment.

The applicant must assess each powerplant separately and in relation to other airplane systems and installations to show that any hazard resulting from the likely failure of any powerplant system, component, or accessory will not—

(a) Prevent continued safe flight and landing or, if continued safe flight and landing cannot be ensured, the hazard has been minimized;

(b) Cause serious injury that may be avoided; and

(c) Require immediate action by any crewmember for continued operation of any remaining powerplant system.

§ 23.2415 Powerplant ice protection.

(a) The airplane design, including the induction and inlet system, must prevent foreseeable accumulation of ice or snow that adversely affects powerplant operation.

(b) The powerplant installation design must prevent any accumulation of ice or snow that adversely affects powerplant operation, in those icing conditions for which certification is requested.

§ 23.2420 Reversing systems.

Each reversing system must be designed so that—

(a) No unsafe condition will result during normal operation of the system; and

(b) The airplane is capable of continued safe flight and landing after any single failure, likely combination of failures, or malfunction of the reversing system.

§ 23.2425 Powerplant operational characteristics.

(a) The installed powerplant must operate without any hazardous characteristics during normal and emergency operation within the range of operating limitations for the airplane and the engine.

(b) The pilot must have the capability to stop the powerplant in flight and restart the powerplant within an established operational envelope.

§ 23.2430 Fuel systems.

(a) Each fuel system must—

(1) Be designed and arranged to provide independence between multiple fuel storage and supply systems so that failure of any one component in one system will not result in loss of fuel storage or supply of another system;

(2) Be designed and arranged to prevent ignition of the fuel within the system by direct lightning strikes or swept lightning strokes to areas where such occurrences are highly probable, or by corona or streamering at fuel vent outlets;

(3) Provide the fuel necessary to ensure each powerplant and auxiliary power unit functions properly in all likely operating conditions;

(4) Provide the flightcrew with a means to determine the total useable fuel available and provide uninterrupted supply of that fuel when the system is correctly operated, accounting for likely fuel fluctuations;

(5) Provide a means to safely remove or isolate the fuel stored in the system from the airplane;

(6) Be designed to retain fuel under all likely operating conditions and minimize hazards to the occupants during any survivable emergency landing. For level 4 airplanes, failure due to overload of the landing system must be taken into account; and

(7) Prevent hazardous contamination of the fuel supplied to each powerplant and auxiliary power unit.

(b) Each fuel storage system must—

(1) Withstand the loads under likely operating conditions without failure;

(2) Be isolated from personnel compartments and protected from hazards due to unintended temperature influences;

(3) Be designed to prevent significant loss of stored fuel from any vent system due to fuel transfer between fuel storage or supply systems, or under likely operating conditions;

(4) Provide fuel for at least one-half hour of operation at maximum continuous power or thrust; and

(5) Be capable of jettisoning fuel safely if required for landing.

(c) Each fuel storage refilling or recharging system must be designed to—

(1) Prevent improper refilling or recharging;

(2) Prevent contamination of the fuel stored during likely operating conditions; and

(3) Prevent the occurrence of any hazard to the airplane or to persons during refilling or recharging.

§ 23.2435 Powerplant induction and exhaust systems.

(a) The air induction system for each powerplant or auxiliary power unit and their accessories must—

(1) Supply the air required by that powerplant or auxiliary power unit and its accessories under likely operating conditions;

(2) Be designed to prevent likely hazards in the event of fire or backfire;

(3) Minimize the ingestion of foreign matter; and

(4) Provide an alternate intake if blockage of the primary intake is likely.

(b) The exhaust system, including exhaust heat exchangers for each powerplant or auxiliary power unit, must—

(1) Provide a means to safely discharge potential harmful material; and

(2) Be designed to prevent likely hazards from heat, corrosion, or blockage.

§ 23.2440 Powerplant fire protection.

(a) A powerplant, auxiliary power unit, or combustion heater that includes a flammable fluid and an ignition source for that fluid must be installed in a designated fire zone.

(b) Each designated fire zone must provide a means to isolate and mitigate hazards to the airplane in the event of fire or overheat within the zone.

(c) Each component, line, fitting, and control subject to fire conditions must—

(1) Be designed and located to prevent hazards resulting from a fire, including any located adjacent to a designated fire zone that may be affected by fire within that zone;

(2) Be fire resistant if carrying flammable fluids, gas, or air or required to operate in event of a fire; and

(3) Be fireproof or enclosed by a fire proof shield if storing concentrated flammable fluids.

(d) The applicant must provide a means to prevent hazardous quantities of flammable fluids from flowing into, within or through each designated fire zone. This means must—

(1) Not restrict flow or limit operation of any remaining powerplant or auxiliary power unit, or equipment necessary for safety;

(2) Prevent inadvertent operation; and

(3) Be located outside the fire zone unless an equal degree of safety is provided with a means inside the fire zone.

(e) A means to ensure the prompt detection of fire must be provided for each designated fire zone—

(1) On a multiengine airplane where detection will mitigate likely hazards to the airplane; or

(2) That contains a fire extinguisher.

(f) A means to extinguish fire within a fire zone, except a combustion heater fire zone, must be provided for—

(1) Any fire zone located outside the pilot's view;

(2) Any fire zone embedded within the fuselage, which must also include a redundant means to extinguish fire; and

(3) Any fire zone on a level 4 airplane.

Subpart F—Equipment

§ 23.2500 Airplane level systems requirements.

This section applies generally to installed equipment and systems unless a section of this part imposes requirements for a specific piece of equipment, system, or systems.

(a) The equipment and systems required for an airplane to operate safely in the kinds of operations for which certification is requested (Day VFR, Night VFR, IFR) must be designed and installed to—

(1) Meet the level of safety applicable to the certification and performance level of the airplane; and

(2) Perform their intended function throughout the operating and environmental limits for which the airplane is certificated.

(b) The systems and equipment not covered by paragraph (a), considered separately and in relation to other systems, must be designed and installed so their operation does not have an adverse effect on the airplane or its occupants.

§ 23.2505 Function and installation.

When installed, each item of equipment must function as intended.

§ 23.2510 Equipment, systems, and installations.

For any airplane system or equipment whose failure or abnormal operation has not been specifically addressed by another requirement in this part, the applicant must design and install each system and equipment, such that there is a logical and acceptable inverse relationship between the average probability and the severity of failure conditions to the extent that:

(a) Each catastrophic failure condition is extremely improbable;

(b) Each hazardous failure condition is extremely remote; and

(c) Each major failure condition is remote.

§ 23.2515 Electrical and electronic system lightning protection.

An airplane approved for IFR operations must meet the following requirements, unless an applicant shows that exposure to lightning is unlikely:

(a) Each electrical or electronic system that performs a function, the failure of which would prevent the continued safe flight and landing of the airplane, must be designed and installed such that—

(1) The function at the airplane level is not adversely affected during and after the time the airplane is exposed to lightning; and

(2) The system recovers normal operation of that function in a timely manner after the airplane is exposed to lightning unless the system's recovery conflicts with other operational or functional requirements of the system.

(b) Each electrical and electronic system that performs a function, the failure of which would significantly reduce the capability of the airplane or the ability of the flightcrew to respond to an adverse operating condition, must be designed and installed such that the system recovers normal operation of that function in a timely manner after the airplane is exposed to lightning.

§ 23.2520 High-intensity Radiated Fields (HIRF) protection.

(a) Each electrical and electronic systems that perform a function, the failure of which would prevent the continued safe flight and landing of the airplane, must be designed and installed such that—

(1) The function at the airplane level is not adversely affected during and after the time the airplane is exposed to the HIRF environment; and

(2) The system recovers normal operation of that function in a timely manner after the airplane is exposed to the HIRF environment, unless the system's recovery conflicts with other operational or functional requirements of the system.

(b) For airplanes approved for IFR operations, each electrical and electronic system that performs a function, the failure of which would significantly reduce the capability of the airplane or the ability of the flightcrew to respond to an adverse operating condition, must be designed and installed such that the system recovers normal operation of that function in a timely manner after the airplane is exposed to the HIRF environment.

§ 23.2525 System power generation, storage, and distribution.

The power generation, storage, and distribution for any system must be designed and installed to—

(a) Supply the power required for operation of connected loads during all intended operating conditions;

(b) Ensure no single failure or malfunction of any one power supply, distribution system, or other utilization system will prevent the system from supplying the essential loads required for continued safe flight and landing; and

(c) Have enough capacity, if the primary source fails, to supply essential loads, including non-continuous essential loads for the time needed to complete the function required for continued safe flight and landing.

§ 23.2530 External and cockpit lighting.

(a) The applicant must design and install all lights to minimize any adverse effects on the performance of flightcrew duties.

(b) Any position and anti-collision lights, if required by part 91 of this chapter, must have the intensities, flash rate, colors, fields of coverage, and other characteristics to provide sufficient time for another aircraft to avoid a collision.

(c) Any position lights, if required by part 91 of this chapter, must include a red light on the left side of the airplane, a green light on the right side of the airplane, spaced laterally as far apart as practicable, and a white light facing aft, located on an aft portion of the airplane or on the wing tips.

(d) Any taxi and landing lights must be designed and installed so they provide sufficient light for night operations.

(e) For seaplanes or amphibian airplanes, riding lights must provide a white light visible in clear atmospheric conditions.

§ 23.2535 Safety equipment.

Safety and survival equipment, required by the operating rules of this chapter, must be reliable, readily accessible, easily identifiable, and clearly marked to identify its method of operation.

§ 23.2540 Flight in icing conditions.

An applicant who requests certification for flight in icing conditions defined in part 1 of appendix C to part 25 of this chapter, or an applicant who requests certification for flight in these icing conditions and any additional atmospheric icing conditions, must show the following in the icing conditions for which certification is requested:

(a) The ice protection system provides for safe operation.

(b) The airplane design must provide protection from stalling when the autopilot is operating.

§ 23.2545 Pressurized systems elements.

Pressurized systems must withstand appropriate proof and burst pressures.

§ 23.2550 Equipment containing high-energy rotors.

Equipment containing high-energy rotors must be designed or installed to protect the occupants and airplane from uncontained fragments.

Subpart G—Flightcrew Interface and Other Information

§ 23.2600 Flightcrew interface.

(a) The pilot compartment, its equipment, and its arrangement to include pilot view, must allow each pilot to perform his or her duties, including taxi, takeoff, climb, cruise, descent, approach, landing, and perform any maneuvers within the operating envelope of the airplane, without excessive concentration, skill, alertness, or fatigue.

(b) The applicant must install flight, navigation, surveillance, and powerplant controls and displays so qualified flightcrew can monitor and perform defined tasks associated with the intended functions of systems and equipment. The system and equipment design must minimize flightcrew errors, which could result in additional hazards.

(c) For level 4 airplanes, the flightcrew interface design must allow for continued safe flight and landing after the loss of vision through any one of the windshield panels.

§ 23.2605 Installation and operation.

(a) Each item of installed equipment related to the flightcrew interface must be labelled, if applicable, as to it identification, function, or operating limitations, or any combination of these factors.

(b) There must be a discernible means of providing system operating parameters required to operate the airplane, including warnings, cautions, and normal indications to the responsible crewmember.

(c) Information concerning an unsafe system operating condition must be provided in a timely manner to the crewmember responsible for taking corrective action. The information must be clear enough to avoid likely crewmember errors.

§ 23.2610 Instrument markings, control markings, and placards.

(a) Each airplane must display in a conspicuous manner any placard and instrument marking necessary for operation.

(b) The design must clearly indicate the function of each cockpit control, other than primary flight controls.

(c) The applicant must include instrument marking and placard information in the Airplane Flight Manual.

§ 23.2615 Flight, navigation, and powerplant instruments.

(a) Installed systems must provide the flightcrew member who sets or monitors parameters for the flight, navigation, and powerplant, the information necessary to do so during each phase of flight. This information must—

(1) Be presented in a manner that the crewmember can monitor the parameter and determine trends, as needed, to operate the airplane; and

(2) Include limitations, unless the limitation cannot be exceeded in all intended operations.

(b) Indication systems that integrate the display of flight or powerplant parameters to operate the airplane or are required by the operating rules of this chapter must—

(1) Not inhibit the primary display of flight or powerplant parameters needed by any flightcrew member in any normal mode of operation; and

(2) In combination with other systems, be designed and installed so information essential for continued safe flight and landing will be available to the flightcrew in a timely manner after any single failure or probable combination of failures.

§ 23.2620 Airplane flight manual.

The applicant must provide an Airplane Flight Manual that must be delivered with each airplane.

(a) The Airplane Flight Manual must contain the following information—

(1) Airplane operating limitations;

(2) Airplane operating procedures;

(3) Performance information;

(4) Loading information; and

(5) Other information that is necessary for safe operation because of design, operating, or handling characteristics.

(b) The following sections of the Airplane Flight Manual must be approved by the FAA in a manner specified by the administrator—

(1) For low-speed, level 1 and 2 airplanes, those portions of the Airplane Flight Manual containing the information specified in paragraph (a)(1) of this section; and

(2) For high-speed level 1 and 2 airplanes and all level 3 and 4 airplanes, those portions of the Airplane Flight Manual containing the information specified in paragraphs (a)(1) thru (a)(4) of this section.

Appendix A to Part 23—Instructions for Continued Airworthiness

A23.1 General

(a) This appendix specifies requirements for the preparation of Instructions for Continued Airworthiness as required by this part.

(b) The Instructions for Continued Airworthiness for each airplane must include the Instructions for Continued Airworthiness for each engine and propeller (hereinafter designated ‘‘products’’), for each appliance required by this chapter, and any required information relating to the interface of those appliances and products with the airplane. If Instructions for Continued Airworthiness are not supplied by the manufacturer of an appliance or product installed in the airplane, the Instructions for Continued Airworthiness for the airplane must include the information essential to the continued airworthiness of the airplane.

(c) The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the airplane will be distributed.

A23.2 Format

(a) The Instructions for Continued Airworthiness must be in the form of a manual or manuals as appropriate for the quantity of data to be provided.

(b) The format of the manual or manuals must provide for a practical arrangement.

A23.3 Content

The contents of the manual or manuals must be prepared in the English language. The Instructions for Continued Airworthiness must contain the following manuals or sections and information:

(a) Airplane maintenance manual or section.

(1) Introduction information that includes an explanation of the airplane's features and data to the extent necessary for maintenance or preventive maintenance.

(2) A description of the airplane and its systems and installations including its engines, propellers, and appliances.

(3) Basic control and operation information describing how the airplane components and systems are controlled and how they operate, including any special procedures and limitations that apply.

(4) Servicing information that covers details regarding servicing points, capacities of tanks, reservoirs, types of fluids to be used, pressures applicable to the various systems, location of access panels for inspection and servicing, locations of lubrication points, lubricants to be used, equipment required for servicing, tow instructions and limitations, mooring, jacking, and leveling information.

(b) Maintenance Instructions.

(1) Scheduling information for each part of the airplane and its engines, auxiliary power units, propellers, accessories, instruments, and equipment that provides the recommended periods at which they should be cleaned, inspected, adjusted, tested, and lubricated, and the degree of inspection, the applicable wear tolerances, and work recommended at these periods. However, the applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test

equipment, or expertise. The recommended overhaul periods and necessary cross reference to the Airworthiness Limitations section of the manual must also be included. In addition, the applicant must include an inspection program that includes the frequency and extent of the inspections necessary to provide for the continued airworthiness of the airplane.

(2) Troubleshooting information describing probable malfunctions, how to recognize those malfunctions, and the remedial action for those malfunctions.

(3) Information describing the order and method of removing and replacing products and parts with any necessary precautions to be taken.

(4) Other general procedural instructions including procedures for system testing during ground running, symmetry checks, weighing and determining the center of gravity, lifting and shoring, and storage limitations.

(c) Diagrams of structural access plates and information needed to gain access for inspections when access plates are not provided.

(d) Details for the application of special inspection techniques including radiographic and ultrasonic testing where such processes are specified by the applicant.

(e) Information needed to apply protective treatments to the structure after inspection.

(f) All data relative to structural fasteners such as identification, discard recommendations, and torque values.

(g) A list of special tools needed.

(h) In addition, for level 4 airplanes, the following information must be furnished—

(1) Electrical loads applicable to the various systems;

(2) Methods of balancing control surfaces;

(3) Identification of primary and secondary structures; and

(4) Special repair methods applicable to the airplane.

A23.4 Airworthiness limitations section.

The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads ''The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.403 of Title 14 of the Code of Federal Regulations unless an alternative program has been FAA approved.''

PART 35—AIRWORTHINESS STANDARDS: PROPELLERS

■ 9. The authority citation for part 35 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44702, 44704.

■ 10. In § 35.1, revise paragraph (c) to read as follows:

§ 35.1 Applicability.

* * * * *

(c) An applicant is eligible for a propeller type certificate and changes to those certificates after demonstrating compliance with subparts A, B, and C of this part. However, the propeller may not be installed on an airplane unless the applicant has shown compliance with either § 23.2400(c) or § 25.907 of this chapter, as applicable, or compliance is not required for installation on that airplane.

* * * * *

■ 11. In § 35.37, revise paragraph (c)(1) to read as follows:

§ 35.37 Fatigue limits and evaluation.

* * * * *

(c) * * *

(1) The intended airplane by complying with § 23.2400(c) or § 25.907 of this chapter, as applicable; or

* * * * *

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

■ 12. The authority citation for part 43 is revised to read as follows:

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(f), 106(g), 40105, 40113, 44701–44702, 44704, 44707, 44709, 44711, 44713, 44715, 45303.

■ 13. In part 43, appendix E, revise the introductory text and paragraph (a)(2) to read as follows:

Appendix E to Part 43—Altimeter System Test and Inspection

Each person performing the altimeter system tests and inspections required by § 91.411 of this chapter must comply with the following:

(a) * * *

(2) Perform a proof test to demonstrate the integrity of the static pressure system in a manner acceptable to the Administrator. For airplanes certificated under part 25 of this chapter, determine that leakage is within the tolerances established by § 25.1325.

* * * * *

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 14. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 1155, 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 15. In § 91.205, revise paragraphs (b)(13) and (b)(14), and remove and reserve paragraph (b)(16) to read as follows:

§ 91.205 Powered civil aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements.

* * * * *

(b) * * *

(13) An approved safety belt with an approved metal-to-metal latching device, or other approved restraint system for each occupant 2 years of age or older.

(14) For small civil airplanes manufactured after July 18, 1978, an approved shoulder harness or restraint system for each front seat. For small civil airplanes manufactured after December 12, 1986, an approved shoulder harness or restraint system for all seats. Shoulder harnesses installed at flightcrew stations must permit the flightcrew member, when seated and with the safety belt and shoulder harness fastened, to perform all functions necessary for flight operations. For purposes of this paragraph—

(i) The date of manufacture of an airplane is the date the inspection acceptance records reflect that the airplane is complete and meets the FAA-approved type design data; and

(ii) A front seat is a seat located at a flightcrew member station or any seat located alongside such a seat.

* * * * *

(16) [Reserved]

* * * * *

■ 16. In § 91.313, revise paragraph (g) introductory text to read as follows:

§ 91.313 Restricted category civil aircraft: Operating limitations.

* * * * *

(g) No person may operate a small restricted-category civil airplane manufactured after July 18, 1978, unless an approved shoulder harness or restraint system is installed for each front seat. The shoulder harness or restraint system installation at each flightcrew station must permit the flightcrew member, when seated and with the safety belt and shoulder harness fastened or the restraint system engaged, to perform all functions necessary for flight operation. For purposes of this paragraph—

* * * * *

■ 17. In § 91.323, revise paragraph (b)(3) to read as follows:

§ 91.323 Increased maximum certificated weights for certain airplanes operated in Alaska.

* * * * *

(b) * * *

(3) The weight at which the airplane meets the positive maneuvering load factor *n, where n*=2.1+(24,000/(W+10,000)) and W=design maximum takeoff weight, except that n need not be more than 3.8; or

* * * * *

■ 18. In § 91.531, revise paragraphs (a)(1) and (a)(3) to read as follows:

§ 91.531 Second in command requirements.

(a) * * *

(1) A large airplane or normal category level 4 airplane, except that a person may operate an airplane certificated under SFAR 41 without a pilot who is designated as second in command if that airplane is certificated for operation with one pilot.

* * * * *

(3) A commuter category airplane or normal category level 3 airplane, except that a person may operate those airplanes notwithstanding paragraph (a)(1) of this section, that have a passenger seating configuration, excluding pilot seats, of nine or less without a pilot who is designated as second in command if that airplane is type certificated for operations with one pilot.

* * * * *

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

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

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

■ 20. In § 121.310, revise paragraph (b)(2)(iii) to read as follows:

§ 121.310 Additional emergency equipment.

* * * * *

(b) * * *

(2) * * *

(iii) For a nontransport category turbopropeller powered airplane type certificated after December 31, 1964, each passenger emergency exit marking and each locating sign must be manufactured to have white letters 1 inch high on a red background 2 inches high, be self-illuminated or independently, internally electrically illuminated, and have a minimum brightness of at least 160 microlamberts. The color may be reversed if the passenger compartment illumination is essentially the same. On these airplanes, no sign may continue to be used if its luminescence (brightness) decreases to below 100 microlamberts.

* * * * *

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 21. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 41706, 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 44730, 45101–45105; Pub. L. 112–95, 126 Stat. 58 (49 U.S.C. 44730).

■ 22. In § 135.169, revise paragraphs (b) introductory text, (b)(6), and (b)(7), and add paragraph (b)(8) to read as follows:

§ 135.169 Additional airworthiness requirements.

* * * * *

(b) No person may operate a small airplane that has a passenger-seating configuration, excluding pilot seats, of 10 seats or more unless it is type certificated—

* * * * *

(6) In the normal category and complies with section 1.(b) of Special Federal Aviation Regulation No. 41;

(7) In the commuter category; or

(8) In the normal category, as a multi-engine certification level 4 airplane as defined in part 23 of this chapter.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), 44703 and Pub. L. 113–53 (127 Stat. 584; 49 U.S.C. 44704 note) in Washington, DC, on December 12, 2016.

Michael P. Huerta,

Administrator.

[FR Doc. 2016–30246 Filed 12–21–16; 4:15 pm]

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Part III

Commodity Futures Trading Commission

17 CFR Parts 1, 15, 17, et al.
Position Limits for Derivatives; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 15, 17, 19, 37, 38, 140, 150 and 151

RIN 3038–AD99

Position Limits for Derivatives

AGENCY: Commodity Futures Trading Commission.

ACTION: Reproposal.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is reproposing rules to amend part 150 of the Commission's regulations concerning speculative position limits to conform to the Wall Street Transparency and Accountability Act of 2010 (''Dodd-Frank Act'') amendments to the Commodity Exchange Act (''CEA'' or ''Act''). The reproposal would establish speculative position limits for 25 exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are ''economically equivalent'' to such contracts (as such term is used in section 4a(a)(5) of the CEA). In connection with establishing these limits, the Commission is reproposing to update some relevant definitions; revise the exemptions from speculative position limits, including for bona fide hedging; and extend and update reporting requirements for persons claiming exemption from these limits. The Commission is also reproposing appendices to part 150 that would provide guidance on risk management exemptions for commodity derivative contracts in excluded commodities permitted under the revised definition of bona fide hedging position; list core referenced futures contracts and commodities that would be substantially the same as a commodity underlying a core referenced futures contract for purposes of the definition of location basis contract; describe and analyze fourteen fact patterns that would satisfy the reproposed definition of bona fide hedging position; and present the reproposed speculative position limit levels in tabular form. In addition, the Commission proposes to update certain of its rules, guidance and acceptable practices for compliance with Designated Contract Market (''DCM'') core principle 5 and Swap Execution Facility (''SEF'') core principle 6 in respect of exchange-set speculative position limits and position accountability levels. Furthermore, the Commission is reproposing processes for DCMs and SEFs to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, as well as to exempt from position limits certain spread positions, in each case subject to Commission review. Separately, the Commission is reproposing to delay for DCMs and SEFs that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps.

DATES: Comments must be received on or before February 28, 2017.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD99, by any of the following methods:

- *CFTC Web site: http://comments.cftc.gov*;
- *Mail:* Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581;
- *Hand delivery/courier:* Same as Mail, above.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov*. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC regulations at 17 CFR part 145.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Stephen Sherrod, Senior Economist, (202) 418–5452, *ssherrod@cftc.gov*, Riva Spear Adriance, Senior Special Counsel, (202) 418–5494, *radriance@cftc.gov*, Hannah Ropp, Surveillance Analyst, 202–418–5228, *hropp@cftc.gov*, or Steven Benton, Industry Economist, (202) 418–5617, *sbenton@cftc.gov*, Division of Market Oversight; or Lee Ann Duffy, Assistant General Counsel, 202–418–6763, *lduffy@cftc.gov*, Office of General Counsel, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Introduction

The Commission has long established and enforced speculative position limits for futures and options contracts on various agricultural commodities as authorized by the Commodity Exchange

Act (''CEA'').[1] The part 150 position limits regime [2] generally includes three components: (1) The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, individual month, and all months combined,[3] (2) exemptions for positions that constitute bona fide hedging transactions and certain other types of transactions,[4] and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[5]

In late 2013, the CFTC proposed to amend its part 150 regulations governing speculative position limits.[6] These proposed amendments were intended to conform the requirements of part 150 to particular changes to the CEA introduced by the Wall Street Transparency and Accountability Act of 2010 (''Dodd-Frank Act'').[7] The proposed amendments included the adoption of federal position limits for 28 exempt and agricultural commodity futures and option contracts and swaps that are ''economically equivalent'' to such contracts.[8] In addition, the Commission proposed to require that DCMs and SEFs that are trading facilities (collectively, ''exchanges'') establish exchange-set limits on such futures, options and swaps contracts.[9] Further, the Commission proposed to (i) revise the definition of bona fide hedging position (which includes a general definition with requirements applicable to all hedges, as well as an enumerated list of bona fide hedges),[10] (ii) revise the process for market participants to request recognition of certain types of positions as bona fide hedges, including anticipatory hedges and hedges not specifically enumerated in the proposed bona fide hedging definition; [11] and (iii) revise the exemptions from position limits for transactions normally known to the trade as spreads.[12]

On June 13, 2016, the Commission published a supplemental proposal to its December 2013 Position Limits rulemaking.[13] The supplemental proposal included revisions and additions to regulations and guidance proposed in 2013 concerning speculative position limits in response to comments received on that proposal, and alternative processes for DCMs and SEFs to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, as well as to exempt from federal position limits certain spread positions, in each case subject to Commission review. In this regard, under the 2016 Supplemental Position Limits Proposal, certain of the regulations proposed in 2013 regarding exemptions from federal position limits and exchange-set position limits would be amended to take into account the alternative processes. In connection with those proposed changes, the Commission proposed to further amend certain relevant definitions, including to clearly define the general definition of bona fide hedging for physical commodities under the standards in CEA section 4a(c). Separately, the Commission proposed to delay for DCMs and SEFs that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps at this time.

After review of the comments responding to both the December 2013 Position Limits Proposal and the 2016 Supplemental Position Limits Proposal, the Commission, in consideration of those comments, is now issuing a reproposal (''Reproposal''). The Commission invites comments on all aspects of this Reproposal.

B. The Commission Preliminarily Construes CEA Section 4a(a) To Mandate That the Commission Impose Position Limits

1. Introduction

a. The History of Position Limits and the 2011 Position Limits Rule

As part of the Dodd-Frank Act, Congress amended the CEA's position limits provision, which since 1936 has authorized the Commission (and its predecessor) to impose limits on speculative positions to prevent the harms caused by excessive speculation. Prior to the Dodd-Frank Act, CEA section 4a(a) stated that for the purpose of diminishing, eliminating or preventing specified burdens on interstate commerce, the Commission shall, from time to time, after due notice and an opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to

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[1] 7 U.S.C. 1 *et seq.*

[2] *See* 17 CFR part 150. Part 150 of the Commission's regulations establishes federal position limits (that is, position limits established by the Commission, as opposed to exchange-set limits) on certain enumerated agricultural contracts; the listed commodities are referred to as enumerated agricultural commodities. The position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts on agricultural commodities have been subject to federal position limits for decades. *See also* Position Limits for Derivatives, 78 FR 75680 at 75723, n. 370 and accompanying text (Dec. 12, 2013) (''December 2013 Position Limits Proposal'').

[3] *See* 17 CFR 150.2.

[4] *See* 17 CFR 150.3.

[5] *See* 17 CFR 150.4.

[6] *See generally* December 2013 Positions Limits Proposal. In the December 2013 Position Limits Proposal, the Commission proposed to amend its position limits to also encompass 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts.

[7] The Commission previously had issued proposed and final rules in 2011 to implement the provisions of the Dodd-Frank Act regarding position limits and the bona fide hedge definition. Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011); Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). A September 28, 2012 order of the U.S. District Court for the District of Columbia vacated the November 18, 2011 rule, with the exception of the rule's amendments to 17 CFR 150.2. *International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012). *See generally* the materials and links on the Commission's Web site at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_26_PosLimits/index.htm.* The Commission issued the December 2013 Position Limits Proposal, among other reasons, to respond to the District Court's decision in *ISDA* v. *CFTC. See generally* the materials and links on the Commission's Web site at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/PositionLimitsforDerivatives/index.htm.*

[8] *See* CEA section 4a(a)(5), 7 U.S.C. 6a(a)(5) (providing that the Commission establish limits on economically equivalent contracts); CEA section 4a(a)(6), 7 U.S.C. 6a(a)(6) (directing the Commission to establish aggregate position limits on futures, options, economically equivalent swaps, and certain foreign board of trade contracts in agricultural and exempt commodities (collectively, ''referenced contracts'')). *See* December 2013 Position Limits Proposal, 78 FR at 75825. Under the December 2013 Position Limits Proposal, ''referenced contracts'' would have been defined as futures, options, economically equivalent swaps, and certain foreign board of trade contracts, in physical commodities, and been subject to the proposed federal position limits. The Commission proposed that federal position limits would apply to referenced contracts, whether futures or swaps, regardless of where the futures or swaps positions were established. *See* December 2013 Positions Limits Proposal, at 78 FR 75826 (proposed § 150.2).

[9] *See* December 2013 Position Limits Proposal, 78 FR at 75754–8. Consistent with DCM Core Principle 5 and SEF Core Principle 6, the Commission proposed at § 150.5(a)(1) that for any commodity derivative contract that is subject to a speculative position limit under § 150.2, a DCM or SEF that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.

[10] *See* December 2013 Position Limits Proposal, 78 FR at 75706–11, 75713–18.

[11] *See* December 2013 Position Limits Proposal, 78 FR at 75718.

[12] *See* December 2013 Position Limits Proposal, 78 FR at 75735–6. CEA section 4a(a)(1), 7 U.S.C. 6a(a)(1), permits the Commission to exempt transactions normally known to the trade as ''spreads'' from federal position limits.

[13] Position Limits for Derivatives: Certain Exemptions and Guidance, 81 FR 38458 (June 13, 2016) (''2016 Supplemental Position Limits Proposal'').

diminish, eliminate, or prevent such burden.[14]

In the Dodd-Frank Act, Congress renumbered a modified version of CEA section 4a(a) as section 4a(a)(1) and added, among other provisions, CEA section 4a(a)(2), captioned ''Establishment of Limitations,'' which provides that in accordance with the standards set forth in CEA section 4a(a)(1), the Commission shall establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person. CEA section 4a(a)(2) further provides that for exempt commodities (energy and metals), the limits required under CEA section 4a(a)(2) shall be established within 180 days after the date of the enactment of CEA section 4a(a)(2); for agricultural commodities, the limits required under CEA section 4a(a)(2) shall be established within 270 days after the date of the enactment of CEA section 4a(a)(2).[15]

These and other changes to CEA section 4a(a) are described in more detail below.

Pursuant to these amendments, the Commission adopted a position limits rule in 2011 (''2011 Position Limits Rule'') in a new part 151.[16] In the 2011 Position Limits Rule, the Commission imposed, in new part 151, speculative limits in the spot-month and non-spot-months on 28 physical commodity derivatives ''of particular significance to interstate commerce.'' [17] Under the 2011 Position Limits Rule, part 151 used formulas for calculating limit levels that are similar to the formulas used to calculate previous Commission- and exchange-set position limits.[18] The 2011 Position Limits Rule contained provisions in part 151 that implemented the statutory exemption for bona fide hedging.[19] It also provided account aggregation standards to determine which positions to attribute to a particular market participant.[20] Because it interpreted the Dodd-Frank Act as mandating position limits, the Commission did not make an independent threshold determination that position limits are necessary to accomplish the purposes set forth in the statute. The Commission explained:

> Congress directed the Commission to impose position limits and to do so expeditiously. Section 4a(a)(2)(B) states that the limits for physical commodity futures and options contracts ''shall'' be established within the specified timeframes, and section 4a(a)(2)(5) states that the limits for economically equivalent swaps ''shall'' be established concurrently with the limits required by section 4a(a)(2). The congressional directive that the Commission set position limits is further reflected in the repeated references to the limits ''required'' under section 4a(a)(2)(A).[21]

ISDA and SIFMA sued the Commission to vacate part 151 on the basis (among others) that, in their view, CEA section 4a(a) clearly required the Commission to make an antecedent necessity finding.

b. The District Court Opinion

As set forth in the Commission's December 2013 Position Limits Proposal,[22] the district court in *ISDA* v. *CFTC* found that, on one hand, CEA section 4a(a)(1) ''unambiguously requires that, prior to imposing position limits, the Commission find that position limits are necessary to 'diminish, eliminate, or prevent' the burden described in [CEA section 4a(a)(1)].'' [23] On the other hand, the court found that the Dodd-Frank Act amendments to CEA section 4a(a) rendered section 4a(a)(1) ambiguous with respect to whether such findings are required for the position limits described in CEA section 4a(a)(2)—futures contracts, options, and certain swaps on agricultural and exempt commodities.[24]

The court's determination in *ISDA* v. *CFTC* that CEA sections 4a(a)(1) and (2), read together, are ambiguous focused on the opening phrase of subsection (A)—''[i]n accordance with the standards set forth in [CEA section 4a(a)(1)].'' The court held that the term ''standards'' in CEA section 4a(a)(2) was ambiguous as to whether it referred to the requirement in CEA section 4a(a)(1) that the Commission impose position limits only ''as [it] finds are necessary to diminish, eliminate, or prevent'' an unnecessary burden on interstate commerce.[25] If not, ''standards'' would refer to the aggregation and flexibility standards stated in CEA section 4a(a)(1) by which position limits are to be implemented. Accordingly, the court rejected both (1) the Commission's contention that CEA section 4a(a) as a whole unambiguously mandated the imposition of position limits without the Commission finding independently that they are necessary; and (2) the plaintiffs' contention that CEA section 4a(a) unambiguously required the Commission to make such findings before the imposition of position limits.[26] The court stated that because the Commission had incorrectly found CEA section 4a(a) unambiguous, it could not defer to any interpretation by the Commission to resolve the section's ambiguity. As the court observed, the D.C. Circuit has held that '' 'deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress.' '' [27] The court further held that, pursuant to the law of the D.C. Circuit, it was required to remand the matter to the Commission so that it could ''fill in the gaps and resolve the ambiguities.'' [28] The court instructed that the Commission must apply its experience and expertise and cautioned that, in resolving the ambiguity in CEA section 4a(a), '' 'it is incumbent upon the agency not to rest simply on its parsing of the statutory language.' '' [29] The Commission does not rest simply on parsing the statutory language, but any interpretation necessarily begins with the text, which is described in the next section.

2. The Statutory Framework for Position Limits

Before the Dodd-Frank Act, what was then CEA section 4a(a) authorized the

[14] 7 U.S.C. 6a(a) (2006).

[15] CEA section 4a(a)(2); 7 U.S.C. 6a(a)(2). The Commission notes that it uses the defined term ''bona fide hedging position'' throughout part 150, rather than ''bona fide hedge positions'' found in CEA section 4a(a)(2). CEA section 4a(c)(1) uses the term ''bona fide hedging transactions or positions'' and CEA section 4a(c)(2) uses the term ''bona fide hedging transaction or position.'' The Commission interprets all of these terms to mean the same. It should be noted that the Commission previously imposed transaction volume limits on ''the amounts of trading which may be done'' as authorized by CEA section 4a(a)(1), but removed those transaction volume limits. Elimination of Daily Speculative Trading Limits, 44 FR 7124, 7127 (Feb. 6, 1979).

[16] Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). As finalized, part 151 replaced part 150.

[17] *Id.* at 71665; *see also id* at 716629–30.

[18] *Id.* at 71632–33 (transition), 71668–70 (spot-month limit), 71671 (non-spot month limit).

[19] *Id.* at 71643–51.

[20] *Id.* at 71651–55. A central feature of any position limits regime is determining which positions to attribute to a particular trader. The CEA requires the Commission to attribute to a person all positions that the person holds or trades, as well as positions held or traded by anyone else that such person directly or indirectly controls. 7 U.S.C. 6a(a)(1). This is referred to as account aggregation. In addition to account aggregation, Congress required the Commission to set limits on all derivative positions in the same underlying commodity that a trader may hold or control across all derivative exchanges. 7 U.S.C. 6a(a)(6). The Commission refers to this as position aggregation.

[21] Position Limits for Futures and Swaps, 76 FR at 71626–628.

[22] *International Swaps and Derivatives Ass'n* v. *United States Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[23] *Id.* at 270.

[24] *Id.* at 281.

[25] 887 F. Supp. 2d at 274–76.

[26] 887 F. Supp. 2d at 279–80.

[27] *Id.* at 280–82, quoting *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.,* 471 F.3d 1350, 1354 (D.C. Cir. 2006).

[28] 887 F. Supp. 2d at 282.

[29] *Id.* at n.7, quoting *PDK Labs. Inc.* v. *DEA,* 362 F.3d 786, 797 (D.C. Cir. 2004).

Commission to set limits on futures for any exchange-traded contract for future delivery of any commodity ''as the Commission finds are necessary to diminish, eliminate, or prevent [the] burden'' of ''[e]xcessive speculation'' ''causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity.'' 7 U.S.C. 6a(a) (2009 Supp.).[30] CEA section 4a(a) also required the Commission to follow certain criteria for aggregating limits once it made that determination. And the Commission was authorized to impose limits flexibly, depending on the commodity, delivery month, and other factors.[31]

The 2010 Dodd-Frank Act amendments to CEA section 4a(a) significantly expanded and altered it. The entirety of pre-Dodd-Frank CEA section 4a(a) became CEA section 4a(a)(1). Congress added six new subsections to CEA section 4a(a)—sections 4a(a)(2) through (7). And, outside of section 4a(a), Congress imposed a requirement that the Commission study the new limits it imposed and provide Congress with a report on their effects within one year of their imposition.[32]

The primary change at issue here was the addition of new CEA section 4a(a)(2), which addresses position limits on a specific class of commodity contracts, ''physical commodities other than excluded commodities'':

CEA section 4a(a)(2)(A) provides that in accordance with the standards set forth in CEA section 4a(a)(1), with respect to physical commodities other than excluded commodities, the Commission shall establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts.

CEA section 4a(a)(2)(B), in turn, provides that the limits ''required'' under CEA section 4a(a)(2)(A) ''shall be established within 180 days after the date of enactment of this paragraph'' for ''agricultural commodities'' (such as wheat or corn) and ''within 270 days after the date of the enactment of this paragraph'' for ''exempt commodities'' (which include energy-related commodities like oil, as well as metals).[33]

The other new subsections of CEA section 4a(a) delineate the types of physical commodity derivatives to which the new limits apply, set forth criteria for the Commission to consider in determining the levels of the required limits, require the Commission to aggregate the limits across exchanges for equivalent derivatives, require the Commission to impose limits on swaps that are economically equivalent to the physical commodity futures and options subject to CEA section 4a(a)(2), and permit the Commission to grant exemptions from the position limits it must impose under the provision:

- Section 4a(a)(3) guides the Commission in setting appropriate limit levels by providing that the Commission shall consider whether the limit levels: (i) Diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted;
- Section 4a(a)(4) sets forth criteria for determining which swaps perform a significant price discovery function for purposes of the position limits provisions;
- Section 4a(a)(5) requires the Commission to concurrently impose appropriate limit levels on physical commodity swaps that are economically equivalent to the futures and options for which limits are required;
- Section 4a(a)(6) requires the Commission to apply the required position limits on an aggregate basis to contracts based on the same underlying commodity across all exchanges; and
- Section a(a)(7) authorizes the Commission to grant exemptions from the position limits it imposes.[34]

In a separate Dodd-Frank Act provision, Congress required that the Commission, in consultation with exchanges, ''shall conduct a study of the effects (if any) of the position limits imposed'' under CEA section 4a(a)(2), that ''[w]ithin twelve months after the imposition of position limits'' the Commission ''shall'' submit a report of the results of the study to Congress, and that Congress ''shall'' hold hearings within 30 days of receipt of the report regarding its findings.[35]

3. The Commission's Experience With Position Limits

As explained in the December 2013 Position Limits Proposal, position limits have a long history as a tool to prevent unwarranted price movement and volatility, including but not limited to price swings caused by market manipulation.[36] Physical commodities underlying futures contracts are, by definition, in finite supply, and so it is

[30] Under the heading of ''Burden on interstate commerce; trading or position limits,'' 7 U.S.C. 6a(a) (2006) provided that excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or on electronic trading facilities with respect to a significant price discovery contract causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. Title 7 U.S.C. 6a(a) (2006) further provided that for the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or on an electronic trading facility with respect to a significant price discovery contract, as the Commission finds are necessary to diminish, eliminate, or prevent such burden. Additionally, 7 U.S.C. 6a(a) (2006) stated that in determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Title 7 U.S.C. 6a(a) (2006) further stated that nothing in that section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as ''spreads'' or ''straddles'' or ''arbitrage'' or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. Moreover, 7 U.S.C. 6a(a) (2006) defined the word ''arbitrage'' in domestic markets to mean the same as a ''spread'' or ''straddle.'' It also authorized the Commission to define the term ''international arbitrage.'' 7 U.S.C. 6a(a) (2006).

[31] There were four other subsections of CEA section 4a: CEA section 4a(b), which made it unlawful for a person to hold positions in excess of Commission-set limits; CEA section 4a(c), which exempted positions held under an exemption for bona fide hedges, CEA section 4a(d), which exempted positions held by or on behalf of the United States, and CEA section 4a(e), which authorized exchanges to set limits so long as they were not higher than Commission-set limits and made it unlawful for any person to hold limits in excess of exchange-set limits. (Exchange-set limits are also addressed elsewhere in the CEA. *E.g.,* 7 U.S.C. 7(d)(5)).

[32] 15 U.S.C. 8307(a). Some parts of pre Dodd-Frank CEA sections 4a(a) and 4a(b)–(e) were also amended by the Dodd-Frank Act. CEA section 4a(a) is now CEA section 4a(a)(1) and was modified primarily to add swaps, CEA section 4a(b) updates the names of applicable exchanges, and CEA section 4a(c) requires the Commission to promulgate a rule in accordance with a narrowed definition of bona fide hedging position as an exemption from position limits. 7 U.S.C. 6a(a)(1), 6a(b)–(e).

[33] 7 U.S.C. 6a(a)(2)(B)(i) and (ii).

[34] 7 U.S.C. 6a(a)(3)–(7).

[35] 15 U.S.C. 8307(a).

[36] December 2013 Position Limits Proposal, 78 FR at 75685.

possible to amass or dissipate an extremely large position in such a way as to interfere with the normal forces of supply and demand. Speculators (who have no commercial use for the underlying commodity) are considered differently from hedgers (who use commodity derivatives to hedge commercial risk). Speculators have been considered a greater source of risk because their trading is unconnected with underlying commercial activity, whereas a hedger's trading is calibrated to other business needs. In various statutory enactments, Congress has recognized both the utility of position limits and the need to treat speculators differently from hedgers.

Congress began regulating commodity derivatives in 1917, when Congress enacted emergency legislation to stabilize the U.S. grain markets during the First World War by suspending wheat futures and securing ''a voluntary limitation'' of 500,000 bushels on trading in corn futures.[37] In 1922 Congress enacted the Grain Futures Act, in which it noted that ''sudden or unreasonable fluctuations in the prices of commodity futures . . . frequently occur as a result of speculation, manipulation, or control . . . .''[38] In 1936, Congress strengthened the government's authority by providing for limits on speculative trading in commodity derivatives when it enacted the CEA. The CEA authorized the CFTC's predecessor, the Commodity Exchange Commission (CEC), to establish limits on speculative trading. Since that time, the Commission has been establishing or authorizing position limits for the past 80 years. As discussed in the December 2013 Position Limits Proposal and prior rulemakings, this history includes setting position limits beginning in 1938; overseeing exchange-set limits beginning in the 1960s; promulgating a rule in 1981, later directly ratified by Congress, mandating that exchanges set limits for all commodity futures for which there were no limits; allowing exchanges, in the 1990s, to set position accountability levels for certain financial contracts, such as futures and options on foreign currencies and other financial instruments with high degrees of stability;[39] and later expanding exchange limits or accountability requirements to significant price discovery contracts traded on exempt commercial markets.[40]

As addressed in the December 2013 Position Limits Proposal, two aspects of the Commission's experience are particularly important to the Commission's interpretation of the Dodd-Frank Act amendments to CEA section 4a. The first is the Commission's experience with the time required to make necessity findings before setting limits, which relates to the time limits contained in CEA section 4a(a)(2)(B). The second is the Commission's experience in rulemaking requiring exchanges to set limits in accordance with certain ''standards,'' the term the district court found ambiguous.

a. Time to Establish Position Limits

Based on its experience administering position limits, the Commission preliminarily concludes (as stated preliminarily in the December 2013 Position Limits Proposal) that Congress could not have contemplated that, as a prerequisite to imposing limits, the Commission would first make antecedent commodity-by-commodity necessity determinations in the 180–270 day time frame within which CEA section 4a(a)(2)(B) states that limits ''required under subparagraph [4a(a)(2(A)] shall be established.''[41] As described in the December 2013 Position Limits Proposal, for 45 years after passage of the CEA, the Commission's predecessor agency made findings of necessity in its rulemakings establishing position limits.[42] During that period, the Commission had jurisdiction over only a limited number of agricultural commodities. In orders issued by the Commodity Exchange Commission between 1940 and 1956 establishing position limits, the CEC stated that the limits it was imposing in each were necessary. Each of those orders involved no more than a small number of commodities. But it took the CEC many months to make those findings. For example, in 1938, the CEC imposed position limits on six grain products.[43] Proceedings leading up to the establishment of the limits commenced more than 13 months earlier, when the CEC issued a notice of hearing regarding the limits.[44] Similarly, in September 1939, the CEC issued a Notice of Hearing with respect to position limits for cotton, but it was not until August 1940 that the CEC finally promulgated such limits.[45] And the CEC began the process of imposing limits on soybeans and eggs in January 1951, but did not complete the process until more than seven months later.[46]

In the Commission's experience (including the experience of its predecessor agency), it generally took many months to make a necessity finding with respect to one commodity. The process of making the sort of necessity findings that plaintiffs in *ISDA* v. *SIFMA* urged with respect to all agricultural commodities and all exempt commodities (and that some commenters urge) would be far more lengthy than the time allowed by CEA section 4a(a)(3), *i.e.,* 180 or 270 days from enactment of the Dodd-Frank Act.[47] Because of the stringent time limits in CEA section 4a(a)(2)(B), the Commission concludes that Congress did not intend for the Commission to delay the imposition of limits until it first made antecedent, contract-by-contract necessity findings.

[37] Frank M. Surface, *The Grain Trade During the World War,* at 224 (Macmilliam 1928).

[38] Grain Futures Act of 1922, ch. 369 at section 3, 342 Stat. 998, 999 (1922), codified at 7 U.S.C. 5 (1925–26).

[39] *See* Speculative Position Limits—Exemptions From Commission Rule 1.61; Chicago Mercantile Exchange Proposed Amendments to Rules 3902.D, 5001.E, 3010.F, 3012.F, 3013.F, 3015.F, 4604, and Deletion of Rules 3902.F, 5001.G, 3010.H., 3012.M, 3013.H, and 3015.H, 56 FR 51687 (Oct. 15, 1991) (providing notice of proposed exchange rule changes; request for comments). The Government, either through Congress, CEC or the Commission, has maintained position limits on various agricultural commodities since 1917.

[40] December 2013 Position Limits Proposal, 78 FR at 75681–85; Significant Price Discovery Contracts on Exempt Commercial Markets, 74 FR 12178 (March 23, 2009).

[41] December 2013 Position Limits Proposal, 78 FR at 75682–83 (citing 887 F. Supp. 2d at 273).

[42] *887 F. Supp. 2d* at 269.

[43] *See* In the Matter of Limits on Position and Daily Trading in Wheat, Corn, Oats, Barley, Rye, and Flaxseed, for Future Delivery Findings of Fact, Conclusions, and Order, 3 FR 3145, Dec. 24, 1938.

[44] *See* 2 FR 2460, Nov. 12, 1937.

[45] *See* Limitation on Buying or Selling of Cotton Notice of Hearing, 4 FR 3903, Sep. 14, 1939; Part 150—Orders of the Commodity Exchange Commission Findings of Fact, Conclusions, and Order In the Matter of Limits on Position and Daily Trading in Cotton for Future Delivery, 5 FR 3198, Aug. 28, 1940.

[46] *See* Handling of Anti-Hog-Cholera Serum and Hog-Cholera Virus; Notice of Proposed Rule Making 16 FR 321, Jan. 12, 1951; Limits on Position and Daily Trading in Eggs for Future Delivery, 16 FR 8106, Aug. 16, 1951; *see also* Limits on Positions and Daily Trading in Cottonseed Oil, Soybean Oil, and Lard for Future Delivery, 17 FR 6055, Jul. 4, 1952 (providing notice of a hearing regarding proposed position limits for cottonseed oil, soybean oil, and lard); Limits on Position and Daily Trading in Cottonseed Oil for Future Delivery, 18 FR 443, Jan. 22, 1953 (giving orders setting limits for cottonseed oil, soybean oil, and lard); Limits on Position and Daily Trading in Onions for Future Delivery; Notice of Hearing, 21 FR 1838, Mar. 24, 1956 (conveying notice of a hearing regarding proposed position limits for onions), Limits on Position and Daily Trading in Onions for Future Delivery, 21 FR 5575, Jul. 25, 1956 (providing order setting position limits for onions).

[47] Although the Commission did not meet these deadlines in its first position limits rulemaking, it completed the task (in which the Commission received and addressed more than 15,000 comments) as expeditiously as possible under the circumstances.

b. Prior Rulemaking Requiring Exchanges to Set Limits

The CFTC's preliminary interpretation of the statute is also based in part on its promulgation of a rule in 1981 requiring exchanges to impose limits on all contracts that did not already have limits. In that rulemaking, the Commission, acting expressly pursuant to, *inter alia,* what was then CEA section 4a(1) (predecessor to CEA section 4a(a)(1)), adopted what was then 17 CFR 1.61.[48] This rule required exchanges to set speculative position limits ''for each separate type of contract for which delivery months are listed to trade'' on any DCM, including ''contracts for future delivery of any commodity subject to the rules of such contract market.'' [49] The Commission explained that this action would ''close the existing regulatory gap whereby some but not all contract markets [we]re subject to a specified speculative position limit.'' [50]

Like the Dodd-Frank Act, the 1981 final rule established (and the rule release described) that such limits ''shall'' be established according to what the Commission termed ''standards.'' [51] As used in the 1981 final rule and release, ''standards'' meant the criteria for determining how the required limits would be set.[52] ''Standards'' did not include the antecedent ''necessity'' determination of *whether* to order limits at all. The Commission had already made the antecedent judgment in the rule that ''speculative limits are appropriate for all contract markets irrespective of the characteristics of the underlying market.'' [53] The Commission further concluded that, with respect to any particular market, the ''existence of historical trading data'' showing excessive speculation or other burdens on that market is not ''an essential prerequisite to the establishment of a speculative limit.'' [54]

The Commission thus directed the exchanges to set limits for all futures contracts ''pursuant to the . . . standards of rule 1.61,'' without requiring that the exchanges first make a finding of necessity.[55] And rule 1.61 incorporated the ''standards'' from then-CEA-section 4a(1)—an ''Aggregation Standard'' (46 FR at 50943) for applying the limits to positions both held and controlled by a trader, and a flexibility standard allowing the exchanges to set ''different and separate position limits for different types of futures contracts, or for different delivery months, or from exempting positions which are normally known in the trade as 'spreads, straddles or arbitrage' or from fixing limits which apply to such positions which are different from limits fixed for other positions.'' [56] Because the Commission had already made the antecedent necessity findings, it imposed tight deadlines for the exchanges to establish the limits. It is, accordingly, reasonable to believe that Congress would have structured CEA section 4a(a) similarly, by first making the antecedent necessity determination on its own,[57] then directing the Commission to impose the limits without making an independent determination of necessity, and then using the term ''standards'' just as the Commission did in 1981 to refer to aggregation and flexibility rather than necessity for the required limits.

Indeed, legislative history shows reason to believe that Congress' choice of the word ''standards'' to refer to aggregation and flexibility alone was purposeful and intended it to mean the same thing it did in the Commission's 1981 rule.[58] The language that ultimately became section 737 of the Dodd-Frank Act, amending CEA section 4a(a), originated in substantially final form in H.R. 977, introduced by Representative Peterson, who was then Chairman of the House Agriculture Committee and who would ultimately be a member of the Dodd-Frank Act conference committee.[59] In important respects, the language of H.R. 977 resembles the language the Commission used in 1981, suggesting that the regulation's text may have influenced the statutory text. Like the Commission's 1981 rule, H.R. 977 states that there ''shall'' be position limits in accordance with the ''standards'' identified in CEA section 4a(a).[60] This language was included in CEA section 4a(a)(2) as adopted. Also like the 1981 rule, H.R. 977 established (and the Dodd-Frank Act ultimately adopted) a ''good faith'' exception for positions acquired prior to the effective date of the mandated limits.[61] The committee report accompanying H.R. 977 described it as ''Mandat[ing] the CFTC to set speculative position limits'' and the section-by-section analysis stated that the legislation ''requires the CFTC to set appropriate position limits for all physical commodities other than excluded commodities.'' [62] This closely resembles the omnibus prophylactic approach the Commission took in 1981, when the Commission required the establishment of position limits on all futures contracts according to ''standards'' it borrowed from CEA section 4a(1). The Commission views the history and interplay of the 1981 rule and Dodd-Frank Act section 737 as further evidence that Congress intended to follow much the same approach as the Commission did in 1981, mandating position limits as to all physical commodities.[63]

There is further evidence based on the 1981 rulemaking that Congress would have found the across-the-board prophylactic approach attractive. In 1983, when enacting the Futures Trading Act of 19982, Public Law 97–444, 96 Stat. 2294 (1983), Congress was aware that the Commission had ''promulgated a final rule requiring exchanges to submit speculative position limit proposals for Commission approval for all futures contracts traded as of that date.'' [64] Presented with competing industry and Commission proposals to amend the position limits statute, Congress elected to amend the

[48] Establishment of Speculative Position Limits, 46 FR 50938, 50944–45, Oct. 16, 1981. The rule adopted in 1981 tracked, in significant part, the language of CEA section 4a(1). *Compare* 17 CFR 1.61(a)(1) (1982) *with* 7 U.S.C. 6a(1) (1976).

[49] Establishment of Speculative Position Limits, 46 FR at 50945.

[50] *Id.* at 50939; *see also id.* at 50938 (''to ensure that each futures and options contract traded on a designated contract market will be subject to speculative position limits'').

[51] *Compare id.* at 50941–42, 50945 *with* 7 U.S.C. 6a(a)(2)(A).

[52] Establishment of Speculative Position Limits, 46 FR 50941–42, 50945.

[53] *Id.* at 50941–42 (preamble), 50945 (text of § 1.61(a)(2)).

[54] The Commission believes it likely that, given the prophylactic purposes articulated in current CEA section 4a(a)(1)(A), a similar view of position limits underpins CEA section 4a(a)(2)(A).

[55] *Establishment of Speculative Position Limits.* 46 FR at 50942.

[56] *Id.* at 50945 (§ 1.61(a)). *Compare* 7 U.S.C. 6a(1) (1976).

[57] As discussed in further detail regarding congressional investigations, below, it is especially reasonable to infer that Congress had in fact made such a determination based on the congressional investigations that preceded these Dodd-Frank Act amendments. The fact that the Commission already had the clear authority to impose limits when *it* deemed them necessary bolsters this inference, because there was no need for these Dodd-Frank Act amendments to the position limits statute unless Congress, based on its own determination of necessity, sought to direct the Commission to impose limits.

[58] The relevant broader legislative history is discussed in depth, below.

[59] H.R. 977, 11th Cong. (2009).

[60] 7 U.S.C. 6.

[61] *Compare* H.R. 977, 11th Cong. (2009) *with* Establishment of Speculative Position Limits, 46 FR at 50944.

[62] H.Rept. 111–385, at 15, 19 (Dec. 19, 2009).

[63] *See Union Carbide Corp. & Subsidiaries* v. *Comm'r of Internal Revenue,* 697 F.3d 104, 109 (2d Cir. 2012) (explaining that when an agency must resolve a statutory ambiguity, to do so ''with the aid of reliable legislative history is rational and prudent'' (quoting Robert A. Katzman, Madison Lecture: Statutes, 87 N.Y.U. L. Rev. 637, 659 (2012)).

[64] S. Rep. No. 97–384, at 44 (1982).

CEA ''to clarify and strengthen the Commission's authority in this area,'' including authorizing the Commission to prosecute violations of exchange-set limits as if they were violations of the CEA.[65] Thus, by granting the Commission explicit authority to enforce the Commission-mandated exchange-set limits, Congress in effect ratified the 1981 rule, finding it reasonable to impose position limits on an across-the board basis, rather than following a commodity-by-commodity determination. This contributes to the Commission's judgment that Congress reasonably could have followed a similar approach here and, for the reasons given elsewhere, likely did.

c. Comments [66]

i. *Commission's Experience:* No commenter disputed the depth or breadth of the Commission's experience and expertise with position limits.[67] Most, if not all, commenters, many of them exchanges, traders, and other market participants who have been subject to a long-standing federal and exchange-set limit regime, implicitly or explicitly agreed that at least spot-month position limits continue to be essential to prevent manipulation and excessive volatility and thus serve the public interest.[68] One commenter acknowledged that only the Commission can impose and monitor limits across exchanges.[69] Another opined that only the Commission could impose limits without any conflicts of interest due to the exchanges' imperative to maximize trading volume in order to maximize profit.[70]

ii. *Time to Establish Limits:* No commenters disputed the fact that it took many months for the Commission to make a necessity determination before establishing limits. Some commenters agreed with the determinations the Commission preliminarily drew from its experience.[71]

Several commenters asserted that the Commission's reliance on the timelines to support its view ignores other qualifying language in the statute, such as the terms ''necessary'' and ''appropriate.'' [72] The Commission disagrees, because its interpretation of the statute considers the relevant provisions as an integrated whole, which is required in interpreting any statute. Under this approach, it is appropriate to give consideration to the import of the tight statutory deadlines in light of the Commission's experience that it could not possibly comply with if it had to make necessity findings as it has in the past. These comments fail to take these considerations into account. The Commission addresses the language relied upon by these commenters, infra, in its discussion of the text of the statute.

CME also contended that the 180- and 270-day time limits were a difficulty manufactured by the December 2013 Position Limits Proposal itself. According to CME, the Commission could instead expedite the process for setting limits by utilizing its exchanges and others to determine whether position limits are necessary and appropriate for a particular commodity and, if so, the appropriate types and levels of limits and related exemptions.[73] While this is a plausible approach to generating necessity findings, the Commission views it unlikely that Congress had this approach in mind. The provisions at issue make no mention of exchange-set limits or necessity findings. CME also gave no reason to believe that commodity-by-commodity necessity findings could be made by the exchanges within the prescribed 180/270 day limits.

iii. *1981 Rulemaking:* Some commenters disagreed with the Commission's consideration of the 1981 Rule. CME commented that the 1981 Rule is inapposite because there the Commission was requiring DCMs to impose position limits based on an ''antecedent judgment'' that limits were necessary and appropriate; a necessity finding was not required there.[74] The Commission believes that CME's observation is consistent with its interpretation. In the 1981 rule, the Commission made an antecedent judgment on an across-the-board basis that position limits were necessary, and the exchanges then set them according to specific standards. Here, Congress has made the antecedent judgment on an across-the-board basis that position limits are necessary for physical commodities (*i.e.,* commodities other than excluded commodities), and ordered the Commission to set them according to the same types of standards referenced in the 1981 rule. This supports, rather than undermines, the Commission's interpretation that the ''standards'' in CEA section 4a(a)(1), referred to in CEA section 4a(a)(2) as added by the Dodd-Frank Act, are the flexibility and aggregation standards, much as they were in the 1981 rulemaking interpreting CEA section 4a(a)(1).

Several commenters contended that the Commission's reliance on the 1981 rulemaking ignores that the CFTC then imposed limits only after a fact-intensive inquiry into the characteristics of individual contracts markets to determine the limits most appropriate for individual contract markets.[75] However, the Commission has taken those inquiries into account. The Commission believes these inquiries are significant because while the Commission performed such investigation for some markets, it did not do so for all markets ultimately within the scope of the rule. The 1981 Rule directed exchanges to impose limits on *all* futures contracts for which exchanges had not already imposed limits. For example, citing a then-recent disruption in the silver market, the Commission directed that position limits be imposed prophylactically for all futures and options contracts.[76] It further directed the exchanges to consider the characteristics of particular contracts and markets in determining *how* to set limits (the standards, limit

[65] *Id.*

[66] A list is provided below in Section V, Appendix B, of the full names, abbreviations, dates and comment letter numbers for all comment letters cited in this rulemaking. The Commission notes that many commenters submitted more than one comment letter. Additionally, all comment letters that pertain to the December 2013 Position Limits Proposal and the 2016 Supplemental Position Limits Proposal, including non-substantive comment letters, are contained in the rulemaking comment file and are available through the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1708.* A search can be done online for a particular comment letters by inserting the specific comment letter number in the address in place of the hash tags in the following web address: *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=#####&SearchText.*

[67] One commenter questioned whether the Commission's experience was even relevant. This commenter asserted that the statute clearly and unambiguously does not mandate imposition of position limits, and therefore no consideration or deference to the Commission's experience is appropriate. CL–ISDA/SIFMA–59611 at 7. But the district court disagreed and directed the Commission to employ its experience in resolving the ambiguities in the statute. 887 F. Supp. 2d at 270, 280–82. In any event, for the reasons discussed, the Commission's reading is, at a minimum, reasonable.

[68] *E.g.,* CL–CME–59718 at 2; *see also* CL–ISDA/SIFMA–59611 at 3, 27–32, App. A at 11, App. B at 6 (arguing for alternatives to limits *outside* the spot month).

[69] CL–CME–59718 at 18.

[70] CL–CMOC–60400 at 3; and CL-Public Citizen-60390 at 2–3.

[71] *E.g.,* CL–A4A–59714 at 3.

[72] CL–CME–59718 at 7; and CL–ISDA/SIFMA–59611 at 9, n. 32 (asserting that deadlines are no excuse for the Commission to be ''arbitrary'' or ''sloppy.'').

[73] CL–CME–59718 at 7.

[74] *Id.* at 9–10.

[75] CL–AMG–59709 at 4, n. 8; and CL–CME–59718 at 15–16.

[76] Establishment of Speculative Position Limits, 46 FR at 50940–41 (Oct. 16, 1981).

levels and so on) but not whether to do so.[77] It specifically rejected commenters' concerns that position limits would not be beneficial for all contracts, finding, after ''considerable years of Federal and contract market regulatory experience,'' that ''the capacity of any contract market . . . is not unlimited,'' and there was no need to evaluate the particulars of whether any contract would benefit from position limits.[78] The Dodd-Frank Act amendments unfolded in an analogous fashion. Prior to the Dodd-Frank Act, Congress conducted studies of some, but not all, markets in physical commodities. This history suggests that Congress extrapolated from the conclusions reached in those studies to determine that position limits were necessary for all physical commodities other than excluded commodities.

ISDA and SIFMA asserted that the Commission's reliance on the 1981 rulemaking is unavailing because (1) it cannot alter the Commission's statutory burdens with respect to imposing position limits; and (2) it was never adopted by Congress.[79] The first of these comments begs the question, *i.e.,* what is ''the statutory burden'' intended in the text of CEA sections 4a(a)(1) and (2), read as a whole and considered in context to resolve the ambiguity found by the district court. As to the second comment, the Commission does not contend that Congress adopted the 1981 rule. Rather, it is relevant because the language the district court found ambiguous in the Dodd-Frank Act amendments to CEA section 4a(a) resembles the language of the 1981 rule, and some of the context is parallel. The relevance of this rulemaking is supported by the fact that Congress did ratify it the following year, when it amended the CEA by granting the Commission the authority to enforce the position limits set by the exchanges, reinforcing that as a historical matter Congress had approved an omnibus prophylactic approach as reasonable. That Congress had approved of such an approach before and then used language in the Dodd-Frank Act that closely resembles the very language the Commission used when it mandated that omnibus approach is another factor that weighs on the side of interpreting the statutory ambiguity to find a mandate to impose physical commodity positon limits.[80]

Finally, several commenters asserted that the Commission cannot consider the 1981 rulemaking because the Commission later allowed exchanges to set position accountability levels in lieu of limits for some commodities and contracts.[81] Those later exemptions do not, however, alter the language or import of the 1981 rule, which directed the exchanges to impose limits in accordance with ''standards'' that did not include a necessity finding. The 1981 rulemaking is the last time the Commission definitively addressed and identified the ''standards'' in CEA section 4a(a)(1) for imposing across-the-board, prophylactic position limits in a manner akin to the Dodd-Frank Act amendments. That other approaches intervened is not inconsistent with the inference that Congress was influenced by the 1981 rulemaking in the Dodd-Frank Act amendments.

4. Legislative History of the Dodd-Frank Act Amendments to Position Limits Statute

As discussed in the 2016 Supplemental Position Limits Proposal, the Commission has also considered the legislative history of the Dodd-Frank Act amendments.[82] That history contains further indication that Congress intended to mandate the imposition of limits for physical commodity derivatives without requiring the Commission to make antecedent necessity findings, and did not intend the term ''standards'' to include such a finding.[83]

The Commission's preliminary interpretation of CEA section 4a(a)(2) is based in part on congressional concerns that arose, and congressional actions taken, before the passage of the Dodd-Frank Act amendments.[84] During the 1990s, the Commission began permitting exchanges to experiment with an alternative to position limits—position accountability, which allowed a trader to hold large positions subject to reporting requirements and gave the exchange the right to order the trader to hold or reduce its position.[85] Then, in the Commodity Futures Modernization Act of 2000 (''CFMA''),[86] Congress expressly authorized the use of position accountability as an alternative means to limit speculative positions.[87]

Following this experiment with position accountability, Congress became concerned about fluctuations in commodity prices. In the late 1990s and 2000s, Congress conducted several investigations that concluded that excessive speculation accounted for significant volatility and price increases in physical commodity markets. For example, a congressional investigation determined that prices of crude oil had risen precipitously and that ''[t]he traditional forces of supply and demand cannot fully account for these increases.'' [88] The investigation found evidence suggesting that speculation was responsible for an increase of as much as $20–25 per barrel of crude oil, which was then at $70.[89] Subsequently, Congress found similar price volatility stemming from excessive speculation in the natural gas market.[90]

These investigations appear to have informed the drafting of the Dodd-Frank Act. During hearings prior to the passage of the Dodd-Frank Act, Senator Carl Levin, then-Chair of the Senate Permanent Subcommittee on Investigations that had conducted them, urged passage to ensure ''a cop on the beat in all commodity markets where U.S. commodities are traded . . . that can enforce the law to prevent excessive speculation and market manipulation.'' [91] In addition, Congress viewed the nearly $600 trillion little-regulated swaps market as a ''major contributor to the financial crisis'' because excessive risk taking, hidden leverage, and under collateralization in that market created a systemic risk of harm to the entire financial system.[92] As Senator Cantwell and others explained, it was imperative that the CFTC have the ability to regulate swaps through

[77] *Id.*

[78] *Id.*

[79] CL–ISDA/SIFMA–59611 at 9.

[80] *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986).

[81] *E.g.,* CL–ISDA/SIFMA–59611 at 9; and CL–AMG–59709 at 4, n.8.

[82] *Union Carbide Corp. & Subsidiaries* v. *Comm'r of Internal Revenue,* 697 F.3d 104, 109 (2d Cir. 2012) (explaining that when an agency must resolve a statutory ambiguity, to do so ''with the aid of reliable legislative history is rational and prudent'' (quoting Robert A. Katzman, Madison Lecture: Statutes, 87 N.Y.U. L. Rev. 637, 659 (2012)).

[83] December 2013 Position Limits Proposal, 78 FR at 75682, 75684–85.

[84] *Id.* at 75682.

[85] Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR 4144, 4147 (Jan. 26, 2010); Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038, 24048–49 (May 5, 1999).

[86] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000).

[87] 7 U.S.C. 7(d)(3) (2009).

[88] *The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat,* Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, S. Prt. No. 109–65 at 1 (June 27, 2006).

[89] *Id.* at 12; *see also Excessive Speculation in the Natural Gas Market,* Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate at 1 (June 25, 2007), *available at http://www.levin.senate.gov/imo/media/doc/supporting/2007/PSI.Amaranth.062507.pdf* (last visited Mar. 18, 2013) (''Gas Report'').

[90] Gas Report at 1–2.

[91] 156 Cong. Record S. 4064 (daily ed. May 20, 2010).

[92] S. Rep. 111–176, at 29 (2010).

''position limits,'' ''exchange trading,'' and ''public transparency'' to avoid a recurrence of the instability that rippled through the entire financial system in 2008.[93] And in the House of Representatives, Representative Collin Peterson, then-Chairman of the House Committee on Agriculture and author of an amendment strengthening the position limits provision as discussed below, reminded his colleagues that his committee's own ''in-depth review of derivative markets began when we experienced significant price volatility in energy futures markets due to excessive speculation—first with natural gas and then with crude oil. We all remember when we had $147 oil. . . . This conference report [now] includes the tools we authorized and the *direction* to the CFTC to mitigate outrageous price spikes we saw 2 years ago.'' [94] Congress's focus in its investigations on excessive speculation involving physical commodities is reflected in the scope of the Dodd-Frank Act's position limits amendment: It applies only to physical commodities.

The evolution of the position limits provision in the bills before Congress from permissive to mandatory supports a preliminary determination that Congress intended to do something more than continue the long-standing statutory regime giving the Commission discretionary authority to impose limits.[95] As initially introduced, the House bill that became the Dodd-Frank Act provided the Commission with discretionary authority to issue position limits, stating that the Commission ''may'' impose them.[96] However, the House replaced the word ''may'' with the word ''shall,'' suggesting a specific judgment that the limits should be mandatory, not discretionary. The House also added other language militating in favor of interpreting CEA section 4a(a)(2) as a mandate. In two new subsections, it set the tight deadlines described above.[97] After changing ''may'' to ''shall,'' the House further amended the bill to refer in one instance to the limits for agricultural and exempt commodities as ''required.'' [98] And only after the language had changed from permissive to mandatory, the House added the requirement that the Commission conduct studies on the ''effects (if any) of position limits imposed'' [99] to determine if the required position limits were harming U.S. markets.[100] Underscoring its intent to amend the bill to include a mandate, the House Report accompanying the House Bill stated that it ''required'' the Commission to impose limits.[101] The Conference Committee adopted the House bill's amended provisions on position limits and then strengthened them even further by referring to the position limits as ''required'' an additional three times, bringing the total to four times in the final legislation the number of references in statutory text to position limits as ''required.'' [102]

a. Comments

A number of commenters generally supported or opposed the Commission's consideration of Congressional investigations and the textual strengthening of the Dodd-Frank bill. The Commission addresses specific comments below.

i. *Congressional Investigations:* Several commenters agreed that the Congressional investigations, hearings and reports support the view that Congress decided to mandate position limits.[103] They pointed out that Congress's investigations followed amendments in 2000 to the CEA as part of the CFMA that exempted swaps and energy derivatives from position limits and expressly authorized exchanges to impose position accountability levels in lieu of limits.[104] According to the Commodity Markets Oversight Coalition (''CMOC''), ''witnesses confirmed [at those hearings] that the erosion of the position limits regime was a leading cause in market instability and wild price swings.'' [105] Senator Levin, who presided over the investigations, commented that those investigations, conducted from 2002 onwards, ''into how our commodity markets function, focusing in particular on the role of excessive speculation on commodity prices'' ''have demonstrated that the failure to impose and enforce effective position limits have led to greater speculation and increased price volatility in U.S. commodity markets.'' [106] According to Senator Levin, the investigations ''provide[d] strong support for the Dodd-Frank decision to require the Commission to impose position limits on all types of commodity futures, swaps, and options.'' [107] Senator Levin also stated that the harms of excessive speculation continue to be felt in the absence of the mandated limits. He cited recent actions by federal regulators to stop manipulation in energy markets, and opined that the continuing problems in the absence of the mandated limits only reinforce the reasonableness of the Commission's view that Congress intended to mandate position limits as a prophylactic measure.[108] Senator Levin's point was echoed by Public Citizen, a consumer advocacy organization, and Airlines for America, a trade association for the U.S. scheduled airline industry.[109]

Other commenters disagreed with the Commission's preliminary determination that the Congressional investigations indicate that Congress intended to mandate limits. CME asserted that the investigations do not in themselves demonstrate that Congress required the CFTC to impose position limits as recommended even if those investigations suggest that excessive speculation poses a burden on interstate commerce in certain physical commodity markets.[110] Citadel questioned whether the cited reports could be ''broadly indicative of Congressional intent,'' or could ''redefine statutory language that has existed for nearly eight decades.'' [111]

But the Commission is not relying solely on these reports. The question, rather, is whether these Congressional

[93] *See, e.g.,* 156 Cong. Rec. S 2676–78, S 2698–99, S 3606–07, S 3966, S 5919 (daily ed. April 27, May 12, 19, July 15, 2010 (providing statements of Senators Cantwell, Feinstein, Lincoln)).

[94] 156 Cong. Rec. H5245 (daily ed. June 30, 2010) (emphasis added).

[95] December 2013 Position Limits Proposal, 78 FR at 75684–85.

[96] Initially, the House used the word ''may'' to permit the Commission to impose aggregate positions on contracts based upon the same underlying commodity. *See* H.R. 4173, 11th Cong. 3113(a)(2) (providing the version introduced in the House, Dec. 2, 2009) (''Introduced Bill''); *see also* Brief of Senator Levin et al as *Amicus Curiae* at 10–11, *ISDA* v. *CFTC,* no. 12–5362 (D.C. Cir. Apr. 22, 2013), Document No. 1432046 (hereafter ''Levine Br.'').

[97] Levin Br. at 11 (citing H.R. 4173, 111th Cong. 3113(a)(5)(2), (7) (as passed by the House Dec. 11, 2009) (''Engrossed Bill'')).

[98] *Id.* at 12. (citing Engrossed Bill at 3113(a)(5)(3)).

[99] 15 U.S.C. 8307; Engrossed Bill at 3005(a).

[100] *See* Levin Br. at 13–17; *see also* DVD: October 21, 2009 Business Meeting (House Agriculture Committee 2009), *ISDA* v. *CFTC,* Dkt. 37–2 Exh. B (Apr. 13, 2012) at 59:55–1:02:18.

[101] Levin Br. at 23 (citing H.R. Rep. No. 111–373 at 11 (2009)).

[102] Levin Br. at 17–18.

[103] CL–CMOC–59720 at 2; CL–Sen. Levin–59637 at 2–5; and CL–A4A–59686 at 2–3.

[104] CL–IECA–59964 at 2; CL–A4A–59686 at 2; and CL–Public Citizen–59648 at 2–3.

[105] CL–CMOC–59720 at 2.

[106] CL–Sen. Levin–59637 at 3–4.

[107] *Id.*

[108] *Id.* at 2.

[109] CL–Public Citizen–59648 at 2–3, and CL–A4A–59686 at 1–2.

[110] CL–CME–59718 at 8. CME also asserted that the Congressional investigation into excessive speculation in natural gas futures focused more on the fact that position accountability rules for exchange-traded natural gas futures were not in place for ''look-alike'' natural gas swaps traded ''over the counter,'' permitting regulatory arbitrage.

[111] CL–Citadel–59717 at 3.

investigations and findings of excessive speculation and price volatility in energy markets, conducted and issued when the Commission was authorized but not required by law to impose limits, may be one indication, among others, that Congress sought to do something more with the Dodd-Frank Act amendments than to maintain the statutory status quo for futures on physical commodities. In the Commission's preliminary view, it is more plausible, based on these investigations, that Congress sought to do something more—to require that the Commission impose limits for the covered commodities without having to first find that they are necessary to prevent excessive speculation. Contrary to Citadel's comment, the Commission is not relying on the investigations and reports to redefine statutory language that has existed for nearly eight decades. Rather, the Commission believes that the investigations favor the conclusion that Congress added CEA section 4a(a)(2) to the pre-existing language in order to strengthen the long-standing position limits regime for a category of commodity derivatives—physical commodities—that Congress's investigations revealed to be vulnerable to substantial price fluctuations.

ii. *Evolution of the Dodd-Frank Bill:* Several commenters agreed with the Commission's preliminary determination that the strengthening of the position limits language in the Dodd-Frank bill evinces Congress' intent to mandate limits.[112]

CME and MFA disagreed; while they do not directly address this point, they believed that the strengthening of the language in the Dodd-Frank bills does not indicate that Congress intended to de-couple the enacted directive to impose position limits from the necessity finding of CEA section 4a(a)(1).[113] The Commission, however, preliminarily considers this the most plausible interpretation. The evolution of the bill from one stating the Commission ''may'' impose position limits to include statements that the Commission ''shall'' impose them, that they are ''required,'' and that the Commission shall study their effects indicates intentional progressive refinement from a bill that would continue the status quo for futures to one that added special nondiscretionary requirements for a category of commodities. This legislative evolution also supports the conclusion ''standards'' does not include an antecedent necessity finding.

5. The Commission Preliminarily Interprets the Text of CEA Section 4a(a) as an Integrated Whole, In Light of Its Experience and Expertise.

In the December 2013 Position Limits Proposal, the Commission discussed how its interpretation of the text of CEA section 4a(a), considered as an integrated whole, is consistent with and supports its conclusions based on experience and expertise. As discussed, the ambiguity is the meaning of CEA section 4a(a)(2)'s statement that the Commission ''shall'' establish limits on physical commodities other than excluded commodities ''[i]n accordance with the standards'' set forth in CEA section 4a(a)(1). If ''standards'' includes a necessity finding, then a necessity finding is required before limits can be imposed on agricultural and exempt commodities. If not, the Commission must impose limits for that subset of commodity derivatives. In the December 2013 Position Limits Proposal, the Commission resolved the ambiguity by preliminarily determining that the reference in CEA section 4a(a)(2) to the ''standards'' in pre-Dodd-Frank section 4a(a)(1) refers to the criteria in CEA section 4a(a)(1) for *how* the required limits are to be set and not the antecedent finding *whether* limits are even necessary. The Commission explained that, in its preliminary view, ''standards'' refers to, in CEA section 4a(a)(1), only the following two provisions. First, the limits must account for situations in which one person controls another or two persons act in concert, by aggregating those positions as if the trading were done by one person acting alone (aggregation). The second ''standard'' in CEA section 4a(a)(1) states that the limits may be different for different commodities, markets, delivery months, etc. (flexibility).

The Commission reasoned that this construction of ''standards'' seemed most consistent with the Commission's experience and history administering position limits. It also seemed most consistent with the text of CEA section 4a(a)(2), the rest of CEA section 4a(a), and the Act as a whole. The Dodd-Frank Act amendments to CEA section 4a(a) largely re-shape CEA section 4a(a) by adding a new, detailed, and comprehensive section 4a(a)(2) that applies only to a subset of the derivatives regulated by the Commission—physical commodities like wheat, oil, and gold—and not intangible commodities like interest rates. Amended CEA section 4a(a) repeatedly uses the word ''shall'' and refers to the new limits as ''required,'' differentiating it from the text that existed before the Dodd-Frank Act.[114] Never before in the Commission's experience had Congress set deadlines on action for position limits by a date certain, much less the short time provided in CEA section 4a(a)(2)(B).[115] Nor, in the Commission's experience, had Congress required a report by a given date or committed itself to hold hearings on the report within 30 days thereafter.[116] The Commission preliminarily concluded that, considered as a whole in light of this experience, these provisions evince a Congressional mandate that the Commission impose limits on physical commodities, that it do so quickly, that it impose limit levels in accordance with certain requirements, and that it study the effectiveness of the limits *after* imposing them and then report to Congress.

By the same token, the Commission preliminarily determined that interpreting CEA section 4a(a)(2) as it proposed to do would not render superfluous the necessity finding requirement in CEA section 4a(a) because that section still applies to the non-physical (excluded) commodity derivatives that are not subject to CEA section 4a(a)(2). Nor would it nullify other parts of CEA section 4a(a), as those are unaffected by this reading.

The Commission received a number of comments on its discussion of the interplay between the statute's text and the Commission's experience and expertise. The Commission has considered them carefully, but is not thus far persuaded. The Commission preliminarily believes that it is a reasonable interpretation of the text of the statute considered as an integrated whole and viewed through the lens of the Commission's experience and expertise, that Congress mandated that the Commission establish position limits for physical commodities. It is also reasonable to construe the reference to ''standards'' as an instruction to the Commission to apply the flexibility and aggregation standards set forth in CEA section 4a(a)(1), just as the Commission instructed the exchanges to impose

[112] CL–Public Citizen–59648 at 2.

[113] CL–CME–59718 at 2, 5–12 (maintaining statutory language requires necessity finding); and CL–MFA–59606 at 9 (citing S. Rept. 111–176 (Apr. 30, 2010, which states ''[t]his section authorizes the CFTC to establish aggregate position limits. . . .'').

[114] *E.g.,* CEA sections 4a(a)(2)(A) (providing that the Commission ''shall'' set the limits); 4a(a)(2)(B) (referring twice to the ''limits required'' and directing that they ''shall'' be established by a time certain); 4a(a)(3)(referring to the limits ''required'' under subparagraph (A)); 4a(a)(5)(stating that the Commission ''shall'' concurrently establish limits on economically equivalent contracts).

[115] 7 U.S.C. 6a(a)(2(B).

[116] 15 U.S.C. 8307.

omnibus limits in 1981. And it is at least reasonable to conclude that Congress, in directing the Commission to impose the ''required'' limits on extremely tight deadlines, did not intend the Commission to independently make an antecedent finding that any given position limit for physical commodities is ''necessary''—a finding that would take many months for each individual physical commodity contract.

a. Comments

Several commenters disputed the Commission's interpretation, based on its experience and expertise, that CEA section 4a(a)(2) is a mandate for prophylactic limits based on their view that the statute unambiguously requires the Commission to promulgate position limits only after making a necessity finding, and only ''as appropriate.'' [117] But in *ISDA* v. *SIFMA,* the district court held that the statute was ambiguous in this respect, and the Commission here is following the court's direction to apply its experience and expertise to resolve the ambiguity. This is consistent with a commenter's statement that ''the meshing of the Dodd-Frank Act into the CEA may have created some ambiguity from a technical drafting/wording standpoint.'' [118] Nevertheless, the Commission addresses these textual arguments to show that its preliminary interpretation is, at a minimum, a permissible one.

The commenters that disagreed with the Commission's preliminary conclusion argued that the Commission: (i) Erred in determining that the reference to ''standards'' in CEA section 4a(a)(2) does not include the necessity finding in CEA section 4a(a)(1); (ii) failed to consider other provisions that show Congress intended to require the Commission to make antecedent findings; and (iii) incorrectly determined that its interpretation is the only way to give effect to CEA section 4a(a)(2).

i. *Meaning of Standards:* Several commenters asserted that the language: ''[in] accordance with the standards set forth in paragraph (1)'' in section 4a(a)(2) must include the phrase ''as the Commission finds are necessary to diminish, eliminate, or prevent [the burden on interstate commerce]'' in CEA section 4a(a)(1).[119] They believed that the Commission's contrary interpretation constitutes an implied repeal of the necessity finding language.[120]

The Commission disagrees that this constitutes an implied repeal. First, CEA section 4a(a)(2) applies only to physical commodities, not other commodities. Accordingly, the requirement of a necessity finding in section 4a(a)(1) still applies to a broad swath of commodity derivatives. Second, there is no implied repeal even in part, because the Commission is interpreting express language—the term ''standards.'' The Commission must bring its experience to bear when interpreting the ambiguity in the new provision, and the Commission preliminarily believes that the statute, read in light of the Commission's experience administering position limits and making necessity findings, is more reasonably read as an express limited exception, for physical commodities futures and economically equivalent swaps, to the preexisting authorization in CEA section 4a(a)(1) for the Commission to impose limits when it finds them necessary.

ii. *Other Limiting Language:* Some commenters pointed to a number of terms and provisions that they say support the notion that the Commission must make antecedent findings before imposing any limits under new CEA section 4a(a)(2).

First, some commenters asserted that the term ''as appropriate'' in CEA sections 4a(a)(3) (factors that the ''Commission, ''as appropriate'' must consider when it ''shall set limits'') and 4a(a)(5)(A) (providing that Commission ''shall'' ''as appropriate'' establish limits on swaps that are economically equivalent to physical commodity futures and options) require the Commission to make antecedent findings that the limits required under CEA section 4a(a)(2) are appropriate before it may impose them.[121] The district court found these words to be ambiguous. In the court's view, they could refer to the Commission's obligation to impose limits (*i.e.,* the Commission shall, ''as appropriate,'' impose limits), or to the level of the limits the Commission is to impose.[122]

The Commission preliminarily believes that when these words are considered in the context of CEA section 4a(a)(2)–(7) as a whole, including the multiple uses of the new terms ''shall'' and ''required'' and the historically unique stringent time limits for imposing the covered limits and post-imposition study requirement, it is more reasonable to interpret these words as referring to the level of limits, *i.e.,* the Commission must set physical commodity limits at an appropriate level, and not to require the Commission to first determine whether the required limits are appropriate before it may even impose them.[123] In other words, while Congress made the threshold decision to impose position limits on physical commodity futures and options and economically equivalent swaps, Congress at the same time delegated to the Commission the task of setting the limits at levels that would maximize Congress' objectives.

Some commenters claimed that other parts of CEA section 4a(a)(2) undermine the Commission's determination. First, CEA section 4a(2)(C) states that the ''[g]oal . . . [i]n establishing the limits required'' is to ''strive to ensure'' that trading on foreign boards of trade (''FBOTs'') for commodities that have limits will be subject to ''comparable limits.'' It goes on to state that for ''any limits to be imposed'' the Commission will strive to ensure that they not shift trading overseas. Commenters argue that ''any limits to be imposed'' under CEA section 4a(a)(2)(A) implies that limits might not be imposed under that section. However, in the context discussed and in view of the reference in that section to position limits

[117] CL–CME–59718 at 11; CL–MFA–59606. at 9; etc. *But see, e.g.,* CL–A4A–59714 at 2–3 (noting that notwithstanding the ''meshing'' problems, ''it is clear that the Commission's interpretation is reasonable and fully supported by the context in which the Dodd-Frank Act was passed, its legislative history, and the many other factors identified in the NPRM''); CL–AFR–59685 at 1; CL–Public Citizen–60390 at 2; CL–Public Citizen–59648 at 2; CL–Sen. Levin–59637 at 4; and CL–CMOC–59720 at 2–3.

[118] CL–A4A–59714 at 2–3.

[119] *See, e.g.,* CL–CME–59718 at 12–13; CL–Citadel–59717 at 3–4; CL–AMG–59709 at 3; CL–MFA–59606 at 9–10; CL–ISDA/SIFMA–59611 at 5–7; CL–IECAssn–59679 at 3–4; and CL–FIA–59595 at 6–7.

[120] CL–CME–59718 at 2, 12 (citing *Hunter* v. *FERC,* 711 F.3d 155 (D.C. Cir. 2013)).

[121] *See, e.g.,* CL–ISDA/SIFMA–59611 at 5, 7–8 (citing CEA section 4a(a)(5) as authorizing aggregate position limits ''as appropriate'' for swaps that are economically equivalent to DCM futures and options and CEA section 4a(a)(3), which directs the Commission to set position limits as appropriate and to the maximum extent practicable, in its discretion: (i) To diminish, eliminate, or prevent excessive speculation; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.).

[122] 887 F.Supp. 2d at 278; December 2013 Position Limits Proposal, 78 FR at 75685, n. 59.

[123] CEA section 4a(a)(2)(A) provides that the Commission ''shall'' establish limits; CEA section 4a(a)(2)(B) refers multiple times to the ''required'' limits in (A) that ''shall'' be established within 180 or 270 days of enactment of Dodd-Frank; and CEA section 4a(a)(2)(C) provides that ''[i]n establishing the limits required'' the Commission shall ''strive to ensure'' that trading on foreign boards of trade for commodities that have limits will be subject to ''comparable limits,'' thereby assuming that limits must be established and requiring that they be set at levels in accordance with particular considerations. CEA section 4a(a)(3) contains ''specific limitations'' on the ''required'' limits which are most reasonably understood to be considerations for the Commission for the levels of limits.

''required,'' the reference to ''any limits to be imposed'' refers again to the levels or other standards applied. That is, whatever the contours the Commission chooses for the required limits, they must meet the goal set forth in that section.

Second, CEA section 4a(a)(3)(B) states certain factors that the Commission must consider in setting limits under CEA section 4a(a)(2).[124] The Commission sees no inconsistency with mandatory position limits—the Commission must consider these factors in setting the appropriate levels and other contours. Indeed, CEA section 4a(a)(3)(B) applies by its own terms to ''establishing the limits required in paragraph (2).'' Moreover, consideration of these factors under CEA section 4a(a)(3) is not mandatory, as some commenters suggest,[125] but rather to be made ''in [the Commission's] discretion.'' [126] In the Commission's preliminary view, there is thus nothing in these provisions at odds with the Commission's interpretation that it is required by CEA section 4a(a)(2)(A) to impose limits on a subset of commodities without making antecedent findings whether they should be imposed, particularly when the language at issue is construed, as it should be, with other terms in CEA section 4a(a)(2)–(7), discussed above, that use mandatory language and impose time limits.

Some commenters stated that two pre-Dodd Frank Act provisions in CEA section 4a undermine the Commission's interpretation. The first is CEA section 4a(e),which states, ''if the Commission shall have fixed limits . . . for any contract . . . , then the limits'' imposed by DCMs, SEFs or other trading facilities ''shall not be higher than the limits fixed by Commission.'' [127] According to a commenter, the ''if/then'' formulation suggests position limits should not be presupposed for any contract.[128] The Commission sees the provision differently. CEA section 4a(a)(2) applies only to a subset of futures contracts—contracts in physical commodities. For other commodities, position limits remain subject to the Commission's determination of necessity, and the ''if/then'' formulation applies and remains logical. There is, accordingly, no inconsistency.

[124] *See, e.g.,* CL–CME–59718 at 11, 13–17, and CL–FIA–59595 at 5–6.

[125] *See, e.g.,* CL–AMG–59709 at 3; and CL–CME–59718 at 13–17.

[126] CEA section 4a(a)(3), 7 U.S.C. 6a(a)(3).

[127] CEA section 4a(e), 7 U.S.C. 6a(e).

[128] CL–CME–59718 at 10 (citing CEA section 4a(e)).

The second pre-Dodd Frank Act provision the commenters mentioned is CEA section 5(d)(5); [129] it gives the exchanges discretionary authority to impose position limits on all commodity derivatives ''as is necessary and appropriate.'' [130] There is, however, no inconsistency. Exchanges retain the discretionary authority to set position limits for the many commodities not covered by CEA section 4a(a)(2), and they retain the discretion to impose position limits for physical commodities, so long as the limits are no higher than federal position limits.

Some commenters cited other language in CEA section 5(d)(5) to support their assertion that, notwithstanding the Dodd-Frank Act amendments discussed above requiring the Commission to impose limits, the Commission retains and should exercise its discretion to impose position accountability levels in lieu of limits or delegate that authority exchanges to do so. CEA section 5(d)(5) authorizes exchanges to adopt ''position limitations or position accountability'' levels in order to reduce the threat of manipulation and congestion. These commenters also pointed out that the Commission has previously endorsed accountability levels for exchanges in lieu of limits.[131] Other commenters disagree. They asserted that, given what they interpret as a mandate in CEA section 4a(a)(2) for the Commission to impose position limits for physical commodities, it would be inappropriate for the Commission to consider imposing position accountability levels instead for those commodities, or to allow exchanges to do so.[132]

[129] 7 U.S.C. 7(d)(5).

[130] CL–CME–59718 at 11 (citing 7 U.S.C. 7(d)(5)).

[131] CL–CME–59718 at 10; CL–AMG–59709 5–6; CL–FIA–59595 at 12–13; CL–FIA–60392 at 4–6, 8 (asserting that under the Commission's general rulemaking authority in CEA section 8a(5), 7 U.S.C. 12a(5), ''the Commission has the power to adopt, as part of an accountability regime, a rule pursuant to which it or a DCM could direct a market participant to reduce speculative positions above an accountability limit because that authority is 'reasonably necessary to effectuate' a position accountability rule,'' and observing that the Commission previously determined in rulemakings that exchange-set accountability levels represent an alternative means to limit excessive speculation); CL–FIA–60303 at 3–4; CL–DBCS–59569 at 4; CL–MFA–60385 at 7–8, 10–14; and CL–Olam–59658 at 1–2 (declaring that the Commission can and should permit exchanges to administer position accountability levels in lieu of Commission-set limits under CEA section 4a(a)(2)).

[132] CL–Public Citizen–60390 at 3–4 (noting other concerns with exchange set limits or accountability levels); CL–IECA 60389 at 3–4 (asserting that the Commission should not cede its authority to exchanges); CL–AFR–60953 at 4; CL–A4A–59686 at 2–3; CL–IECA–59671 at 2; and CL–CMOC–59720 at 2.

The Commission agrees with the latter group of commenters and finds the former reading strained. CEA section 4a(a)(2) makes no mention of position accountability levels. Regardless whether pre-Dodd Frank section 5(d)(5) allows exchanges to set accountability levels in lieu of limits where the Commission has not set limits, and regardless whether the Commission has in the past endorsed exchange-set position accountability levels in lieu of limits, CEA section 4a(a)(2) does not mention that tool. If anything, reference to accountability levels elsewhere in the CEA shows that Congress understands that exchanges have used position accountability, but made no reference to it in amended CEA section 4a(a).

iii. *Avoiding Surplusage or Nullity:* Several commenters took issue with the Commission's preliminary determination that its interpretation is necessary in order to avoid rendering CEA section 4a(a)(2)(A) surplusage. These commenters suggested that reading the term ''standards'' in CEA section 4a(a)(2)(A) to include the antecedent necessity finding in CEA section 4a(a)(1) will not render CEA section 4a(a)(2) surplusage because if the Commission finds a position limit is ''necessary'' and ''appropriate,'' it now must impose one (as opposed to pre-Dodd-Frank, when the Commission had authority but not a mandate under CEA section 4a(a) to impose limits).[133] The Commission finds this reading highly unlikely. There is no history of the Commission determining that limits are necessary and appropriate, but then declining to impose them. Nor is it reasonable to expect that the Commission might do so. Indeed, historically necessity findings were made only in connection with establishing limits.

Furthermore, if Congress had still wanted to leave it to the Commission to ultimately decide whether a limit was necessary, there is no reason for it to have also set tight deadlines, repeat multiple times that the limits are ''required,'' and direct the agency to conduct a study after the limits were imposed. In other words, requiring the Commission to make an antecedent necessity finding would render many of the Dodd-Frank Act amendments superfluous. For example, if the Commission determined limits were not necessary then, contrary to CEA section 4a(a)(2), no limits were in fact ''required,'' no limits needed to be imposed by the deadlines, and no study

[133] CL–ISDA/SIFMA–59611 at 5; and CL–MFA–59606 at 9–10. The District Court expressed the same concern. 887 F. Supp. 2d at 274–75.

needed to be conducted. But none of these provisions were phrased in conditional terms (*e.g., if* the Commission finds a limit necessary, *then* it shall . . .). Had Congress wanted the Commission to continue to be the decisionmaker regarding the need for limits, it could have expressed that view in countless ways that would not strain the statutory language in this way.

CME contended that the Commission's position—that requiring a necessity finding would essentially give the Commission the same permissive authority it had before the Dodd-Frank Act amendments—is ''short-sighted'' because other provisions of CEA section 4a(a) ''would still have practical significance.'' In support of this view, CME stated that new CEA sections 4a(a)(2)(C) and 4(a)(3)(B) have significance even if the Commission is required to make a necessity finding because they ''set forth safeguards that the CFTC must balance when it establishes limits'' after ''the CFTC finds that such limits are necessary.'' The Commission preliminarily believes it unlikely that Congress would have intended that. On CME's reading, the statute would place additional requirements to constrain the Commission's *preexisting* authority. Given the background for the amendments, particularly the studies that preceded the Dodd-Frank Act, the Commission sees no reason why Congress would have placed *additional* constraints, nor any reason it would have placed them with respect to physical commodities but not excluded commodities or others. This comment also does not address the thrust of the Commission's interpretation, which is that finding a mandate is the only way to read the entirety of the statute harmoniously, including the timing requirements of CEA section 4a(a)(2)(B) and the reporting requirements of Section 719 of the Dodd-Frank Act, account for the historical context, and, at the same time, avoid reading CEA section 4a(a)(2)(A) as the functional equivalent of CEA section 4a(a)(1).[134] CME also cited CEA section 4a(a)(5), which requires position limits for economically equivalent swaps, to make the same point that there are still meaningful provisions in CEA section 4a(a), even with a necessity finding. But CEA section 4a(a)(1) already authorizes the Commission to establish limits on swaps as necessary, and so the authority, which would be discretionary under CME's reading, to impose limits on economically equivalent swaps would add nothing to the statute and the amendment would be wholly superfluous.

6. Conclusion

Having carefully considered the text, purpose and legislative history of CEA section 4a(a) as a whole, along with its own experience and expertise and the comments on its proposed interpretation, the Commission preliminarily believes for the reasons above that Congress—while not expressing itself with ideal clarity—decided that position limits were necessary for a subset of commodities, physical commodities, mandated the Commission to impose them on those commodities in accordance with certain criteria, and required that the Commission do so expeditiously, without first making antecedent findings that they are necessary to prevent excessive speculation. Consistent with this interpretation, Congress also directed the agency to report back to Congress on their effectiveness within one year. In the Commission's preliminary view, this interpretation, even if not the only possible interpretation, best gives effect to the text and purpose of the Dodd-Frank Act amendments in the context of the pre-existing position limits provision, while ensuring that neither the amendments nor the pre-existing language is rendered superfluous.

C. Necessity Finding

1. Necessity

The Commission reiterates its preliminary alternative necessity finding as articulated in the December 2013 Position Limits Proposal: [135] Out of an abundance of caution in light of the district court decision in *ISDA* v. *CFTC,*[136] and without prejudice to any argument the Commission may advance in any forum, the Commission reproposes, as a separate and independent basis for the Rule, a preliminary finding herein that the speculative position limits in this reproposed Rule are necessary to achieve their statutory purposes.

As described in the Proposal, the policy basis and reasoning for the Commission's necessity finding is illustrated by two major incidents in which market participants amassed massive futures positions in silver and natural gas, respectively, which enabled them to cause sudden and unreasonable fluctuations and unwarranted changes in the prices of those commodities. CEA section 4a(a)(1) calls for position limits for the purpose of diminishing, eliminating, or preventing the burden of excessive speculation.[137] Although both episodes involved manipulative intent, the Commission believes that such intent is not necessary for an excessively large position to give rise to sudden and unreasonable fluctuations or unwarranted changes in the price of an underlying commodity. This is illustrated, for example, by the fact that when the perpetrators of the silver manipulation lost the ability to control their scheme, *i.e.,* to manipulate the market at will, they were forced to liquidate quickly, which, given the amount of contracts sold in a very short time, caused silver prices to plummet. Any trader who was forced by conditions in the market or their own financial condition to liquidate a very large position could predictably have similar effects on prices, regardless of their motivation for amassing the position in the first place. Moreover, although these two episodes unfolded in contract markets for silver and natural gas, and unfolded at two different times in the past, there is nothing unique about either market at either relevant time that causes the Commission to restrict its preliminary finding of necessity to those markets or to reach a different conclusion based on market conditions today. Put another way, any contract market has a limited ability, closely linked to the market's size, to absorb the establishment and liquidation of large speculative positions in an orderly manner.[138] The silver and natural gas examples illustrate these issues, but the reasoning applies beyond their specific facts. Accordingly, the Commission preliminarily finds it necessary to implement position limits as a prophylactic measure for the 25 core referenced futures contracts.[139]

[134] In this vein, then-Commissioner Mark Wetjen, who was an aide to Senate Majority Leader Harry Reid during the Dodd-Frank legislative process, stated at the Commission's public meeting to adopt the December 2013 proposal that to read Section 4a(a)(2)(A) to require the same antecedent necessity finding as Section 4a(a)(1) ''does not comport with my understanding of the statute's intent as informed by my experience working as a Senate aide during consideration of these provisions.'' Statement of Commissioner Mark Wetjen, Public Meeting of the Commodity Futures Trading Commission (Nov. 5, 2013), *http://www.cftc.gov/PressRoom/SpeechesTestimony/wetjenstatement110513.*

[135] December 2013 Position Limits Proposal, 78 FR at 75685.

[136] *International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[137] 7 U.S.C. 6a(a)(1).

[138] Establishment of Speculative Position Limits, 46 FR 50938, 50940 (Oct. 16, 1981).

[139] The Commission's necessity finding is also supported by the consideration of costs and benefits below.

The Commission received many comments on its preliminary alternative necessity finding; the Commission summarizes and responds to significant comments below.

a. Studies' Lack of Consensus.[140] The Commission stated in the December 2013 Position Limits Proposal that the lack of consensus in the studies reviewed at that time warrants acting on the side of caution and implementing position limits as a prophylactic measure, ''to protect against undue price fluctuations and other burdens on commerce that in some cases have been at least in part attributable to excessive speculation.'' [141] Some commenters suggested that a lack of consensus means instead that the Commission should not implement position limits,[142] that the issue merits further study,[143] that it would be arbitrary and capricious to implement position limits,[144] and that the desire to err on the side of caution should be irrelevant to an assessment of whether position limits are necessary.[145] In short, these comments contend that the lack of consensus means position limits cannot be necessary.[146] The Commission disagrees. The lack of consensus does not provide ''objective evidence that position limits are not necessary;'' [147] rather, it suggests that they remain controversial.[148] In response to these comments, the Commission believes that Congress could not have intended by using the word ''necessary'' to restrict the Commission from determining to implement position limits unless experts unanimously agree or form a consensus they would be beneficial. Otherwise a necessity finding would be virtually impossible and, in fact, the Commission could plausibly be stymied by interested persons publishing self-interested studies. The Commission's view in this respect is supported by the text of CEA section 4a(a)(1), which states that there shall be such limits as ''the Commission finds'' are necessary.[149] Thus, while the Commission finds the studies useful, it does not cede the necessity finding to the authors.

b. Reliance on Silver and Natural Gas Studies.[150] The Commission stated in the December 2013 Position Limits Proposal that it ''found two studies of actual market events to be helpful and persuasive in making its preliminary alternative necessity finding,'' [151] namely, the Interagency Silver Study [152] and the PSI Report on Excessive Speculation in the Natural Gas Market.[153] Some commenters criticized the Commission's reliance on these two studies.[154] These commenters dismissed the two studies, variously, as limited, outdated,[155] dubious,[156] unpersuasive, anecdotal, and irrelevant.[157] Other commenters characterized the episodes as extreme or unique.[158] Some commenters observed that neither study recommended position limits.[159] One noted that, ''Each study focuses on activities in a *single* market during a *limited timeframe* that occurred *years ago.*'' [160] Others noted that the Commission has undertaken no independent analysis of each market, commodity, or contract affected by this rulemaking.[161] They then claim that because particular markets or commodities have unique characteristics, one cannot extrapolate from these two specific episodes to other commodities or other markets.[162] Several commenters describe the Hunt brothers silver crisis and the collapse of the natural gas speculator Amaranth as instances of market manipulation rather than excessive speculation.[163]

As discussed above, the presence of manipulative intent or activity does not preclude the existence of excessive speculation, and traders do not need manipulative intent for the accumulation of very large positions to cause the negative consequences observed in the Hunt and Amaranth incidents. These are some reasons position limits are valuable as a prophylactic measure for, in the language of CEA section 4a(a)(1), ''preventing'' burdens on interstate commerce. The Hunt brothers, who distorted the price of silver, and Amaranth, who distorted the price of natural gas, are examples that illustrate the burdens on interstate commerce of excessive speculation that occurred in the absence of position limits, and position limits would have restricted those traders' ability to cause unwarranted price movement and market volatility, and this would be so even had their motivations been innocent. Both episodes involved extraordinarily large speculative positions, which the Commission has historically associated with excessive speculation.[164] We are also given no persuasive reason to change our conclusion that extraordinarily large speculative positions could result in sudden or unreasonable fluctuations or unwarranted price changes in other physical commodity markets, just as they did in silver and natural case in the Hunt Brothers and Amaranth episodes. Although commenters describe changes in these markets over time, the characteristics that we find salient have

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[140] The Commission observed in the December 2013 Position Limits Proposal that the studies discussed therein ''overall show a lack of consensus regarding the impact of speculation on commodity markets and the effectiveness of position limits.'' 78 FR at 75695.

[141] December 2013 Position Limits Proposal, 78 FR at 75695.

[142] *E.g.,* CL–CCMR–59623 at 4–5; CL–EEI–EPSA–59602 at 3; CL–FIA–59595 at 7; and CL–IECAssn–59679 at 3.

[143] *E.g.,* CL–BG Group–59656 at 3; CL–EEI–EPSA–59602 at 3; and CL–WGC–59558 at 2.

[144] CL–Chamber–59684 at 4.

[145] CL–CCMR–59623 at 4–5.

[146] *Contra* CL–AFR–59711 at 1; CL–AFR–59685 at 1; CL–Public Citizen–59648 at 3; CL–WEED–59628.

[147] CL–EEI–EPSA–59602 at 3.

[148] A discussion of the cumulative studies reviewed by the Commission follows below. *See* below, Section I.C.2. (discussing studies and reports received or reviwed in connection with the December 2013 Position Limits Proposal), and accompanying text.

[149] This assumes that, contrary to the Commission's interpretation of the statute, Congress did not make that determination itself as to physical commodity markets.

[150] The Commission stated in the December 2013 Position Limits Proposal that it found two studies of actual market events to be helpful and persuasive in making its preliminary alternative necessity finding, namely, the interagency report on the silver crisis, U.S. Commodity Futures Trading Commission, ''Part Two, A Study of the Silver Market, May 29, 1981, Report to The Congress in Response to Section 21 of the Commodity Exchange Act, and the PSI Report on, U.S. Senate, ''Excessive Speculation in the Natural Gas Market,'' June 25, 2007.

[151] December 2013 Position Limits Proposal, 78 FR at 75695.

[152] Commodity Futures Trading Commission, Report to The Congress in Response to Section 21 of the Commodity Exchange Act, May 29, 1981, Part Two, A Study of the Silver Market.

[153] Excessive Speculation in the Natural Gas Market, Staff Report with Additional Minority Staff Views, Permanent Subcommittee on Investigations, United States Senate, Released in Conjunction with the Permanent Subcommittee on Investigations June 25 & July 9, 2007 Hearings.

[154] One commenter called the Commission's choice 'cherry-picking.' CL–Citadel–59717 at 4.

[155] The Commission disagrees; that an exemplary event occurred in the past does not make it irrelevant.

[156] *Contra* CL–Sen. Levin–59637 at 6 (pointing to ''concrete examples'').

[157] *E.g.,* CL–Chamber–59684 at 3; CL–CME–59718 at 3, 18; CL–IECAssn–59679 at 2; CL–ISDA/SIFMA–59611 at 12; and CL–USCF–59644 at 3.

[158] *E.g.,* CL–IECAssn–59679 at 2; and CL–BG Group–59656 at 3. Certainly the Commission seeks to prevent extreme events such as Amaranth and the Hunt brothers, however infrequently they may occur.

[159] *E.g.,* CL–CME–59718 at 18; and CL–CCMR–59623 at 3.

[160] CL–CME–59718 at 18.

[161] *E.g.,* CL–EEI–EPSA–59602 at 2; CL–WGC–59558 at 2.

[162] *E.g.,* CL–Citadel–59717 at 4; CL–ISDA/SIFMA–59611 at 12–14; CL–MFA–59606 at 10; and CL–WGC–59558 at 2.

[163] *E.g.,* CL–Better Markets–59716 at 12; CL–BG Group-59656 at 3; CL–COPE–59622 at 4–5; CL–CCMR–59623 at 4; CL–ISDA/SIFMA–59611 at 13; and CL–AMG–59709 at 5.

[164] December 2013 Position Limits Proposal, 78 FR at 75685, n. 60.

not changed materially.[165] Thus, these two examples remain relevant and compelling.

CME makes a textual argument in support of the position that CEA section 4a(a)(2) requires a commodity-by-commodity determination that position limits are necessary. It cites several places in CEA section 4a(a)(1) that refer to limits as necessary to eliminate ''such burden'' on ''such commodity'' or ''any commodity.'' [166] However, the prophylactic measures described herein address vulnerabilities characteristic of each market.[167] Accordingly, the Commission believes the statute's use of the singular is immaterial.[168]

The Commission's analysis applies to all physical commodities, and it would account for differences among markets by setting the limits at levels based on updated data regarding estimated deliverable supply in each of the given underlying commodities in the case of spot-month limits or based on exchange recommendation, if an exchange recommended a spot-month limit level of less than 25 percent of estimated deliverable supply, and open interest in the case of single-month and all-months-combined limits, for each separate commodity. The Commission's Reproposal regarding whether to adopt conditional spot-month limits is also based on updated data.[169] The Commission also does not find it relevant that the Interagency Silver Study and the PSI Report, each of which was published before the Dodd-Frank Act became law, do not recommend the imposition of position limits. Based on the facts described in those reports, along with the Commission's understanding of the policies underlying CEA section 4a(a)(1) in light of the Commission's own experience with legacy limits, the Commission preliminarily finds that position limits are necessary within the meaning of that section.

c. Commission research. One commenter asserted that the Commission failed ''to conduct proper economic analysis to determine, if in fact, the position limits as proposed were likely to have any positive impact in promoting fair and orderly commodity markets.'' [170] While acknowledging the Commission's resource constraints, this commenter remarked on ''the paucity of the published record by the CFTC's s own staff'' [171] and suggests that outside authors be given ''controlled access to all of the CFTC's data regarding investor and hedger trading records.'' [172] This commenter then proceeds to accuse the Commission of failing to ''conduct such research because they felt the data would not in fact support the proposed position limit regulations.'' [173]

The Commission disagrees that it has failed to conduct proper economic analysis to determine the likely benefits of position limits. CEA section 15(a) requires that before promulgating a regulation under the Act, the Commission consider the costs and benefits of the action according to five statutory factors. The Commission does so below in robust fashion with respect to the Reproposal in its entirety, including the alternative necessity finding. Neither section 15(a) of the CEA nor the Administrative Procedure Act requires the Commission to conduct a study in any particular form so long as it considers the costs and benefits and the entire administrative record. Section 719(a) of the Dodd-Frank Act, on the other hand, provides that the Commission ''shall conduct a study of the effects (if any) of the position limits imposed pursuant to the . . . [CEA] on excessive speculation'' and report to Congress on such matters after the imposition of position limits.[174] The Commission will do so as required by Section 719(a), thereby fully discharging its duty. At all stages, the Commission has relied on and will continue to rely on the input of staff economists in the Division of Market Oversight (''DMO'') and the Office of the Chief Economist (''OCE'').

d. Excessive Speculation

One commenter opined that, ''in discussing only the Hunt Brothers and Amaranth case studies the Commission has not given adequate weight to the benefits that speculators provide to the market.'' [175] To the contrary, the Commission recognizes that speculation is part of a well-functioning market, particularly insofar as speculators contribute valuable liquidity. The focus of this reproposed rulemaking is not speculation *per se;* Congress identified *excessive* speculation as an undue

[165] *See infra* Section I.C.1.f., and accompanying text.

[166] CL–CME–59718 at 13–14.

[167] *See, e.g.,* Establishment of Speculative Position Limits, 46 FR at 50940 (Oct. 16, 1981) (''[I]t appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.'').

[168] *See also* 1 U.S.C. 1 (''In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things[.]'')

[169] *See* the Commission's discussion of its verification of estimates of deliverable supply and work with open interest data, below.

[170] CL–USCF–59644 at 2.

[171] CL–USCF–59644 at 2. This commenter exaggerates. The last arguably relevant report of Commission staff is ''Commodity Swap Dealers & Index Traders with Commission Recommendations'' (Sept. 2008), available at *http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf.* However, several authors or co-authors of academic papers reviewed by the Commission are or have been affiliated with the Commission in various capacities and have added to the current literature relating to position limits. Each of Harris, *see* note240, Kirilenko, *see* note 2400, and Overdahl, *see* notes 240 and 241, are former Chief Economists of the Commission. Other authors, *e.g.,* Aulerich, Boyd, Brunetti, Büyükşahin, Einloth, Haigh, Hranaiova, Kyle, Robe, and Rothenberg, are now or have been staff and/or consultants to the Commission, have spent sabbaticals at the Commission, or have been detailed to the Commission from other federal agencies. Graduate students studying with some study authors, including some working on dissertations, have also cycled through the Commission as interns. *Cf.* note 180 (disclaimer on paper by Harris and Büyükşahin).

[172] CL–USCF–59644 at 3. Data regarding investor and hedger trading records may be protected by section 8 of the CEA, 7 U.S.C. 12. In general, ''the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers . . . .'' 7 U.S.C. 12(a)(1). The Commission must therefore be very careful about granting outside economists access to such data. Commission registrants have in the past ''questioned why the CFTC was permitting outside economists to access CFTC data, why the CFTC was permitting the publication of academic articles using that data, and . . . the administrative process by which the CFTC was employing these outside economists.'' Review of the Commodity Futures Trading Commission's Response to Allegations Pertaining to the Office of the Chief Economist, Prepared by the Office of the Inspector General, Commodity Futures Trading Commission, Feb. 21. 2014, at ii, available at *http://www.cftc.gov/idc/groups/public/@freedomofinformationact/documents/file/oigreportredacted.pdf.* The Commission is sensitive to these concerns, and strives to ensure that reports and publications that rely on Commission data do not reveal sensitive information. To do so requires an expenditure of effort by Commission staff.

[173] CL–USCF–59644 at 3. The Commission rejects the commenter's aspersion. The Commission's Office of the Inspector General addressed the perception of institutional censorship in its ''Follow Up Report: Review of the Commodity Futures Trading Commission's Response to Allegations Pertaining to the Office of the Chief Economist, Jan. 13, 2016 (''Follow Up Report''), available at *http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/oig_oce011316.pdf.* The Follow Up Report emphasizes ''that there has been no allegation that the Chairman or Commissioners have attempted to prevent certain topics from being researched or to alter conclusions,'' Follow Up Report at 11, but nevertheless recommended ''that OCE not prohibit research topics relevant to the CFTC mission.'' Follow Up Report at 10. The Follow Up Report observed that recently ''OCE has focused almost exclusively on short-term research and economic analysis in support of other Divisions and the Commission.'' Follow Up Report at 10.

[174] 15 U.S.C. 8307(a). *See* December 2013 Position Limits Proposal, 78 FR at 75684 (discussing section 719(a) of the Dodd-Frank Act in the context of the Commission's construal of CEA section 4a(a) to mandate that the Commission impose position limits).

[175] CL–MFA–59606 at 11–12.

burden on interstate commerce in CEA section 4a(a)(1).[176]

One commenter asserted that the Commission must provide a definition of excessive speculation before making any necessity finding.[177] The Commission disagrees that the rule must include such a definition. The statute contains no such requirement, and did not contain such a requirement prior to the Dodd-Frank Act. The Commission has never based necessity findings on a rigid definition. The Commission's position on this issue has been clear over time: ''The CEA does not define excessive speculation. But the Commission historically has associated it with extraordinarily large speculative positions . . . .'' [178] CEA section 4a(a)(1) states that position limits should diminish, eliminate, or prevent burdens on interstate commerce associated with sudden or unreasonable fluctuations or unwarranted changes in the price of commodities.[179] It stands to reason that excessive speculation involves positions large enough to risk such unreasonable fluctuations or unwarranted changes. This commenter also urges the Commission to ''demonstrate and determine that . . . harmful excessive speculation exists or is reasonably likely to occur with respect to particular commodities'' [180] before implementing any position limits.[181] As stated in the December 2013 Position Limits Proposal, the Commission referenced its prior determination in 1981 ''that, with respect to any particular market, the 'existence of historical trading data' showing excessive speculation or other burdens on that market is not 'an essential prerequisite to the establishment of a speculative limit.' '' [182] The Commission reiterates this statement and underscores that these risks are characteristic of contract markets generally. Differences among markets can be addressed, as the Commission reproposes to do here, by setting the limit levels to account for individual market characteristics. Attempting to demonstrate and determine that excessive speculation is reasonably likely to occur with respect to particular commodities before implementing position limits is impractical because historical trading data in a particular commodity is not necessarily indicative of future events in that commodity. Further, it would require the Commission to determine what may happen in a forecasted future state of the market in a particular commodity. As the Commission has often repeated, position limits are a prophylactic measure. Inherently, then, position limits are designed to address the burdens of excessive speculation well before they occur, not when the Commission somehow determines that such speculation is imminent, which the Commission (or any market actor for that matter) cannot reliably do.

e. Volatility

Commenters assert, variously, that ''the volatility of commodity markets has decreased steadily over the past decade,'' [183] that ''research found that there was a negative correlation between speculative positions and market volatility,'' [184] research shows that factors other than excessive speculation were primarily responsible for specific instances of price volatility,[185] that futures markets are associated with lower price volatility,[186] that particular types of speculators provide liquidity rather than causing price volatility,[187] that position limits will increase volatility,[188] etc. It would follow, then, according to these commenters, that because they believe there is little or no volatility (no sudden or unreasonable fluctuations or unwarranted price changes), or no volatility caused by excessive speculation, position limits cannot be necessary.

As stated above, the Commission recognizes that speculation is part of a

[176] 7 U.S.C. 6a(a)(1). One commenter suggests that the Commission base speculative position limits on ''a determination of an acceptable total level of speculation that approximates the historic ratio of hedging to investor/speculative trading.'' CL–A4A–59714 at 4. The Commission declines at this time to adopt such a ratio as basis for speculative position limits. Among other things, the Commission does not now collect reliable data distinguishing hedgers from speculators. Also, there may be levels above a historic hedging ratio that still provide liquidity rather than denoting excessive speculation. While the Commission has authority under section 4a(a)(1) of the Act to impose position limits on a group or class of traders, the only way that the Commission knows how to implement limit levels based on such a historic ratio would be to impose rationing, which the Commission declines to do at this time.

[177] CL–ISDA/SIFMA–59611 at 3, 14–15; *see also* CL–FIA–59595 at 6–7.

[178] December 2013 Position Limits Proposal, 78 FR at 75685, n. 60 (citation omitted).

[179] 7 U.S.C. 6a(a)(1).

[180] CL–ISDA/SIFMA–59611 at 3; *see also* CL–CCMR–59623 at 4; CL-Chamber-59684 at 4. *Contra* CL-Sen. Levin-59637 at 6 (stating ''[c]ontrary to the complaints of some critics, it would be a waste of time and resources for the Commission to expand the proposed rules beyond the existing justification to repeat the same analysis, reach the same conclusions, and issue the same findings for each of the 28 commodities.'').

[181] *See also* CL–CCMR–59623 at 4–5. Another commenter ''contends that the best available evidence discounts the theory that there is excessive speculation distorting the prices in the commodity markets.'' CL–MFA–59606 at 13 (citing Pirrong). Such a contention is inconsistent with ''Congress' determination, codified in CEA section 4a(a)(1), that position limits are an effective tool to address excessive speculation as a cause of sudden or unreasonable fluctuations or unwarranted changes in the price of . . . [agricultural and exempt] commodities. December 2013 Position Limits Proposal, 78 FR at 75695 (footnote omitted). Another commenter mischaracterizes the finding of the Congressional Budget Report, ''Evaluating Limits on Participation and Transactions in Markets for Emissions Allowances'' (2010), available at *http://www.cbo.gov/publication/21967* (''CBO Report''); the CBO Report does not conclude ''that position limits are harmful to markets.'' CL–IECAssn–59679 at 3. Rather, in the context of creating markets for emissions allowance trading, the CBO Report discusses both the uses and benefits and the challenges and drawbacks of not only position limits but also circuit breakers, in addition to banning certain types of traders and banning allowance derivatives. Among other things, the CBO Report states, ''Position Limits would probably lessen the possibility of systemic risk and manipulation in allowance markets . . . .'' CBO Report at viii. Another commenter states that a ''CFTC study'' found that the 2008 crude oil crisis was primarily due to fundamental factors in the supply and demand of oil. CL–CCMR–59623 at 4. The referenced study is Harris and Büyükşahin, The Role of Speculators in the Crude Oil Futures Market (working paper 2009). *See generally* note 240 (listing studies that employ the Granger method of statistical analysis). While Harris is a former Chief Economist, and Büyükşahin is a former staff economist in OCE, as noted above, the cover page of the referenced paper contains the standard disclaimer, ''This paper reflects the opinions of its authors only, and not those of the U.S. Commodity Futures Trading Commission, the Commissioners, or other staff of the Commission.'' That is, it is not a ''CFTC study.'' In addition, other studies of that market at that time reached different conclusions. *Cf.* note 252 (citing study that concludes price changes precede the position change). The Commission reviewed several studies of the crude oil market around 2008 and discusses them herein. *See* discussion of persuasive academic studies, below. The Commission cautions that, given the continuing controversy surrounding position limits, it is unlikely that one study will ever be completely dispositive of these complicated and difficult issues.

[182] December 2013 Position Limits Proposal, 78 FR at 75683.

[183] CL–CCMR–59623 at 4 (claim supported only by a reference to a comment letter that pre-dates the December 2013 Position Limits Proposal).

[184] CL–MFA–59606 at 12 (citing one academic paper, Irwin and Sanders, The Impact of Index and Swap Funds on Commodity Futures Markets: Preliminary Results (working paper 2010)). *See generally note 240 (*studies that employ the Granger method of statistical analysis).

[185] *E.g.,* CL–MFA–59606 at 11–12, n. 26. *Contra* CL–AFR–59685 at 1 (stating ''We understand that other factors contribute to highly volatile commodity prices, but excessive speculation plays a significant part, according to studies by Princeton, MIT, the Petersen Institute, the University of London, and the U.S. Senate, among other highly credible sources.'').

[186] CL–MFA–59606 at 13, n. 30.

[187] E.g., CL–MFA–59606 at 12–13 (hedge funds). *Cf.* CL–SIFMA AMG–59709 at 15 (asserting ''neither Amaranth nor the Hunt brothers were in any way involved in commodity index swaps''), 16 (registered investment companies and ERISA accounts).

[188] CL–MFA- 59606 at 13. *Contra* CL–CMOC–59702 at 2 (maintaining that witness testimony before policymakers ''confirmed that the erosion of the position limits regime was a leading cause in market instability and wild price swings seen in recent years and that it had led to diminished confidence in the commodity derivative markets as a hedging and price discovery tool'').

well-functioning market particularly, as noted in comments, as a source of liquidity. Position limits address excessive speculation, not speculation *per se.* Position limits neither exclude particular types of speculators nor prohibit speculative transactions; they constrain only speculators with excessively large positions in order to diminish, eliminate, or prevent an undue and unnecessary burden on interstate commerce in a commodity.[189] The Commission agrees that futures markets are associated with, and may indeed contribute to, lower volatility in underlying commodity prices. However, as Congress observed, in CEA section 4a(a)(1), excessive speculation in a commodity contract that causes sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.[190] In promulgating CEA section 4a(a)(1), Congress adopted position limits as a useful tool to diminish, eliminate, or prevent those problems. The Commission believes that position limits are a necessary prophylactic measure to guard against disruptions arising from excessive speculation, and the Commission has endeavored to repropose limit levels that are not so low as to hamper healthy speculation as a source of liquidity.[191]

f. Basis for Determination

One commenter states, ''The necessity finding . . . proffered by the Commission—which consists of a discussion of two historical events and a cursory review of existing studies and reports on position limits related issues—falls short of a comprehensive analysis and justification for the proposed position limits.[192] We disagree with the commenter's opinion that the Commission's analysis is not comprehensive or falls short of justifying the reproposed rule.[193]

Another commenter states that the December 2013 Position Limits Proposal ''does not provide any quantitative analysis of how the outcome of these [two historical] events might have differed if the proposed position limits had been in place.'' [194] The Commission disagrees. The Commission stated in the December 2013 Position Limits Proposal that, ''The Commission believes that if Federal speculative position limits had been in effect that correspond to the . . . . [proposed] limits . . . , across markets now subject to Commission jurisdiction, such limits would have prevented the Hunt brothers and their cohorts from accumulating such large futures positions.'' [195] This statement was based on calculations using a methodology similar to [196] that proposed in the December 2013 Position Limits Proposal applied to quantitative data included and as described therein.[197] The Commission's stated belief is unchanged at the higher single-month and all-months-combined limit levels of 7,600 contracts that the Commission adopts today for silver.[198] Nevertheless, historical data regarding absolute position size from the period of the late-1970's to 1980 may not be readily comparable to the numerical limits adopted in the current market environment. Accordingly, the Commission is reproposing establishing levels using the methodology based on the size of the current market as described elsewhere in this release.

With respect to Amaranth, the Commission stated, ''Based on certain assumptions . . . , the Commission believes that if Federal speculative position limits had been in effect that correspond to the limits that the Commission . . . [proposed in the December 2013 Position Limits Proposal], across markets now subject to Commission jurisdiction, such limits would have prevented Amaranth from accumulating such large futures positions and thereby restrict its ability to cause unwarranted price effects.'' [199] This statement of belief about Amaranth was also based on calculations using the methodology applied to quantitative data as described and included in the December 2013 Position Limits Proposal preamble.[200] The historical size of Amaranth positions would no longer breach the higher single-month and all-months-combined limit levels of 200,900 contracts that the Commission adopts today for natural gas.[201] However, the Commission is reproposing setting a level using a methodology that adapts to changes in the market for natural gas, *i.e.,* the fact that it has grown larger and more liquid since the collapse of Amaranth. Thus, it stands to reason that a speculator might now have to accumulate a larger position than Amaranth's historical position to present a similar risk of disruption to the natural gas market. In fact, the Commission has long recognized ''that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.'' [202] A larger market should have larger capacity, other things being equal; [203] hence, the Commission is adopting higher levels of limits. Moreover, costly disruptions like those associated with Amaranth remain entirely possible. Because the costs of these disruptions can be great, and borne by members of the public

[189] That a particular type of speculator trades a different type of instrument, employs a different trading strategy, or is unlevered, diversified, subject to other regulatory regimes, etc., so as to distinguish it in some way from Amaranth or the Hunt brothers does not overcome the size of the position held by the speculator, and the risks inherent in amassing extraordinarily large speculative positions.

[190] CEA section 4a(a)(1); 7 U.S.C. 6a(a)(1).

[191] *See* the discussion of the impact analysis, below under § 150.2.

[192] CL–Citadel–59717 at 3–4 (footnote omitted). *Contra* CL-Sen. Levin-59637 at 6 (declaring that ''[t]he Commission's analysis and findings, paired with concrete examples, provide a comprehensive explanation of the principles and reasoning behind establishing position limits.'').

[193] Although the events described in the proposal are sufficient to support the necessity finding for the reasons given, the Commission also notes reports that more recent market events have been perceived as involving excessively large positions that have caused or threatened to cause market disruptions. *See, e.g.,* Ed Ballard, Speculators sit on Sugar Pile, Raising Fears of Selloff, The Wall Street Journal (Nov. 21, 2016) (''Speculative investors have built a record position in sugar this year, sparking fears of a swift pullback in its price.''); Of mice and markets, A surge in speculation is making commodity markets more volatile, The Economist (Sept. 10, 2016) (discussing ''scramble by funds to unwind their short positions in'' West Texas Intermediate that appears to have ''fanned a rally in spot oil prices''). As discussed elsewhere, willingness to participate in the futures and swaps markets may be reduced by perceptions that a participant with an unusually large speculative position could exert unreasonable market power.

[194] CL–WGC–59558 at 2; *see also* CL–BG Group-59656 at 3.

[195] December 2013 Position Limits Proposal, 78 FR at 75690.

[196] The Commission's methodology is a fair approximation of how the limits would have been applied during the time of the silver crisis. *See* December 2013 Position Limits Proposal, 78 FR at 75690.

[197] December 2013 Position Limits Proposal, 78 FR at 75690–1.

[198] For example, using historical month-end open interest data, the Commission calculated a single- and all-months-combined limit level of 6,700 contracts, which would have been exceeded by a total Hunt position of over 12,000 contracts for March delivery. December 2013 Position Limits Proposal, 78 FR at 75690. Baldly, a position of 12,000 contracts would still exceed a 7,600 contract limit.

[199] December 2013 Position Limits Proposal, 78 FR at 75692.

[200] December 2013 Position Limits Proposal, 78 FR at 75692–3.

[201] *See* level of initial limits under App. D to part 150.

[202] Establishment of Speculative Position Limits, 46 FR 50938, 50940.

[203] A gross comparison such as this may not meaningful. For example, the Commission could have increased the size of Amaranth's historical position proportionately to the increased size of the market and compared it to the limit level for natural gas that the Commission adopts today. But such an approach would be less rigorous than the analysis on which the Commission bases its determination today.

unconnected with trading markets, the Commission preliminarily finds it necessary to impose speculative position limits as a preventative measure. As markets differ in size, the limit levels differ accordingly, each designed to prevent the accumulation of positions that are extraordinary in size in the context of each market.

Several commenters opined that the Commission, in reaching its preliminary alternative necessity finding, ignores current market developments and does not employ the ''new tools'' other than position limits available to it to prevent excessive speculation or manipulative or potentially manipulative behavior.[204] Specifically, some commenters suggested that position limits are not necessary because position accountability rules and exchange-set limits are adequate.[205] The Commission agrees that the Dodd-Frank Act gave the Commission new tools with which to protect and oversee the commodity markets, and agrees that these along with older tools may be useful in addressing market volatility. However, the Commission disagrees that the availability of other tools means that position limits are not necessary.[206] Rather the statute, at a minimum, reflects Congress' judgment that position limits may be found by the Commission to be necessary. The Commission notes that although CEA section 4a(a) position limits provisions have existed for many years, the Dodd-Frank Act not only retained CEA section 4a(a), but added, rather than deleted, several sections. This leads to the conclusion that Congress appears to share the Commission's view that the other tools provided by Congress were not sufficient.

Position accountability, for example, is an older tool, from the era of the CFMA. As the Commission explained in the December 2013 Position Limits Proposal, the CFMA ''provided a statutory basis for exchanges to use pre-existing position accountability levels as an alternative means to limit the burdens of excessive speculative positions. Nevertheless, the CFMA did not weaken the Commission's authority in CEA section 4a to establish position limits as an alternative means to prevent such undue burdens on interstate commerce. More recently, in the CFTC Reauthorization Act of 2008, Congress gave the Commission expanded authority to set position limits for significant price discovery contracts on exempt commercial markets,'' [207] and it expanded the Commission's authority again in the Dodd-Frank Act.[208] While position accountability is useful in providing exchanges with information about specific trading activity so that exchanges can act if prudent to require a trader to reduce a position after the position has already been amassed, position limits operate prophylactically without requiring case-by-case, ex post determinations about large positions. As to exchange-set accountability levels or position limits set at levels below those of federal position limits, those remain useful as well and should be used, at the exchanges' discretion, in conjunction with federal position limits. They may be most useful, for example, with respect to contracts that are not core-referenced futures contracts or if an exchange determines that federal limits are too high to address adequately the conditions in the markets it administers. In the regulations that the Commission reproposes today, the Commission would update (rather than eliminate) the acceptable practices for exchange-set speculative position limits and position accountability rules to conform to the Dodd-Frank Act changes [as described in the December 2013 Position Limits Proposal].[209] Generally, for contracts subject to speculative limits, exchanges may set limits no higher than the federal limits,[210] and may impose ''restrictions . . . to reduce the threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.'' [211] And § 150.5(b)(3) sets forth the requirements for position accountability in lieu of exchange-set limits in the case of contracts not subject to federal limits. The exchanges are also still authorized to react to instances of greater price volatility by exercising emergency authority as they did during the silver crisis.[212] In addition, the Commission has striven to take current market developments into account by considering the market data to which the Commission has access as described herein and by considering the description of current market developments to the extent included in the comments the Commission has received in connection with the December 2013 Position Limits Proposal. Some commenters suggest that the Commission, in reaching its preliminary alternative necessity finding, has not undertaken any empirical analysis of available data.[213] As discussed above, the Commission carefully reviewed the Interagency Silver Study and the PSI Report on Excessive Speculation in the Natural Gas Market.[214] The Commission also carefully considered the studies submitted during the various comment periods regarding the December 2013 Position Limits Proposal and the 2016 Supplemental Position Limits Proposal. Other commenters suggest that the Commission relies on incomplete, unreliable, or out of date data, and that the Commission should collect more and/or better data before determining that position limits are necessary or implementing position limits.[215] The Commission disagrees. The Commission has considered the recent data presented by the exchanges in support of their estimates of deliverable supply. The Commission is expending significant, agency-wide efforts to improve data collection and to analyze the data it receives. The quality of the data on which the Commission relies has improved since the December 2013 Position Limits Proposal. The Commission is satisfied with the quality of the data on which it bases its Reproposal.

One commenter opines that, ''The Proposal's 'necessary' finding offers no reasoned basis for adopting its framework and the shift in regulatory policy it embodies.'' [216] To the contrary,

[204] *E.g.,* CL–CCMR–59623 at 3 (supporting additional transparency and reporting); CL-Citadel–59717 at 4 (pointing to available tools, including ''enhanced market surveillance, broadened reporting requirements, broadened special call authorities, and exchange limits''); CL–ISDA/SIFMA–59611 at 13 (noting that tools that the Commission has incorporated include ''enhanced market surveillance, broadened reporting requirements, broadened special call authorities, and exchange limits''); CL–MFA–59606 at 10; and CL–SIFMA AMG–59709 at 5–6 (providing examples of new tools).

[205] *E.g.,* CL–CME–59718 at 18; CL–ICE–59645 at 2–4; CL–FIA–59595 at 6, n. 13, 12–13; and CL–AMG–59709 at 8.

[206] The Commission observes that logically there is no reason why the availability of some regulatory tools under the CEA should preclude the use of another tool explicitly authorized by Congress.

[207] 78 FR at 75681 (footnotes omitted).

[208] *See generally* December 2013 Position Limits Proposal, 78 FR at 75681.

[209] *See generally* December 2013 Position Limits Proposal, 78 FR at 75747–8.

[210] *See* discussion of requirements for exchange-set position limits under § 150.5, below, and exchange core principles regarding position limits, below.

[211] *See* reproposed § 150.5(a)(6)(iii).

[212] *See generally* 7 U.S.C. 7(d)(6) (DCM Core Principles: Emergency Authority); 7 U.S.C. 7b–3(f)(8) (Core Principles for Swap Execution Facilities—Emergency Authority); 17 CFR 37.800 (Swap Execution Facility Core Principle 8—Emergency authority), 17 CFR 38.350 (Designated Contract Markets –Emergency Authority—Core Principle 6).

[213] *E.g.,* CL–FIA–59595 at 3; CL–EEI–EPSA–59602 at 2, 8–9.

[214] *See supra* Section I.C.2 (discussing the Interagency Silver Study and the PSI Report on Excessive Speculation in the Natural Gas Market).

[215] *E.g.,* CL-Citadel-59717 at 4–5; CL–EEI–EPSA–59602 at 8–9.

[216] CL–CME–59718 at 3.

the necessity finding, including the Commission's responses to comments, is the Commission's explanation of why position limits are necessary.[217]

g. Non-Spot-Month Limits

Some commenters opine that ''the Commission's proposed non-spot-month position limits do not increase the likelihood of preventing the excessive speculation or manipulative trading exemplified by Amaranth or the Hunt brothers relative to the status quo.'' [218] The Commission disagrees; as repeated above, ''the capacity of the market is not unlimited.'' [219] This includes markets in non-spot month contracts. Thus, as with spot-month contracts, extraordinarily large positions in non-spot month contracts may still be capable of distorting prices.[220] If prices are distorted, the utility of hedging may decline.[221] One commenter argues for non-spot month position accountability rules; [222] the Commission discusses position accountability above.[223] Another argues that Amaranth was really just ''another case of spot-month misconduct.'' [224] The Commission disagrees that this limits the relevance of Amaranth; a speculator like Amaranth may attempt to distort the perception of supply and demand in order to benefit, for instance, calendar spread positions by, for instance, creating the perception of a nearby shortage of the commodity which a speculator could do by accumulating extraordinarily large long positions in the nearby month.[225] One commenter states that ''improperly calibrated non-spot month limits would also deter speculative activity that triggers no risk of manipulation or 'causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity,' the hallmarks of 'excessive speculation.' '' [226] The Commission sees little merit in this objection because the Reproposal would calibrate the levels of the non-spot month limits to accommodate speculative activity that provides liquidity for hedgers.

h. Meaning of Necessity

One commenter suggests that position limits could only be necessary if they were the only means of preventing the Hunt brothers and Amaranth crises.[227] First, while the Commission relies on these incidents to explain its reasoning, the risks they illustrate apply to all markets in physical commodities, and so the efficacy of the limits the Commission adopts today, and the extent to which other tools are sufficient, cannot be judged solely by whether they might have prevented those specific incidents. Second, in any event, the Commission rejects such an overly restrictive reading, which lacks a basis in both common usage and statutory construction. The Commission preliminarily finds that limits are necessary as a prophylactic tool to strengthen the regulatory framework to prevent excessive speculation *ex ante* to diminish the risk of the economic harm it may cause further than it would reliably be from the other tools alone. Other commenters question why the Commission proposed limits at levels they contend are too high to be effective, undercutting the Commission's alternative necessity finding.[228] One commenter points out that the limit levels as proposed would not have prevented the misconduct alleged by the Commission in a particular enforcement action filed in 2011.[229] As repeated elsewhere in this Notice [230] and in the December 2013 Position Limits Proposal,[231] in establishing limits, the Commission must, ''to the maximum extent practicable, in its discretion . . . ensure sufficient market liquidity for bona fide hedgers.[232] The Commission realizes that the reproposed initial limit levels may prevent or deter some, but fail to eliminate all, excessive speculation in the markets for the 25 commodities covered by this first phase of implementation. But the Commission is concerned that initial limit levels set lower than those reproposed today, and in particular low enough to prevent market manipulation or excessive speculation in specific, less egregious cases than the Hunt brothers or Amaranth, could impair liquidity for hedges.[233]

The Commission requests comment on all aspects of this section.

2. Studies and Reports

The Commission has reviewed and evaluated studies and reports received as comments on the December 2013 Position Limits Proposal, in addition to the studies and reports reviewed in connection with the December 2013 Position Limits Proposal [234] (such

[217] *See* CL–Sen. Levin–59637 at 6 (stating that the Commission's necessity finding ''appropriately reflects Congressional action in enacting the Dodd-Frank Act which requires the Commission to impose appropriate position limits on speculators trading physical commodities.'').

[218] CL–AMG–59709 at 9. *See* the Commission's response to the comment regarding the purported lack of ''quantitative analysis of how the outcome of these [two historical] events might of differed if the proposed position limits had been in place'' at the text accompanying notes 192–200 above. *See also* CL–CME–59718 at 41–3; CL–ISDA/SIFMA–59611 at 28.

[219] *See* note 202 *supra* and accompanying text.

[220] *See* December 2013 Position Limits Proposal, 78 FR at 75691 (citing the PSI Report, ''Amaranth accumulated such large positions and traded such large volumes of natural gas futures that it distorted market prices, widened price spread, and increased price volatility.'').

[221] *See* December 2013 Position Limits Proposal, 78 FR at 75692 (citing the PSI Report, ''Commercial participants in the 2006 natural gas markets were reluctant or unable to hedge.'').

[222] CL–CME–59718 at 41–42.

[223] *See* notes 207–212 *supra* and accompanying text.

[224] CL–ISDA/SIFMA–59611 at 28.

[225] The Commission discussed the trading activity of Amaranth at length in the December 2013 Position Limits Proposal, 78 FR at 75691–3; in particular, Amaranth's calendar spread trading is discussed at 78 FR 75692. The Commission repeats that the findings of the Permanent Subcommittee in the PSI Report support the imposition of speculative position limits outside the spot month. A trader, who does not liquidate an extraordinarily large long futures position in the nearby physical-delivery futures contract, contrary to typical declining open interest patterns in a physical-delivery contract approaching expiration, may cause the nearby futures price to increase as short position holders, who do not wish to make physical delivery, bid up the futures price in an attempt to offset their short positions. Potential liquidity providers who do not currently hold a deliverable commodity may be hesitant to establish short positions as a physical-delivery futures contract approaches expiration, because exchange rules and contract terms require such short position holder to prepare to make delivery by obtaining the cash commodity.

[226] CL–CME–59718 at 43; *cf.* CL–APGA–59722 at 3 (asserting that ''the non-spot month limits being proposed by the Commission are too high to be effective'').

[227] CL–CCMR–59623 at 4.

[228] CL–ISDA/SIFMA–59611 at 28; CL–Better Markets–59716 at 24; CL–APGA–59722 at 6–7.

[229] CL–Better Markets–59716 at 22, n. 38 (Parnon Energy).

[230] *See* the discussion in levels of limits, under § 150.2, below.

[231] *E.g.,* December 2013 Position Limits Proposal, 78 FR at 75681.

[232] CEA section 4a(a)(3)(B)(iii), 7 U.S.C. 6a(a)(3)(B)(iii). Some commenters expressed concern that position limits could disproportionately affect commercial entities. *E.g.,* CL–CME–59718 at 43; CL–APGA–59722 at 3. Some commenters expressed concern about the application of position limits to trade options. *E.g.,* CL–APGA–59722 at 3; CL–EEI–EPSA–59602 at 3. The Commission reminds commenters that speculative position limits do not apply to bona fide hedging transactions or positions. CEA section 4a(c), 7 U.S.C. 6a(c).

[233] The Commission will revisit the specific limitations set forth in CEA section 4a(a)(3) when, under reproposed § 150.2(e), it considers resetting limit levels.

[234] A list of studies and reports that the Commission reviewed in connection with the December 2013 Position Limits Proposal was included in its Appendix A to the preamble. December 2013 Position Limits Proposal, 78 FR at 75784–7. One commenter observed that the studies reviewed in connection with the December 2013 Position Limits Proposal are not all ''necessarily germane to specific position limits proposed.'' CL–Citadel–59717 at 4. *See also* CL–CCMR–59623 at 5 (stating that it had reviewed the studies, and found that ''only 27 address position limits''). The Commission acknowledges that some studies are more relevant than others. The Commission in the December 2013 Position Limits Proposal was disclosing the studies that it had reviewed and

studies and reports, collectively, ''studies''). Appendix A to this preamble is a summary of the various studies reviewed and evaluated by the Commission.

The Commission observed in the December 2013 Position Limits Proposal, ''There is a demonstrable lack of consensus in the studies.'' [235] Neither the passage of time nor the additional studies have changed the Commission's view: As a group, these studies do not show a consensus in favor of or against position limits.[236] In addition to arriving at disparate conclusions, the quality of the studies varies. Nevertheless, the Commission believes that some well-executed studies suggest that excessive speculation cannot be excluded as a possible cause of undue price fluctuations and other burdens on commerce in certain circumstances. All of these factors persuade the Commission to act on the side of caution in preliminarily finding limits necessary, consistent with their prophylactic purpose. For these reasons, explained in more detail below, the Commission preliminarily concludes that the studies, individually or taken as a whole, do not persuade the Commission to reverse course [237] or to change its necessity finding.[238]

The Commission's deliberations are informed by its consideration of the studies. The Commission recognizes that speculation and volatility are not *per se* unusual or exceptional occurrences in commodity markets. Some economic studies attempt to distinguish normal, helpful speculative activity in commodity markets from excessive speculation, and normal volatility from unreasonable price fluctuations. It has proven difficult in some studies to discriminate between the proper workings of a well-functioning market and unwanted phenomena. That some studies have as yet failed to do so with precision or certainty does not, in light of the full record, persuade the Commission to reverse course or to change its necessity finding.

In general, many studies focused on subsidiary questions and did not directly address the desirability or utility of position limits. Their proffered interpretations may not be the only plausible explanation for statistical results. There is no broad academic consensus on the formal, testable economic definition of ''excessive speculation'' in commodity futures markets or other relevant terms such as ''price bubble.'' There is also no broad academic consensus on the best statistical model to test for the existence of excessive speculation. There are not many papers that quantify the impact and effectiveness of position limits in commodity futures markets. The Commission has identified some reasons why there are not many compelling, peer-reviewed economic studies engaging in quantitative, empirical analysis of the impact of position limits on prices or price volatility: Limitations on publicly available data, including detailed information on specific trades and traders; pre-existing position limits in some commodity markets, making it difficult to determine how those markets would operate in the absence of position limits; and the difficulties inherent in modelling complex economic phenomena.

The studies that the Commission considered can be grouped into seven categories.[239]

Granger Causality Analyses [240]

evaluated. The Commission requested comment on its discussion of the studies, and invited commenters to advise the Commission of other studies to consider, in the hope that commenters would indicate which studies they believe are more germane or persuasive and suggest other studies for Commission review.

[235] December 2013 Position Limits Proposal, 78 FR at 75694.

[236] *See* 162 Cong. Rec. E1005–03, E1006 (June 28, 2016) (Statement of Rep. Conaway, Chairman of the House Committee on Agriculture) (''Comment letters on either side declaring that the matter is settled in their favor among respectable economists are simply incorrect.''). *Contra* CL–CCMR–59623 at 5, which says, ''The Committee staff also reviewed these studies and found that of them, only 27 address position limits, with the majority opposing such limits.'' The commenter describes how it arrives at this conclusion as follows: ''The Committee staff reviewed the abstract and body of each study to determine if the author assessed: (1) Whether position limits are effective at reducing speculation; or (2) whether excessive speculation is distorting prices in commodities markets. If the author presented a critical analysis of the issue, rather than just mentioning position limits or excessive speculation in passing, then the Committee staff included the study in its tally.'' Such a method is relatively unsophisticated, and the Commission cannot evaluate it without knowing to which studies the commenter refers. The commenter continues, ''Of the total, 105 studies address whether excessive speculation is distorting prices in today's commodity markets, with 66 of these studies finding that excessive speculation is not a problem.'' This statement did not identify the 66 studies or 105 studies on which it based its belief. Accordingly, the Commission is unable to evaluate the basis of its belief.

[237] *See* discussion of mandate, above. We emphasize that this discussion relates only to the Commission's alternative necessity finding. To the extent there is a Congressional mandate that the Commission establish position limits, these studies could be no basis to disregard it. As noted in the December 2013 Position Limits Proposal, ''Studies that militate against imposing any speculative position limits appear to conflict with the Congressional mandate . . . that the Commission impose limits on futures contracts, options, and certain swaps for agricultural and exempt commodities.'' 78 FR at 75695 (footnote omitted). Separately, ''such studies also appear to conflict with Congress' determination, codified in CEA section 4a(a)(1), that position limits are an effective tool to address excessive speculation as a cause of sudden or unreasonable fluctuations or unwarranted changes in the price of such commodities,'' irrespective of whether they are mandated. *Id.* The Commission acknowledges that some of the studies, when considered as comments on the December 2013 Position Limits Proposal, can be understood to suggest that, contrary to the Congressional determination, there is no empirical evidence that excessive speculation exists, that excessive speculation causes sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity, or is an undue and unnecessary burden on interstate commerce in a commodity.

[238] *See* discussion of necessity finding, above.

[239] These categories are not exclusive; some studies employ or examine more than one type of methodology. That researchers in the different categories employed different methodologies complicates the task of comparing the studies across the seven categories. In addition, some studies were not susceptible to meaningful economic analysis for various reasons, such as being written in a foreign language, being founded on suspect methodologies, being press releases, etc. These studies include: Basak and Pavlova, A Model Financialization of Commodities (working paper 2013); Bass, Finanazmärkte als Hungerverursacher? (working paper 2011); Bass, Finanzspekulation und Nahrungsmittelpreise. Anmerkungenzum Stand der Forschung (working paper 2013); Bukold, Ölpreisspekulation und Benzinpreise in Deutschland, (2011); Chevalier, (Ministère de l'Economie, de l'Industrie e t de l'emploi): Rappor t du groupe de travai l sur la volatilitè des prix du pètrole, (2010); Dicker, Oil's Endless Bid, (2011); Ederington and Lee, Who Trades Futures and How: Evidence from the Heating Oil Market?, Journal of Business 2002; Evans, The Official Demise of the Oil Bubble, Wall Street Journal 2008; Gheit and Katzenberg, Surviving Lower Oil Prices, Oppenheimer & Co. (2008); Ghosh, Commodity Speculation and the Food Crisis, (working paper 2010); Halova, The Intraday Volatility-Volume Relationship in Oil and Gas Futures, (working paper 2012); Jouyet, Rappor t d' étape-Prévenir e t gérer l'instabilité des marchés agricoles, (2010); Korzenik, Fundamental Misconceptions in the Speculation Debate, (2009); Lake Hill Capital Management, Investable Indices are Distorting Commodity Markets?, (2013); Lee, Cheng, and Koh, Would Position Limits Have Made any Difference to the 'Flash Crash' on May 6, 2010?, Review of Futures Markets (2010); Markham, Manipulation of Commodity Futures Prices: The Unprosecutable Crime, Yale Journal of Regulation (1991); Mayer, The Growing Financializsation of Commodity Markets: Divergences between Index Investors and Money Managers, Journal of Development Studies (2012); Morse, Oil dotcom, Research Notes, (2008); Naylor, Food Security in an Era of Economic Volatility (working paper 2010); Newell, Commodity Speculation's ''Smoking Gun'' (2008); Peri, Vandone, and Baldi, Internet, Noise Trading and Commodity Prices (working paper 2012); Soros, Interview with Stern Stern Magazine (2008); Tanaka, IEA Says Speculation Amplifying Oil Price Moves, (2006); Von Braun and Tadesse, Global Food Price Volatility and Spikes: An Overview of Costs, Cause and Solutions (2012).

[240] Studies that employ the Granger method of statistical analysis include: Algieri, Price Volatility,

Continued

Speculation and Excessive Speculation in Commodity Markets: Sheep or Shepherd Behaviour? (working paper 2012); Antoshin, Canetti, and Miyajima, IMF Global Financial Stability Report: Financial Stress and Deleveraging: Macrofinancial Implications and Policy, Annex 1.2, Financial Investment in Commodities Markets (October 2008); Aulerich, Irwin, and Garcia, Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files (NBER Conference 2012); Borin and Di Nino, The Role of Financial Investments in Agricultural Commodity Derivatives Markets (working paper 2012); Brunetti and Büyükşahin, Is Speculation Destabilizing? (working paper 2009); Cooke and Robles, Recent Food Prices Movements: A Time Series Analysis (working paper 2009); Frenk, Review of Irwin and Sanders 2010 OECD Report (Better Markets June 10, 2010); Gilbert, Commodity Speculation and Commodity Investment (2010); Gilbert, How to Understand High Food Prices, Journal of Agricultural Economics (2008); Gilbert, Speculative Influences on Commodity Futures Prices, 2006–2008, UN Conference on Trade and Development (2010); Goyal and Tripathi, Regulation and Price Discovery: Oil Spot and Futures Markets (working paper 2012); Grosche, Limitations of Granger Causality Analysis to Assess the Price Effects From the Financialization of Agricultural Commodity Markets Under Bounded Rationality, Agricultural and Resource Economics (2012); Harris and Büyükşahin, The Role of Speculators in the Crude Oil Futures Market (working paper 2009); Irwin and Sanders, Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data (working paper 2014); Irwin and Sanders, The Impact of Index and Swap Funds on Commodity Futures Markets: A Systems Approach, Journal of Alternative Investments (working paper 2010); Irwin and Sanders, The Impact of Index and Swap Funds on Commodity Futures Markets: Preliminary Results (working paper 2010); Irwin and Sanders, The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data (working paper 2014); Irwin and Sanders, The Performance of CBOT Corn, Soybean, and Wheat Futures Contracts after Recent Changes in Speculative Limits (working paper 2007); Irwin, Sanders, and Merrin, Devil or Angel: The Role of Speculation in the Recent Commodity Price Boom, Journal of Agricultural and Applied Economics (2009); Kaufman, The role of market fundamentals and speculation in recent price changes for crude oil, Energy Policy, Vol. 39, Issue 1 (January 2011); Kaufmann and Ullman, Oil Prices, Speculation, and Fundamentals: Interpreting Causal Relations Among Spot and Futures Prices, Energy Economics, Vol. 31, Issue 4 (July 2009); Mayer, The Growing Interdependence Between Financial and Commodity Markets, UN Conference on Trade and Development (discussion paper 2009); Mobert, Do Speculators Drive Crude Oil Prices? (2009 working paper); Robles, Torero, and von Braun, When Speculation Matters (working paper 2009); Sanders, Boris, and Manfredo, Hedgers, Funds, and Small Speculators in the Energy Futures Markets: An Analysis of the CFTC's Commitment of Traders Reports, Energy Economics (2004); Sanders, Irwin, and Merrin, The Adequacy of Speculation in Agricultural Futures Markets: Too Much of a Good Thing?, Applied Economic Perspectives and Policy (2010); Sanders, Irwin, and Merrin, Smart Money? The Forecasting Ability of CFTC Large Traders, Journal of Agricultural and Resource Economics (2009); Sanders, Irwin, and Merrin, A Speculative Bubble in Commodity Futures? Cross-Sectional Evidence, Agricultural Economics (2010); Singleton, The 2008 Boom/Bust in Oil Prices (working paper 2010); Singleton, Investor Flows and the 2008 Boom/Bust in Oil Prices (working paper 2011); Stoll and Whaley, Commodity Index Investing and Commodity Futures Prices (working paper 2010); Timmer, Did Speculation Affect World Rice Prices?, UN Food and Agricultural Organization (working paper 2009); Tse and Williams, Does Index Speculation Impact Commodity Prices?, Financial Review, Vol. 48, Issue 3 (2013); Tse, The Relationship Among Agricultural Futures, ETFs, and the US Stock Market, Review of Futures Markets (2012); Varadi, An Evidence of Speculation in Indian Commodity Markets (working paper 2012); Williams, Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof, Law & Policy Journal of the University of Denver (2015).

Some economic studies considered by the Commission employ the Granger method of statistical analysis. The Granger method seeks to assess whether there is a strong linear correlation between two sets of data that are arranged chronologically forming a ''time series.'' While the Granger test is referred to as the ''Granger causality test,'' it is important to understand that, notwithstanding this shorthand, ''Granger causality'' does not necessarily establish an actual cause and effect relationship. The result of the Granger method is evidence, or the lack of evidence, of the existence of a linear correlation between the two time series. The absence of Granger causality does not necessarily imply the absence of actual causation.

Comovement or Cointegration Analyses [241]

The comovement method looks for whether there is correlation that is contemporaneous and not lagged. A subset of these comovement studies use a technique called cointegration for testing correlation between two sets of data.

Models of Fundamental Supply and Demand [242]

[241] Studies that employ the comovement or cointegration methods include: Adämmer, Bohl and Stephan, Speculative Bubbles in Agricultural Prices (working paper 2011); Algieri, A Roller Coaster Ride: an Empirical Investigation of the Main Drivers of Wheat Price (working paper 2013); Babula and Rothenberg, A Dynamic Monthly Model of U.S. Pork Product Markets: Testing for and Discerning the Role of Hedging on Pork-Related Food Costs, Journal of Int'l Agricultural Trade and Development (2013); Baffes and Haniotos, Placing the 2006/08 Commodity Boom into Perspective, World Bank Policy Research Working Paper 5371 (2010); Basu and Miffre, Capturing the Risk Premium of Commodity Futures: The Role of Hedging Pressure, Journal of Banking and Risk (2013); Belke, Bordon, and Volz, Effects of Global Liquidity on Commodity and Food Prices, German Institute for Economic Research (2013); Bicchetti and Maystre, The Synchronized and Long-lasting Structural Change on Commodity Markets: Evidence from High Frequency Data (working paper 2012); Boyd, Büyükşahin, and Haigh, The Prevalence, Sources, and Effects of Herding (working paper 2013); Bunn, Chevalier, and Le Pen, Fundamental and Financial Influences on the Co-movement of Oil and Gas Prices (working paper 2012); Büyükşahin, Harris, and Haigh, Fundamentals, Trader Activity, and Derivatives Pricing (working paper 2008); Büyükşahin and Robe, Does it Matter Who Trades Energy Derivatives?, Review of Env't, Energy, and Economics (2013); Büyükşahin and Robe, Does ''Paper Oil'' Matter? (working paper 2011); Büyükşahin and Robe, Speculators, Commodities, and Cross-Market Linkages (working paper 2012); Cheng, Kirilenko, and Xiong, Convective Risk Flows in Commodity Futures Markets (working paper 2012); Coleman and Dark, Economic Significance of Non-Hedger Investment in Commodity Markets (working paper 2012); Creti, Joets, and Mignon, On the Links Between Stock and Commodity Markets' Volatility, Energy Economics (2010); Dorfman and Karali, Have Commodity Index Funds Increased Price Linkages between Commodities? (working paper 2012); Filimonov, Bicchetti, Maystre, and Sornette, Quantification of the High Level of Endogeneity and of Structural Regime Shifts in Commodity Markets, (working paper 2013); Haigh, Harris, and Overdahl, Market Growth, Trader Participation and Pricing in Energy Futures Markets (working paper 2007); Hoff, Herding Behavior in Asset Markets, Journal of Financial Stability (2009); Kawamoto, Kimura, *et al.,* What Has Caused the Surge in Global Commodity Prices and Strengthened Cross-market Linkage?, Bank of Japan Working Papers Series No.11–E–3 (May 2011); Korniotis, Does Speculation Affect Spot Price Levels? The Case of Metals With and Without Futures Markets (working paper, FRB Finance and Economic Discussion Series 2009); Le Pen and Sévi, Futures Trading and the Excess Comovement of Commodity Prices (working paper 2012); Pollin and Heintz, How Wall Street Speculation is Driving Up Gasoline Prices Today (AFR working paper 2011); Tang and Xiong, Index Investment and Financialization of Commodities, Financial Analysts Journal (2012); and Windawi, Speculation, Embedding, and Food Prices: A Cointegration Analysis (working paper 2012).

[242] Studies that employ models of fundamental supply and demand include: Acharya, Ramadorai, and Lochstoer, Limits to Arbitrage and Hedging: Evidence from Commodity Markets, Journal of Financial Economics (2013); Allen, Litov, and Mei, Large Investors, Price Manipulation, and Limits to Arbitrage: An Anatomy of Market Corners, Review of Finance (2006); Bos and van der Molen, A Bitter Brew? How Index Fund Speculation Can Drive Up Commodity Prices, Journal of Agricultural and Applied Economics (2010); Breitenfellner, Crespo, and Keppel, Determinants of Crude Oil Prices: Supply, Demand, Cartel, or Speculation?, Monetary Policy and the Economy (2009); Brennan and Schwartz, Arbitrage in Stock Index Futures, Journal of Business (1990); Byun and Sungje, Speculation in Commodity Futures Market, Inventories and the Price of Crude Oil (working paper 2013); Chan, Trade Size, Order Imbalance, and Volatility-Volume Relation, Journal of Financial Economics (2000); Chordia, Subrahmanyam and Roll, Order imbalance, Liquidity, and Market Returns, Journal of Financial Economics (2002); Cifarelli and Paladino, Oil Price Dynamics and Speculation: a Multivariate Financial Approach, Energy Economics (2010); Doroudian and Vercammen, First and Second Order Impacts of Speculation and Commodity Price Volatility (working paper 2012); Ederington, Dewally, and Fernando, Determinants of Trader Profits in Futures Markets (working paper 2013); Einloth, Speculation and Recent Volatility in the Price of Oil (working paper 2009); Frankel and Rose, Determinants of Agricultural and Mineral Commodity Prices (working paper 2010); Girardi, Do Financial Investors Affect Commodity Prices? (working paper 2011); Gorton, Hayashi, Rouwenhorst, The Fundamentals of Commodity Futures Returns, Review of Finance (2013); Guilleminot and Ohana, The Interaction of Hedge Funds and Index Investors in Agricultural Derivatives Markets (working paper 2013); Gupta and Kamzemi, Factor Exposures and Hedge Fund Operational Risk: The Case of Amaranth (working

Some economists have developed economic models for the supply and demand of a commodity. These models often include theories of how storage capacity and use affect supply and demand, which may influence the price of a physical commodity over time. An economist looks at where the model is in equilibrium with respect to quantities of a commodity supplied and demanded to arrive at a ''fundamental'' price or price return. The economist then looks for deviations between the fundamental price (based on the model) and the actual price of a commodity. When there is a statistically significant deviation between the fundamental price and the actual price, the economist generally infers that the price is not driven by market fundamentals of supply and demand.

Switching Regressions or Similar Analyses [243]

In the context of studies relating to position limits, economists employing switching regression analysis generally posit a model with two states: A normal state, where prices reflect market fundamentals, and a second state, often interpreted as a ''bubble.'' [244] Using price data, authors of these studies calculate the probability of a transition between the two states. The point of transition is called a structural ''breakpoint.'' Examination of these breakpoints permits the researcher to identify the duration of a particular ''bubble.''

Eigenvalue Stability Analysis [245]

Some economists have run regression analyses [246] on price and time-lagged values of price. They estimate an equation that relates current to past time values over short time intervals and solve for the roots of that equation, called the eigenvalues (latent values), in order to detect unusual price changes. If they find an eigenvalue [247] with an absolute value of greater than one, they infer that the price of the commodity is in a ''bubble.''

Theoretical Models [248]

paper 2009); Haigh, Hranaiova, and Overdahl, Hedge Funds, Volatility, and Liquidity Provisions in the Energy Futures Markets, Journal of Alternative Investments (2007); Haigh, Hranaiova, and Overdahl, Price Dynamics, Price Discovery, and Large Futures Trader Interactions in the Energy Complex, (working paper 2005); Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, Brookings Paper on Economic Activity (2009); Hamilton and Wu, Effects of Index-Fund Investing on Commodity Futures Prices, International Economic Review, Vol. 56, No. 1 (2015); Hamilton and Wu, Risk Premia in Crude Oil Futures Prices, Journal of International Money and Finance (2013); Harrison and Kreps, *Speculative Investor Behavior in a Stock Market with Heterogeneous Expectations,* Quarterly Journal of Economics (1978); Henderson, Pearson and Wang, New Evidence on the Financialization of Commodity Markets (working paper 2012); Hirshleifer, Residual Risk, Trading Costs, and Commodity Futures Risk Premia, Review of Financial Studies, Vol. 1, No. 2, Oxford University Press (1988); Hong and Yogo, Digging into Commodities (working paper 2009); Interagency Task Force on Commodity Markets, Interim Report on Crude Oil, multiple federal agencies including the CFTC (2008); Juvenal and Petrella, Speculation in the Oil Market (working paper 2012); Juvenal and Petrella, Speculation in Commodities, and Cross-Market Linkages (working paper 2011); Kilian, Not All Oil Price Shocks Are Alike: Disentangling Demand and Supply Shocks in the Crude Oil Market, American Economic Review (2007); Kilian and Lee, Quantifying the Speculative Component in the Real Price of Oil: The Role of Global Oil Inventories (working paper 2013); Kilian and Murphy, The Role of Inventories and Speculative Trading in the Global Market for Crude Oil, Journal of Applied Econometrics (2010); Knittel and Pindyck, The Simple Economics of Commodity Price Speculation, (working paper 2013); Kyle and Wang, Speculation Duopoly with Agreement to Disagree: Can Overconfidence Survive the Market Test?, Journal of Finance (1997); Manera, Nicolini and Vignati, Futures Price Volatility in Commodities Markets: The Role of Short-Term vs Long-Term Speculation (working paper 2013); Mei, Acheinkman, and Xiong, Speculative Trading and Stock Prices: An Analysis of Chinese A–B Share Premia, Annals of Economics and Finance (2009); Morana, Oil Price Dynamics, Macro-finance Interactions and the Role of Financial Speculation, Journal of Banking & Finance, Vol. 37, Issue 1 (Jan. 2012); Mou, Limits to Arbitrage and Commodity Index Investment: Front-Running the Goldman roll (working paper 2011); Plato and Hoffman, Measuring the Influence of Commodity Fund Trading on Soybean Price Discovery (working paper 2007); Sornette, Woodard and Zhou, The 2006–2008 Oil Bubble and Beyond: Evidence of Speculation, and Prediction, Physica A. (2009); Stevans and Sessions, Speculation, Futures Prices, and the U.S. Real Price of Crude Oil, American Journal of Social and Management Science (2010); Trostle, Global Agricultural Supply and Demand: Factors Contributing to the Recent Increase in Food Commodity Prices, USDA Economic Research Service (2008);Van der Molen, Speculators Invading the Commodity Markets (working paper 2009); Weiner, Do Birds of A Feather Flock Together? Speculation in the Oil Markets, (Working Paper 2006); Weiner, Speculation in International Crises: Report from the Gulf, Journal of Int'l Business Studies (2005); Westcott and Hoffman, Price Determination for Corn and Wheat: The Role of Market Factors and Government Programs (working paper 1999); Wright, International Grain Reserves and Other Instruments to Address Volatility in Grain Markets, World Bank Research Observer (2012).

[243] Studies that include switching regressions or similar analyses include: Brooks, Prokopczuk, and Wu, *Boom and Bust in Commodity Markets: Bubbles or Fundamentals?* (working paper 2014); Baldi and Peri, Price Discovery in Agricultural Commodities: the Shifting Relationship Between Spot and Futures Prices (working paper 2011); Chevallier, Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data, Environmental Economics and Policy Studies (2012); Cifarelli and Paladino, Commodity Futures Returns: A non-linear Markov Regime Switching Model of Hedging and Speculative Pressures (working paper 2010); Fan and Xu, What Has Driven Oil Prices Since 2000? A Structural Change Perspective, Energy Economics (2011); Hache and Lantz, Speculative Trading & Oil Price Dynamic: A Study of the WTI Market, Energy Economics, Vol. 36, p.340 (March 2013); Lammerding, Stephan, Trede, and Wifling, Speculative Bubbles in Recent Oil Price Dynamics: Evidence from a Bayesian Markov Switching State-Space Approach, Energy Economics Vol. 36 (2013); Sigl-Grüb and Schiereck, Speculation and Nonlinear Price Dynamics in Commodity Futures Markets, Investment Management and Financial Innovations, Vol. 77 (2010); Silvernnoinen and Thorp, Financialization, Crisis and Commodity Correlation Dynamics, Journal of Int'l Financial Markets, Institutions, and Money (2013).

[244] While there is no broad academic consensus on the formal, testable economic definition of the term ''price bubble,'' price bubbles are colloquially thought to be unsustainable surges in asset prices fueled by speculation and followed by ''crashes'' or precipitous price drops.

[245] Studies that employ eigenvalue stability analysis include: Czudaj and Beckman, Spot and Futures Commodity Markets and the Unbiasedness Hypothesis—Evidence from a Novel Panel Unit Root Test, Economic Bulletin (2013); Du, Yu, and Hayes, Speculation and Volatility Spillover in the Crude Oil and Agricultural Commodity Markets: A Bayesian Analysis, (working paper 2012); Gilbert, *Speculative Influences on Commodity Futures Prices, 2006–2008,* UN Conference on Trade and Development (working paper 2010); Gutierrez, Speculative Bubbles in Agricultural Commodity Markets, European Review of Agricultural Economics (2012); Phillips and Yu, Dating the Timeline of Financial Bubbles During the Subprime Crisis, Quantitative Economics (2011).

[246] In statistical modeling, regression analysis is a process for estimating the relationships among certain types of variables (values that change over time or in different circumstances).

[247] In this context, an eigenvalue is a mathematical calculation that summarizes the dynamic properties of the data generated by the model. Generally, an eigenvalue is a concept from linear algebra.

[248] Studies that present theoretical models include: Avriel and Reisman, Optimal Option Portfolios in Markets with Position Limits and Margin Requirements, Journal of Risk (2000); Dai, Jin and Liu, Illiquidity, Position Limits, and Optimal Investment (working paper 2009); Dicembrino and Scandizzo, The Fundamental and Speculative Components of the Oil Spot Price: A Real Options Value Approach (working paper 2012); Dutt and Harris, Position Limits for Cash-Settled Derivative Contracts, Journal of Futures Markets (2005); Ebrahim and ap Gwilym, Can Position Limits Restrain Rogue Traders?, at p.832 Journal of Banking & Finance (2013); Edirsinghe, Naik, and Uppal, Optimal Replication of Options with Transaction Costs and Trading Restrictions, Journal of Financial and Quantitative Analysis (1993); Froot, Scharfstein, and Stein, Herd on the Street: Informational Inefficiencies in a Market with Short Term Speculation, (Working Paper 1990); Kumar and Seppi, Futures Manipulation with ''Cash Settlement'', Journal of Finance (1992); Kyle and Viswanathan, How to Define Illegal Price Manipulation, American Economic Review (2008); Kyle and Wang, Speculation Duopoly with Agreement to Disagree: Can Overconfidence Survive the Market Test?, Journal of Finance (1997); Lee, Cheng and Koh, An Analysis of Extreme Price Shocks and Illiquidity Among Systematic Trend Followers (working paper 2010); Leitner, Inducing Agents to Report Hidden Trades: A Theory of an Intermediary, Review of Finance (2012); Liu, Financial-Demand Based Commodity Pricing: A Theoretical Model for Financialization of Commodities (working paper 2011); Lombardi and van Robays, Do Financial Investors Destabilize the

Continued

Some studies perform little or no empirical analysis and instead present a general theoretical model that may bear, directly or indirectly, on the effect of excessive speculation in the commodities markets. Because these papers do not include empirical analysis, they contain many untested assumptions and conclusory statements, limiting their usefulness to the Commission.

Surveys of Economic Literature and Opinion Pieces [249]

The Commission considered more than seventy studies that are survey or opinion pieces. Some of these studies provide useful background material but, on the whole, they offer mere opinion unsupported by rigorous empirical analysis. While they may be useful for developing hypotheses or informing policymakers, these secondary sources often exhibit policy bias and are not neutral, reliable bases for scientific inquiry the way that primary economic studies are.[250]

More Persuasive Academic Studies

While the economic literature is inconclusive, the Commission can

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Oil Price? (working paper, European Central Bank, 2011); Morris, Speculative Investor Behavior and Learning, Quarterly Journal of Economics (1996); Parsons, Black Gold & Fool's Gold: Speculation in the Oil Futures Market, Economia (2009); Pierru and Babusiaux, Speculation without Oil Stockpiling as a Signature: A Dynamic Perspective (working paper 2010); Pirrong, Manipulation of the Commodity Futures Market Delivery Process, Journal of Business (1993); Pirrong, The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation, Journal of Law and Economics (1995); Pliska and Shalen, The Effects of Regulation on Trading Activity and Return Volatility in Futures Markets, Journal of Futures Markets (2006); Routledge, Seppi, and Spatt, Equilibrium Forward Curves for Commodities, Journal of Finance (2000); Schulmeister, Technical Trading and Commodity Price Fluctuations (working paper 2012); Schulmeister, Torero, and von Braun, Trading Practices and Price Dynamics in Commodity Markets (working paper 2009); Shleifer and Vishney, The Limits of Arbitrage, Journal of Finance (1997); Sockin and Xiong, Feedback Effects of Commodity Futures Prices (working paper 2012); Vansteenkiste, What is Driving Oil Price Futures? Fundamentals Versus Speculation (working paper, European Central Bank, 2011); Westerhoff, Speculative Markets and the Effectiveness of Price Limits, Journal of Economic Dynamics and Control (2003).

[249] Studies that are survey or opinion pieces include: Anderson, Outlaw, and Bryant, The Effects of Ethanol on Texas Food and Feed, Agricultural and Food Policy Center Research Report (2008); Baffes, The Long-term Implications of the 2007–2008 *Commodity-Price Boom,* Development in Practice (2011); Basu and Gavin, What Explains the Growth in Commodity Derivatives? (working paper 2011); Berg, The Rise of Commodity Speculation: from Villainous to Venerable, (2011); Bessenbinder, Lilan, and Mahadeva, The Role of Speculation in Oil Markets: What Have We Learned So Far? (working paper 2012); Cagan, Financial Futures Markets: Is More Regulation Needed?, Journal of Futures Markets (1981); Chincarini, The Amaranth Debacle: Failure of Risk Measures or Failure of Risk Management (working paper 2007); Chincarini, Natural Gas Futures and Spread Position Risk: Lessons from the Collapse of Amaranth Advisors L.L.C., Journal of Applied Finance (2008); CME Group, Inc., Excessive Speculation and Position Limits in Energy Derivatives Markets (working paper); Cooper, Excessive Speculation and Oil Price Shock Recessions: A Case of Wall Street ''Déjà vu All Over Again,'' Consumer Federation of America (2011); Dahl, Future Markets: The Interaction of Economic Analyses and Regulation: Discussion, American Journal of Agricultural Economics (1980); De Schutter, Food Commodities Speculation and Food Price Crises, United Nations Special Report on the Right to Food (2010); Easterbrook, Monopoly, Manipulation, and the Regulation of Futures Markets, Journal of Business (1986); Eckaus, The Oil Price Really is a Speculative Bubble (working paper 2008); Ellis, Michaely, and O'Hara, The Making of a Dealer Market: From Entry to Equilibrium in the Trading of Nasdaq Stocks, Journal of Finance (2002); European Commission, Review of the Markets in Financial Instruments Directive (working paper 2010); European Commission, Tackling the Challenges in Commodity Markets, Communication from the European Commission to the European Parliament (2011); Frenk and Turbeville, Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices, Better Markets Copyright (2011); Goldman Sachs, Global Energy Weekly March 2011 (2011); Government Accountability Office, Issues Involving the Use of the Futures Markets to Invest in Commodity Indexes, (Report 2009); Greenberger, The Relationship of Unregulated Excessive Speculation to Oil Market Price Volatility (working paper 2010); Harris, Circuit Breaker and Program Trading Limits: What Have We Learned, Brooking Institutions Press (1997); Henn, CL–WEED–59628; Her Majesty's Treasury, Global Commodities: A Long Term Vision for Stable, Secure, and Sustainable Global Markets, (2008); House of Commons Select Committee on Science & Technology of the United Kingdom, Strategically Important Metals, (2011); Hunt, Thought for the Day: Unreported Copper Stocks, Simon Hunt Strategic Services (2011); Inamura Kimata, and Takeshi, Recent Surge in Global commodity Prices—Impact of Financialization of Commodities and Globally Accommodative Monetary Conditions, Bank of Japan Review March 2011; International Monetary Fund, Is Inflation Back? Commodity Prices and Inflation, Chapter 3 of IMF's World Economic Outlook ''Financial Stress, Downturns, and Recoveries'' (2008); Irwin and Sanders, Index Funds, Financialization, and Commodity Futures Markets, Applied Economic Perspective and Policy (2010); Jack, Populists vs Theorists: Futures Markets and the Volatility of Prices, Exploration in Economic History (2006); Jickling and Austin, Hedge Fund Speculation and Oil Prices (working paper 2011); Kemp, Crisis Remarks the Commodity Business, Reuters Columnist (2008); Khan, The 2008 Oil Price ''Bubble (working paper 2009); Koski and Pontiff, How Are Derivatives Used? Evidence from the Mutual Fund Industry, Journal of Finance (1996); Lagi, Bar-Yam, and Bertrand, The Food Crisis: A Quantitative Model Of Food Prices Including Speculators and Ethanol Conversion (working paper 2012); Lagi, Bar-Yam, and Bertrand, The Food Crisis: A Quantitative Model Of Food Prices Including Speculators and Ethanol Conversion (working paper 2011); Lines, Speculation in Food Commodity Markets, World Development Movement (2010); Luciani, From Price Taker to Price Maker? Saudi Arabia and the World Oil Market (working paper 2009); Masters and White, The Accidental Hunt Brother: How Institutional Investors are Driving UP Food and Energy Prices (working paper 2008); Medlock and Myers, Who is in the Oil Futures Market and How Has It Changed?, (working paper 2009); Newman, Financialiation and Changes in the Social Relations along commodity Chains: The Case of Coffee, Review of Radical Political Economics (2009); Nissanke, Commodity Markets and Excess Volatility: An Evolution of Price Dynamics Under Financialization (working paper 2011); Nissanke, Commodity Market Linkage in the Global Financial Crisis: Excess Volatility and Development Impact, Journal of Development Studies (2012); Parsons, Black Gold & Fool's Gold: Speculation in the Oil Futures Market, (Economia 2009); Jones, Price Limits: A Return to Patience and Rationality in U.S. Markets, Speech to the CME Global Financial Leadership (2010); Petzel, Testimony before the CFTC, (July 28, 2009); Pfuderer and Gilbert, Index Funds Do Impact Agricultural Prices? (working paper 2012); Pirrong, Squeezes, Corners, and the Anti-Manipulation Provisions of the Commodity Exchange Act, Regulation (1994); Pirrong, Annex B to CL–ISDA/SIFMA–59611; Plante and Yucel, Did Speculation Drive Oil Prices? Market Fundamentals Suggest Otherwise, Federal Reserve Bank of Dallas (2011); Plante and Yucel, Did Speculation Drive Oil Prices? Futures Market Points to Fundamentals, Federal Reserve Bank of Dallas (2011); Ray and Schaffer, Index Funds and the 2006–2008 Run-up in Agricultural Commodity Prices (working paper 2010); Rossi, Analysis of CFTC Proposed Position Limits on Commodity Index Fund Trading (working paper 2011); Smith, World Oil: Market or Mayhem*?,* Journal of Economic Perspectives (2009); Technical Committee of the International Organization of Securities Commissions, Task Force on Commodity Futures Market Final Report, (2009); Tokic, Rational Destabilizing Speculation, Positive Feedback Trading, and the Oil Bubble of 2008, Energy Economics (2011); U.S. Commodity Futures Trading Commission, Part Two, A Study of the Silver Market, May 29, 1981, Report to the Congress in Response to Section 21 Of The Commodity Exchange Act., (1981); U.S. Commodity Futures Trading Commission, Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations, (2008); U.S. Senate Permanent Subcommittee, Excessive Speculation in the Natural Gas Market, (2007); U.S. Senate Permanent Subcommittee, Excessive Speculation in the Wheat Market, (2009); U.S. Senate Permanent Subcommittee, The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the cop Back on the Beat, (2006); United Nations Commission of Experts on Reforms of the International and Monetary System, Report of the Commission of Experts, (2009); United Nations Conference on Trade and Development, The Global Economic Crisis: Systemic Failures and Multilateral Remedies, (2009); United Nations Conference on Trade and Development, The Financialization of Commodity Markets, (2009); United Nations Conference on Trade and Development, Trade and Development Report: Price Formation in Financialized Commodity Markets: The Role of Information, (2011); United Nations Food and Agricultural Organization, Final Report of the Committee on Commodity Problems*: Extraordinary Joint Intersessional Meeting of the Intergovernmental Group (IGG),* (2010); United Nations Food and Agricultural Organization, Price Volatility in Agricultural Markets, Economic and Social Perspectives Policy Brief (2010); United Nations Food and Agricultural Organization, Price Volatility in Food and Agricultural Markets: Policy Response, (2011); Urbanchuk, *Speculation and the Commodity Markets* (2011); Verleger, Annex A to CL–ISDA/SIFMA–59611; Woolley, Why are Financial Markets so Inefficient and Exploitative—and a Suggested Remedy, (2010); Wray, The Commodities Market Bubble: Money Manager Capitalism and the Financialization of Commodities (working paper 2008).

[250] For example, these surveys may posit ''facts'' that are unsupported by testing, may not test their hypotheses, or may claim results that are subject to multiple interpretations.

identify a few of the well-executed studies that do not militate against and, to some degree, support the Commission's reproposal to follow, out of due caution, a prophylactic approach.[251] Hamilton and Wu, in *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013), using models of fundamental supply and demand, find evidence that changes in non-commercial positions can affect the risk premium in crude oil futures prices; that is, Hamilton and Wu found that, for a limited period around the time of the 2008 financial crisis that gave rise to the Dodd-Frank Act, increases in speculative positions reduced the risk premiums [252] in crude oil futures prices.[253] This is important because, all else being equal, one would expect the risk premium to be the component of price that would be affected by traders accumulating large positions.[254] Hamilton, in *Causes of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009), also concludes that the oil price run-up was caused by strong demand confronting stagnating world production, but that something other than fundamental factors of supply and demand (as modeled) may have aggravated the speed and magnitude of the ensuing oil price collapse. Singleton, in *Investor Flows and the 2008 Boom/Bust in Oil Prices* (working paper 2011), employs a technique that is similar to Granger causality and finds a negative correlation between speculative positions and risk premiums.[255] Chevallier, in *Price Relationships in Crude Oil Futures: New Evidence from CFTC Disaggregated Data,* Environmental Economics and Policy Studies (2012), applies switching regression analysis to position data and concludes that one cannot eliminate the possibility of speculation as one of the main factors contributing to oil price volatility in 2008. This study also suggests that when supply and demand are highly inelastic, *i.e.,* relatively unresponsive to price changes, financial investors may have contributed to oil price volatility by taking large positions in energy sector commodity index funds.[256] As one may infer from this small sample, some of the more compelling studies that support the proposition that large positions may move prices involve empirical studies of the oil market. The Commission acknowledges that not all commodity markets exhibit the same price behavior at the same times. Even so, that the findings of a particular study of the market experience of a particular commodity over a particular time period may not be extensible to other commodity markets or over other time periods does not mean that the Commission should disregard that study. This is because, as explained elsewhere, these markets are over time all susceptible to similar risks from excessive speculation. Again, this supports a prophylactic approach to limits and a determination that limits are necessary to effectuate their statutory purposes.

The Commission in the December 2013 Position Limits Proposal identified two studies of actual market events to be helpful and persuasive in making its alternative necessity finding: [257] The inter-agency report on the silver crisis [258] and the PSI Report on Excessive Speculation in the Natural Gas Market.[259] These two studies and some of the other reports included in the survey category [260] do not use statistical or theoretical models to reach economically rigorous conclusions. Some of the evidence cited in these studies is anecdotal. Still, these two studies are in-depth examinations of actual market events and the Commission continues to find them to be helpful and persuasive in making its preliminary alternative necessity finding. The Commission reiterates that the PSI Report (because it closely preceded Congress' amendments to CEA section 4a(a) in the Dodd-Frank Act) indicates how Congress views limits as necessary as a prophylactic measure to prevent the adverse effects of excessively large speculative positions. The studies, individually or taken as a whole, do not dissuade the Commission from its consistent view that large speculative positions and outsized market power pose risks to well-functioning commodities markets, nor from its preliminary finding that speculative position limits are necessary to achieve their statutory purposes.

The Commission requests comment on its discussion of studies and reports. It also invites commenters to advise the Commission of any additional studies that the Commission should consider, and why.

II. Compliance Date for the Reproposed Rules

Commenters requested that the Commission delay the compliance date, generally for at least nine months, to provide adequate time for market participants to come into compliance with a final rule.[261] In addition, a commenter requested the Commission delay the compliance date until no earlier than January 3, 2018, to coordinate with the expected implementation date for position limits in Europe.[262]

In response to commenters, in this reproposal, the Commission proposes to delay the compliance date of any final rule until, at earliest, January 3, 2018, as provided under reproposed § 150.2(e). The Commission is of the opinion that a delay would provide market participants with sufficient time to come into compliance with a final rule, particularly in light of grandfathering provisions, discussed below.

The Commission believes that a delay until January 3, 2018, would provide time for market participants to gain

[251] Generally, studies that the Commission considers to be well-executed, for example, employ well-accepted, defensible, scientific methodology, document and present facts and results that can be replicated, are on point regarding issues relevant to position limits, and may eventually appear in respected, peer-reviewed academic journals.

[252] A risk premium is the amount of return on a particular asset or investment that is in excess of the expected rate of return on a theoretically risk free asset or investment, *i.e.,* one with a virtually certain or guaranteed return.

[253] The economic rationale behind this is that speculative traders would be taking long positions to earn the risk premium, among other things. If more speculative traders are going long, *i.e.,* bidding to earn the risk premium, the risk premium would be reduced. In this way, speculators make it cheaper for short hedgers to lock in their price risk. *Contra* Harris and Büyükşahin, The Role of Speculators in the Crude Oil Futures Market (working paper 2009) (concluding that price changes precede the position change). In this way, speculators make it cheaper for short hedgers to lock in their price risk.

[254] Long speculators would tend to be compensated for assuming the price risk that is inherent with going long in the crude oil futures contract. If more speculators are bidding to earn the risk premium by taking long position in crude oil futures contracts, it should lower the risk premium, all else being equal.

[255] That is, when long speculative positions are larger, the risk premiums are smaller.

[256] *See also* Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013); Hamilton, *Causes of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009).

[257] December 2013 Position Limits Proposal, 78 FR at 75695–6.

[258] U.S. Commodity Futures Trading Commission, ''Part Two, A Study of the Silver Market,'' May 29, 1981, Report to Congress in Response to Section 21 of The Commodity Exchange Act.

[259] U.S. Senate Permanent Subcommittee on Investigations, ''Excessive Speculation in the Natural Gas Market,'' June 25, 2007.

[260] *E.g.,* U.S. Commodity Futures Trading Commission, Staff Report on Commodity Swap Dealers and Index Traders with Commission Recommendations (2008); U.S. Senate Permanent Subcommittee, Excessive Speculation in the Wheat Market (2009); U.S. Senate Permanent Subcommittee, The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat (2006).

[261] *See, e.g.,* CL–FIA–60937 at 5.

[262] CL–FIA–61036 at 2.

access to adequate systems to compute futures-equivalent positions. The Commission bases this opinion on its experience, including with swap dealers and clearing members of derivative clearing organizations, who, as reporting entities under part 20 (swaps large trader reporting), have been required to prepare reports of swaps on a futures-equivalent basis for years. As discussed above, futures-equivalent reporting of swaps under part 20 generally has improved. This means many reporting entities already have implemented acceptable systems to compute futures-equivalent positions. The systems developed for that purpose also should be acceptable for monitoring compliance with position limits. The Commission believes it is reasonable to expect some reporting entities to offer futures-equivalent computation services to market participants. In this regard, such reporting entities already compute and report, under part 20, futures-equivalent positions for swap counterparties with reportable positions, including spot-month positions and non-spot-month positions.

The Commission notes that market participants who expect to be over the limits would need to assess whether exemptions are available (including requesting non-enumerated bona fide hedging positon exemptions or spread exemptions from exchanges, as discussed below under reproposed §§ 150.9 and 150.10). In the absence of exemptions, such market participants would need to develop plans for coming into compliance.

The Commission notes the request for a further delay in a compliance date may be mitigated by the grandfathering provisions in the Reproposal. First, the reproposed rules would exclude from position limits ''pre-enactment swaps'' and ''transition period swaps,'' as discussed below. Second, the rules would exempt certain pre-existing positions from position limits under reproposed § 150.2(f). Essentially, this means only futures contracts initially would be subject to non-spot-month position limits, as well as swaps entered after the compliance date. The Commission notes that a pre-existing position in a futures contract also would not be a violation of a non-spot-month limit, but, rather, would be grandfathered, as discussed under reproposed § 150.2(f)(2), below. Nevertheless, the Commission intends to provide a substantial implementation period to ease the compliance burden.

The Commission requests comment on its discussion of the proposed compliance date.

III. Reproposed Rules

The Commission is not addressing comments that are beyond the scope of this reproposed rulemaking.

A. § 150.1—Definitions

1. Various Definitions Found in § 150.1

Among other elements, the December 2013 Position Limits Proposal included amendments to the definitions of ''futures-equivalent,'' ''long position,'' ''short position,'' and ''spot-month'' found in § 150.1 of the Commission's regulations, to conform them to the concepts and terminology of the CEA, as amended by the Dodd-Frank Act. The Commission also proposed to add to § 150.1, definitions for ''basis contract,'' ''calendar spread contract,'' ''commodity derivative contract,'' ''commodity index contract,'' ''core referenced futures contract,'' ''eligible affiliate,'' ''entity,'' ''excluded commodity,'' ''intercommodity spread contract,'' ''intermarket spread positions,'' ''intramarket spread positions,'' ''physical commodity,'' ''pre-enactment swap,'' ''pre-existing position,'' ''referenced contract,'' ''spread contract,'' ''speculative position limit,'' ''swap,'' ''swap dealer'' and ''transition period swap.'' In addition, the Commission proposed to move the definition of bona fide hedging from § 1.3(z) into part 150, and to amend and update it. Moreover, the Commission proposed to delete the definition for ''the first delivery month of the 'crop year.' ''[263] Separately, the Commission proposed making a non-substantive change to list the definitions in alphabetical order rather than by use of assigned letters.[264] According to the December 2013 Position Limits Proposal, this last change would be helpful when looking for a particular definition, both in the near future, in light of the additional definitions proposed to be adopted, and in the expectation that future rulemakings may adopt additional definitions.

Finally, in connection with the 2016 Supplemental Position Limits Proposal, which provided new alternative processes for DCMs and SEFs to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, and to exempt from federal position limits certain spread positions, the Commission proposed to further amend certain relevant definitions, including changes to the definitions of ''futures-equivalent,'' ''intermarket spread position,'' and ''intramarket spread position.''

Separately, as noted in the December 2013 Position Limits Proposal, amendments to two definitions were proposed in the November 2013 Aggregation Proposal,[265] which was approved by the Commission on the same date as the December 2013 Position Limits Proposal. The November 2013 Aggregation Proposal, a companion to the December 2013 Position Limits Proposal, included amendments to the definitions of ''eligible entity'' and ''independent account controller.''[266] The Commission notes that since the amendments were part of the separate Aggregation proposal, the proposed amendments to those definitions, and comments thereon, are addressed in the final Aggregation rulemaking (the ''2016 Final Aggregation Rule'');[267] therefore, the Commission is not addressing the definitions of ''eligible entity'' and ''independent account controller'' herein.

The Commission is reproposing the amendments to the definitions in § 150.1, as set forth in the December 2013 Position Limits Proposal and as amended in the 2016 Supplemental Position Limits Proposal, with modifications made in response to public comments. The Reproposal also includes non-substantive changes to certain definitions to enhance readability and clarity for market participants and the public, including the extraction of definitions that were contained in the definition of ''referenced contract'' to stand on their own. The amendments and the public

[263] At that time, the Commission noted that several terms that are not currently in part 150 were not included in the December 2013 Position Limits Proposal even though definitions for those terms were adopted in vacated part 151. The Commission stated its view that the definition of those terms was not necessary for clarity in light of other revisions proposed in that rulemaking. The terms not proposed at that time include ''swaption'' and ''trader.''

[264] The December 2013 Position Limits Proposal also made several non-substantive edits to the definitions to make them easier to read.

[265] *See* Aggregation of Positions, 78 FR 68946 (Nov. 15, 2013) at 68965, 68974 (proposing changes to the definitions of ''eligible entity'' and ''independent account controller'') (''November 2013 Aggregation Proposal''). The Commission issued a supplement to this proposal in September 2015, but the supplement did not propose any changes to the definitions. *See* 80 FR 58365 (Sept. 29, 2015).

[266] The December 2013 Position Limits Proposal mirrored the amendments to the definitions of ''eligible entity'' and ''independent account controller,'' proposed in the November 2013 Aggregation Proposal, and also included some non-substantive change to the definition of ''independent account controller.''

[267] *See* 2016 Final Aggregation Rule, adopted by the Commission separately from this Reproposal.

comments relevant to each amendment are discussed below.

a. Basis Contract

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to exclude ''basis contracts'' from the definition of ''referenced contracts.'' [268] While the term ''basis contract'' is not defined in current § 150.1, the Commission proposed a definition for basis contract in the December 2013 Position Limits Proposal. Proposed § 150.1 defined basis contract to mean ''a commodity derivative contract that is cash-settled based on the difference in: (1) The price, directly or indirectly, of: (a) A particular core referenced futures contract; or (b) a commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and (2) the price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of: (a) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or (b) a commodity that is listed in appendix B to this part as substantially the same as a commodity underlying the same core referenced futures contract.''

The Commission also proposed Appendix B to part 150, Commodities Listed as Substantially the Same for Purposes of the Definition of Basis Contract. As proposed, the definition of basis contract would include contracts cash-settled on the difference in prices of two different, but economically closely related commodities, for example, certain quality differentials (*e.g.,* RBOB gasoline vs. 87 unleaded).[269] As explained when it was proposed, the intent of the proposed definition was to reduce the potential for excessive speculation in referenced contracts where, for example, a speculator establishes a large outright directional position in referenced contracts and nets down that directional position with a contract based on the difference in price of the commodity underlying the referenced contracts and a close economic substitute that was not deliverable on the core referenced futures contract.[270] In the absence of this provision, the speculator could then increase further the large position in the referenced contracts. By way of comparison, the Commission noted in the December 2013 Position Limits Proposal that there is greater concern (i) that someone may manipulate the markets by disguise of a directional exposure through netting down the directional exposure using one of the legs of a quality differential (if that quality differential contract were not exempted), than (ii) that someone may use certain quality differential contracts that were exempted from position limits to manipulate the outright price of a referenced contract.[271]

Comments Received: The Commission received a number of comment letters regarding the proposed definition of basis contract. One commenter supported the proposed definition of basis contract and stated that it appreciates the Commission's inclusion of Appendix B listing the commodities it believes are substantially the same as a core referenced futures contract for purposes of identifying contracts that meet the basis contract definition.[272] Other comment letters requested that the Commission broaden the definition to include contracts that settle to other types of differentials, such as processing differentials (*e.g.,* crack or crush spreads) or quality differentials (*e.g.,* sweet vs. sour crude oil). One commenter recommended a definition of basis contract that includes crack spreads, by-products priced at a differential to other by-products (*e.g.,* jet fuel vs. heating oil, both of which are crude oil by-products), and a commodity that includes similar commodities such as a contract based on the difference in prices between light sweet crude and a sour crude that is not deliverable against the NYMEX Light Sweet Crude Oil core referenced futures contract. This commenter suggested that if these types of contracts are included as basis contracts, market participants should be able to net certain contracts where a commodity is priced at a differential to a product or by-product, subject to prior approval according to a process created by the Commission.[273]

Two commenters specifically requested that the list in Appendix B include Jet fuel (54 grade) as substantially the same as heating oil (67 grade). They also requested that WTI Midland (Argus) vs. WTI Financial Futures should be listed as basis contracts for Light Louisiana Sweet (LLS) Crude Oil.[274]

Noting that basis contracts are excluded from the definition of referenced contract and thus not subject to speculative position limits, two commenters requested CFTC expand the list in Appendix B to part 150 of commodities considered substantially the same as a core referenced futures contract, and the corresponding list of basis contracts, to reflect the commercial practices of market participants.[275] One of these commenters recommended that the Commission adopt a flexible process for identifying any additional commodities that are substantially the same as a commodity underlying a core referenced futures contract for inclusion in Appendix B, and allow market participants to request a timely interpretation regarding whether a particular commodity is substantially the same as a core referenced futures contract or that a particular contract qualifies as a basis contract.[276]

Commission Reproposal: The Commission has determined to repropose the definition of basis contract as originally proposed, but to change the defined term from ''basis contract'' to ''location basis contract.'' The Commission intended the ''basis contract'' definition to encompass contracts that settle to the difference between prices in separate delivery locations of the same (or substantially the same) commodity, while the industry seems to use the term ''basis'' more broadly to include other price differentials, including, among other things, processing differentials and quality differentials. Thus, under the Reproposal, the term is changing from ''basis contract'' to ''location basis contract'' in order to reduce any confusion stemming from the more encompassing use of the word ''basis'' in industry parlance.[277]

[268] The Commission also notes that the proposed definition of ''commodity index contract'' excluded intercommodity spread contracts, calendar spread contracts, and basis contracts.

[269] The proposed basis contract definition was not intended to include significant time differentials in prices of the two commodities (*e.g.,* the proposed basis contract definition did not include calendar spreads for nearby vs. deferred contracts).

[270] December 2013 Position Limits Proposal at 75696.

[271] *Id.*

[272] CL–Working Group–59693 at 68.

[273] CLWorking Group–59959 at 16.

[274] CL–FIA–59595 at 19; CL–ISDA/SIFMA–59611 at 35.

[275] CL–FIA–59595 at 4 and 18–19; CL–ISDA/SIFMA–59611 at 34–35.

[276] CL–FIA–59595 at 19.

[277] Consequently, the Commission realizes that its determination to retain its traditional definition while clarifying its meaning by adopting the amended term of ''locational basis contract'' does not provide for the expanded definition of basis contract requested by some of the commenters. A broader definition of basis contract would result in the exclusion of more derivative contracts from the definition of referenced contract than previously proposed. A contract excluded from the definition of referenced contract is not subject to position limit under this Reproposal. The Commission declines to exclude more than the locational basis contracts that it previously proposed from the definition of referenced contract.

The Commission is reproposing Appendix B as originally proposed. The Commission is not persuaded by commenters' suggestions for expanding the current list of commodities considered ''substantially the same'' in Appendix B. While a commenter requested the Commission expand the list to address all ''commercial practices'' used by market participants, the Commission believes this request is too vague and too broad to be workable. In addition, although a commenter recommended that the Commission adopt a flexible process for identifying any additional commodities that are substantially the same as a commodity underlying a core referenced futures contract for inclusion in Appendix B,[278] the Commission observes that market participants are already provided the flexibility of two processes: (i) To request an exemptive, no-action or interpretative letter under § 140.99; and/or (ii) to petition for changes to Appendix B under § 13.2. Under either process, the Commission would need to carefully consider whether it would be beneficial and consistent with the policies underlying CEA section 4a to list additional commodities as substantially the same as a commodity underlying a core referenced futures contract, especially since various market participants might have conflicting views on such a determination in certain cases.

Finally, the Commission notes that comments regarding other types of differentials were addressed in the Commission's 2016 Supplemental Position Limits Proposal, which would allow exchanges to grant spread exemptions, including calendar spreads, quality differential spreads, processing spreads, and product or by-product differential spreads.[279] Comments responding to that 2016 Supplemental Position Limits Proposal and the Commission's Reproposal are discussed below.

b. Commodity Derivative Contract

Proposed Rule: The December 2013 Position Limits Proposal would define in § 150.1 the term ''commodity derivative contract'' for position limits purposes as shorthand for any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)). The proposed use of such a generic term would be a convenient way to streamline and simplify references in part 150 to the various kinds of contracts to which the position limits regime applies. As such, this new definition can be found frequently throughout the Commission's proposed amendments to part 150.[280]

Comments Received: The Commission received no comments on the proposed definition.

Commission Reproposal: The Commission has determined to repropose the definition as proposed for the reasons given above.

c. Commodity Index Contract, Spread Contract, Calendar Spread Contract, and Intercommodity Spread Contract

Proposed Rule: The December 2013 Position Limits Proposal excluded commodity index contracts from the definition of referenced contracts; thus, commodity index contracts would not be subject to position limits. The Commission also proposed to define the term commodity index contract, which is not in current § 150.1, to mean ''an agreement, contract, or transaction that is not a basis contract or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same.''

Further, the Commission proposed to add a definition of basis contract, as discussed above, and spread contract to clarify which types of contracts would not be considered a commodity index contract and thus would be subject to position limits. Under the proposal, a spread contract was defined as ''a calendar spread contract or an intercommodity spread contract.'' [281] Finally, the Commission proposed the addition of definitions for a calendar spread contract, and an intercommodity spread contract to clarify the meanings of those terms. In particular, under the proposal, a calendar spread contract would mean ''a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction.'' An intercommodity spread contract would mean ''a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.'' [282]

The December 2013 Position Limits Proposal further noted that part 20 of the Commission's regulations requires reporting entities to report commodity reference price data sufficient to distinguish between commodity index contract and non-commodity index contract positions in covered contracts.[283] Therefore, for commodity index contracts, the Commission stated its intention to rely on the data elements in § 20.4(b) to distinguish data records subject to § 150.2 position limits from those contracts that are excluded from § 150.2. The Commission explained that this would enable the Commission to set position limits using the narrower data set (*i.e.,* referenced contracts subject to § 150.2 position limits) as well as conduct surveillance using the broader data set.[284]

Comments Received: The Commission received no comments on the proposed definitions for commodity index contract, spread contract, calendar spread contract, and intercommodity spread contract.[285]

[278] As noted above, according to the commenter, a flexible process would allow market participants to request a timely interpretation regarding whether a particular commodity is substantially the same as a core referenced futures contract or that a particular contract qualifies as a ''basis contract. *See* CL–FIA–59595 at 19

[279] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38476–80.

[280] *See, e.g.,* amendments to § 150.1 (the definitions of: ''location basis contract,'' the definition of ''bona fide hedging position,'' ''inter-market spread position,'' ''intra-market spread position,'' ''pre-existing position,'' ''speculative position limits,'' and ''spot month''), §§ 150.2(f)(2), 150.3(d), 150.3(h), 150.5(a), 150.5(b), 150.5(e), 150.7(d), 150.7(f), Appendix A to part 150, and Appendix C to part 150.

[281] In the December 2013 Position Limits Proposal, the Commission noted that while the proposed definition of ''referenced contract'' specifically excluded guarantees of a swap, basis contracts and commodity index contracts, spread contracts were not excluded from the proposed definition of ''referenced contract.'' The December 2013 Position Limits Proposal at 75702.

[282] In the December 2013 Position Limits Proposal, the Commission also clarified that if a swap was based on the difference between two prices of two different commodities, with one linked to a core referenced futures contract price (and the other either not linked to the price of a core referenced futures contract or linked to the price of a different core referenced futures contract), then the swap was an ''intercommodity spread contract,'' was not a commodity index contract, and was a referenced contract subject to the position limits specified in § 150.2. The Commission further clarified that a contract based on the prices of a referenced contract and the same or substantially the same commodity (and not based on the difference between such prices) was not a commodity index contract and was a referenced contract subject to position limits specified in § 150.2. *See* December 2013 Position Limits Proposal, 78 FR at 75697, n. 163.

[283] *Id.* at 75697, n. 163.

[284] *Id.* at 75697.

[285] The Commission notes that although it did not receive comments on the proposed definitions for commodity index contract, spread contract, calendar spread contract, and intercommodity spread contract, it did receive a number of comments regarding the interplay of those defined terms and the definition of ''referenced contract.'' Discussion of those comments are included in the discussion of the proposed definition of ''referenced contract'' below.

Commission Reproposal: The Commission has determined to repropose the definitions as originally proposed for the reasons provided above, with the exception that, under the Reproposal, the term ''basis contract'' will be replaced with the term ''location basis contract,'' in the reproposed definition of commodity index contract, to conform to the name change discussed above. In addition, the Commission notes that while it had proposed to subsume the definitions of commodity index contract, spread contract, calendar spread contract, and intercommodity spread contract under the definition of referenced contract, in the Reproposal it is enumerating each as a separate definition for ease of reference.

d. Core referenced Futures Contract

Proposed Rule: The December 2013 Position Limits Proposal provided a list of futures contracts in § 150.2(d) to which proposed position limit rules would apply. The Commission proposed the term ''core referenced futures contract'' as a short-hand phrase to denote such contracts.[286] Accordingly, the Commission proposed to include in § 150.1 a definition of core referenced futures contract to mean ''a futures contract that is listed in § 150.2(d).'' In its proposal, the Commission also clarified that core referenced futures contracts include options that expire into outright positions in such contracts.[287]

Comments Received: The Commission received no comments on the proposed definition.

Commission Reproposal: The Commission has determined to repropose the definition as originally proposed.

e. Eligible Affiliate

Proposed Rule: The term ''eligible affiliate,'' used in proposed § 150.2(c)(2), is not defined in current § 150.1. The Commission proposed to amend § 150.1 to define an ''eligible affiliate'' as an entity with respect to which another person: (1) Directly or indirectly holds either: (i) A majority of the equity securities of such entity, or (ii) the right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity; (2) reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and (3) is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.[288]

The definition of ''eligible affiliate'' proposed in the December 2013 Position Limits Proposal qualified persons as eligible affiliates based on requirements similar to those adopted by the Commission in a separate rulemaking.[289] On April 1, 2013, the Commission provided relief from the mandatory clearing requirement of CEA section 2(h)(1)(A) of the Act for certain affiliated persons if the affiliated persons (''eligible affiliate counterparties'') meet requirements contained in § 50.52.[290] Under both § 50.52 and the definition proposed in the December 2013 Position Limits Proposal, a person is an eligible affiliate if another person (*e.g.* a parent company), directly or indirectly, holds a majority ownership interest in such affiliates, reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such affiliates. In addition, for purposes of the position limits regime, that other person (*e.g.,* a parent company) must be required to aggregate the positions of such affiliates under § 150.4 and not claim an exemption from aggregation for such affiliates.[291]

Comments Received: The Commission received few comments on the proposed definition of ''eligible affiliate.'' Commenters requested that the Commission harmonize the definition of ''eligible affiliate'' with the definition of ''eligible affiliate counterparty'' under § 50.52 in order to include ''sister affiliates'' within the definition.[292]

Commission Reproposal: The Commission notes that under § 150.4, aggregation is required by a person that holds an ownership or equity interest of 10 percent or greater in another person, unless an exemption applies. Under reproposed § 150.2(c)(2), sister affiliates would not be required to comply separately with position limits, provided such entities are eligible affiliates.[293]

As such, the Commission does not believe a there is a need to conform the ''eligible affiliate'' definition in reproposed § 150.1 to the definition of ''eligible affiliate counterparty'' in § 50.52 in order to accommodate sister affiliates. The Commission notes that a third person that holds an ownership or equity interest in each of the sister affiliates—*e.g.,* the parent company—would be required to aggregate positions of such eligible affiliates. Thus, the Commission is reproposing the definition without changes.

f. Entity

Proposed Rule: The December 2013 Position Limits Proposal defined ''entity'' to mean ''a 'person' as defined in section 1a of the Act.'' [294] The term, not defined in current § 150.1, is used in a number of contexts, and in various definitions in the proposed amendments to part 150. Thus, the definition originally proposed would provide a clear and unambiguous meaning for the term, and prevent confusion.

Comments Received: The Commission received no comments on the proposed definition.

Commission Reproposal: The Commission has determined to repropose the definition as originally proposed, for the reasons provided above.

g. Excluded Commodity

Proposed Rule: The phrase ''excluded commodity'' was added into the CEA in the CFMA, and is defined in CEA

[286] The selection of the core referenced futures contracts is explained in the discussion of § 150.2. *See* discussion below.

[287] *See* 78 FR at 75697 n. 166.

[288] *See* proposed § 150.1.

[289] *See* December 2013 Position Limits Proposal, 78 FR at 75698.

[290] *See* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21749, 21783, Apr. 11, 2013. Section 50.52(a) addresses eligible affiliate counterparty status, allowing a person not to clear a swap subject to the clearing requirement of section 2(h)(1)(A) of the Act and part 50 if the person meets the requirements of the conditions contained in paragraphs (a) and (b) of § 50.52. The conditions in paragraph (a) of § 50.52 specify either one counterparty holds a majority ownership interest in, and reports its financial statements on a consolidated basis with, the other counterparty, or both counterparties are majority owned by a third party who reports its financial statements on a consolidated basis with the counterparties.

The conditions in paragraph (b) of § 50.52 address factors such as the decision of the parties not to clear, the associated documentation, audit, and recordkeeping requirements, the policies and procedures that must be established, maintained, and followed by a dealer and major swap participant, and the requirement to have an appropriate centralized risk management program, rather than the nature of the affiliation. As such, those conditions are less pertinent to the definition of eligible affiliate.

[291] *See* December 2013 Position Limits Proposal, 78 FR at 75698; *see also* definition of ''eligible affiliate'' in § 150.1, as proposed therein.

[292] *See, e.g.,* CL–ISDA/SIFMA–59611 at 3 and 33, CL–Working Group–59693 at 66–7.

[293] Of course, sister affiliates would be required to aggregate, as would any other market participants, if they were trading together pursuant to an express or implied agreement.

[294] CEA section 1a(38); 7 U.S.C. 1a(38). *See also* December 2013 Position Limits Proposal, 78 FR at 75698.

section 1a(19), but is not defined or used in current part 150.[295] CEA section 4a(a)(2)(A), as amended by the Dodd-Frank Act, utilizes the phrase ''excluded commodity'' when it provides a timeline under which the Commission is charged with setting limits for futures and option contracts other than on excluded commodities.[296]

The December 2013 Position Limits Proposal included in § 150.1, a definition of excluded commodity that simply incorporates the statutory meaning, as a useful term for purposes of a number of the proposed changes to part 150. For example, the phrase was used in the proposed amendments to § 150.5, in its provision of requirements and acceptable practices for DCMs and SEFs in their adoption of rules and procedures for monitoring and enforcing position limits and accountability provisions; the phrase was also used in the definition of bona fide hedging position.

Comments Received: The Commission received no comments on the proposed definition.

Commission Reproposal: The Commission has determined to repropose the definition as previously proposed, for the reasons provided above.

h. First Delivery Month of the Crop Year

Proposed Rule: The term ''first delivery month of the crop year'' is currently defined in § 150.1(c), with a table of the first delivery month of the crop year for the commodities for which position limits are currently provided in § 150.2. The crop year definition had been pertinent for purposes of the spread exemption to the individual month limit in current § 150.3(a)(3), which limits spreads to those between individual months in the same crop year and to a level no more than that of the all-months limit.[297] Under the December 2013 Position Limits Proposal, the definition of ''crop year'' would be deleted from § 150.1. The proposed elimination of the definition conformed with level of individual month limits set at the level of the all-months limits, thus negating the purpose of the existing spread exemption in current § 150.3(a)(3), which the December 2013 Position Limits Proposal also eliminated.

The Commission notes that in its 2016 Supplemental Position Limits Proposal, the Commission proposed to retain a spread exemption in § 150.3 and not, as proposed in the December 2013 Position Limits Proposal, to eliminate it altogether.[298]

Comments Received: The Commission received no comments on the proposed deletion of the crop year definition.

Commission Reproposal: The Commission has determined to repropose the deletion of the definition of the term ''first delivery month of the crop year'' as originally proposed. The Commission notes that, although in its 2016 Supplemental Position Limits Proposal, the Commission proposed to retain a spread exemption in § 150.3 and, in fact, provides for the approval by exchanges of exemptions to spread positions beyond the limited exemption for spread positions in current § 150.3(a)(3), the crop year definition remains unnecessary since the level of individual month limits has been set at the level of the all-months limits.

i. Futures Equivalent

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to broaden the definition of the term ''futures-equivalent'' found in current § 150.1(f) of the Commission's regulations,[299] and to expand upon clarifications included in the current definition relating to adjustments and computation times.[300] The Dodd-Frank Act amendments to CEA section 4a,[301] in part, direct the Commission to apply aggregate federal position limits to physical commodity futures contracts and to swaps contracts that are economically equivalent to such physical commodity futures contracts on which the Commission has established limits. In order to aggregate positions in futures, options and swaps contracts, it is necessary to adjust the position sizes, since such contracts may have varying units of trading (*e.g.,* the amount of a commodity underlying a particular swap contract could be larger than the amount of a commodity underlying a core referenced futures contract). The Commission proposed to adjust position sizes to an equivalent position based on the size of the unit of trading of the core referenced futures contract. Under the December 2013 Position Limits Proposal, the definition of ''futures equivalent'' in current § 150.1(f), which is applicable only to an option contract, would be extended to both options and swaps.

In the 2016 Supplemental Position Limits Proposal, the Commission proposed two further clarifications to the definition of the term ''futures-equivalent.'' First, the Commission proposed to address circumstances in which a referenced contract for which futures equivalents must be calculated is itself a futures contract. The Commission noted that this may occur, for example, when the referenced contract is a futures contract that is a mini-sized version of the core referenced futures contract (*e.g.,* the mini-corn and the corn futures contracts).[302] The Commission proposed to clarify in proposed § 150.1 that the term ''futures-equivalent'' includes a futures contract which has been converted to an economically equivalent amount of an open position in a core

[295] CEA section 1a(19); 7 U.S.C. 1a(19).

[296] CEA section 4a(2)(A); 7 U.S.C. 6a(2)(A).

[297] Prior to the adoption of Part 151, a single-month limit was set at a level that was lower than the all-months-combined limit. Operating in conjunction with the lower single-month limit level, as noted below, § 150.3(a)(3) provides a limited exemption for calendar spread positions to exceed that single-month limit, as long as the single month position (including calendar spread positions) is no greater than the level of the all-months-combined limit. In part 151, the Commission determined to set the single-month position limit levels in § 150.2 at the same level as the all-months-combined limits; in vacating part 151, the court retained the amendments to § 150.2, leaving the single-month limit at the same level as those of the all-months-combined limit levels. The December 2013 Position Limits Proposal retained parity of the single-month limit and all-months-combined limits levels.

[298] Moreover, the 2016 Supplemental Position Limits Proposal did not limit the exemption to spread positions held between individual months of a futures contract in the same crop year, nor limit the size of an individual month position to the all-months limit.

[299] 17 CFR 150.1(f) currently defines ''futures-equivalent'' only for an option contract, adjusting the open position in options by the previous day's risk factor, as calculated at the close of trading by the exchange.

[300] The December 2013 Position Limits Proposal defined ''futures-equivalent'' for: (1) An option contact, adjusting the position size by an economically reasonable and analytically supported risk factor, computed as of the previous day's close or the current day's close or contemporaneously during the trading day; and (2) a swap, converting the position size to an economically equivalent amount of an open position in a core referenced futures contract. *See* December 2013 Position Limits Proposal, 78 FR at 75698–9.

[301] Amendments to CEA section 4a(1) authorize the Commission to extend position limits beyond futures and option contracts to swaps traded on an exchange and swaps not traded on an exchange that perform or affect a significant price discovery function with respect to regulated entities. 7 U.S.C. 6a(a)(1). In addition, under new CEA sections 4a(a)(2) and 4a(a)(5), speculative position limits apply to agricultural and exempt commodity swaps that are ''economically equivalent'' to DCM futures and option contracts. 7 U.S.C. 6a(a)(2) and (5).

[302] Under current § 150.2, for purposes of compliance with federal position limits, positions in regular sized and mini-sized contracts are aggregated. The Commission's practice of aggregating futures contracts when a DCM lists for trading two or more futures contracts with substantially identical terms, is to scale down a position in the mini-sized contract, by multiplying the position in the mini-sized contract by the ratio of the unit of trading in the mini-sized contract to that of the regular sized contract. *See* paragraph (b)(2)(D) of app. C to part 38 of the Commission's regulations for guidance regarding the contract size or trading unit for a futures or futures option contract.

referenced futures contract. This clarification would mirror the expanded definition of ''futures-equivalent'' in the December 2013 Position Limits Proposal, as it would pertain to swaps.

Second, the Commission proposed in the 2016 Supplemental Position Limits Proposal to clarify the definition of the term ''futures-equivalent'' to provide that, for purposes of calculating futures equivalents, an option contract must also be converted to an economically equivalent amount of an open position in a core referenced futures contract. This clarification would address situations, for example, where the unit of trading underlying an option contract (that is, the notional quantity underlying an option contract) may differ from the unit of trading underlying a core referenced futures contract.[303]

The Commission expressed the view in the 2016 Supplemental Position Limits Proposal that these clarifications would be consistent with the methodology the Commission used to provide its analysis of unique persons over percentages of the proposed position limit levels in the December 2013 Position Limits Proposal.[304]

Comments Received: The Commission received two comments on the proposed definition of ''futures-equivalent'' in the December 2013 Position Limits Proposal.[305] Each comment was generally supportive of the proposed definition. Although one commenter commended the flexibility granted to market participants to use different option valuation models, it recommended that the Commission provide guidance on when it would consider an option valuation model unsatisfactory and what the factors the Commission would consider in arriving at such an opinion.[306] According to the commenter, the Commission should utilize a ''reasonableness approach'' by explicitly providing a ''safe harbor'' for models that produce results within 10 percent of an exchange or Commission model, and should permit market participants to demonstrate the reasonableness under prevailing market conditions of any model that falls outside this safe harbor.[307] It was also recommended that the Commission consider the exchanges' approach to option valuation where appropriate because these approaches are already in use and familiar to market participants.[308]

Both MFA and FIA supported the optional use of the prior day's delta to calculate a futures-equivalent position for purposes of speculative position limit compliance.[309] In addition, each requested that the Commission confirm or adopt a provision similar to CME Rule 562. That exchange rule provides, among other things, that if a participant's position exceeds position limits as a result of an option assignment, that participant is allowed one business day to liquidate the excess position without being considered in violation of the limits. FIA urged the Commission to provide market participants with a reasonable period of time to reduce its position below the speculative position limit.[310]

Commission Reproposal: The Commission has determined to repropose the definition of ''futures-equivalent'' as proposed in the 2016 Supplemental Position Limits proposal, with the exception that it now proposes adopting the current exchange practice with regard to option assignments, as discussed below.

Regarding risk (delta) models, the Reproposal does not provide a ''safe harbor'' as requested since risk models, generally, should produce similar results. The Commission believes a difference of 10 percent above or below the delta resulting from an exchange's model generally would be too great to be economically reasonable. However, the Commission notes that, under the Reproposal, should a market participant believe its model produces an economically reasonable and analytically supported risk factor for a particular trading session that differs significantly from a result published by an exchange for that same time,[311] it may describe the circumstances that result in a significant difference and request that staff review that model for reasonableness.[312]

Regarding the time period for a participant to come into compliance because of option assignment, the Commission agrees that a participant in compliance only because of a previous day's delta, and no longer, after option assignment, in compliance on a subsequent day, should have one business day to liquidate the excess position resulting from option assignment without being considered in violation of the limits.[313] Exchanges currently provide the same amount of time to come into compliance.

j. Intermarket Spread Position and Intramarket Spread Position

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to add to current § 150.1 new definitions of the terms ''intermarket spread position'' and ''intramarket spread position.'' [314] These terms were defined in the December 2013 Position Limits Proposal within the definition of ''referenced contract.'' In connection with its 2016 Supplemental Position Limits Proposal to permit exchanges to process applications for exemptions from federal position limits for certain spread positions, the Commission proposed to expand the definitions of these terms as proposed in the December 2013 Position Limits Proposal.

In particular, in the 2016 Supplemental Position Limits Proposal,

[303] For an example of a futures-equivalent conversion of a swaption, *see* example 6, WTI swaptions, Appendix A to part 20 of the Commission's regulations.

[304] 2016 Supplemental Position Limits Proposal, 81 FR at 38483. *See also* Table 11 in the December 2013 Position Limits Proposal, 78 FR at 75731–3.

[305] CL–MFA–59606; CL–FIA–59595 at 15.

[306] CL–MFA–59606 at 16–17.

[307] MFA also stated that the Commission should not second guess the results of reasonable models and impose findings of violations after-the-fact as that would introduce tremendous uncertainty into compliance with the position limits regime. *Id* at 17.

[308] *Id* at 17.

[309] CL–MFA–59606 at 17; CL–FIA–59595 at 15.

[310] CL–FIA–59595 at 15.

[311] Under § 16.01(a)(2), a reporting market is required to record for each trading session the option delta, when a delta system is used, while § 16.01(e) requires a reporting market to make that option delta readily available to the public. A reporting market for this purpose is defined in § 15.00(q) as a DCM or a registered entity under CEA section 1a(40) (under CEA section 1a(40), registered entities include, among others, DCMs, DCOs, SEFs, SDRs).

[312] Deltas are computed using an option pricing model. Different option pricing models incorporate different assumptions. For a discussion of circumstances where assumptions in an option pricing model may not hold, *see,* for example, Paul Wilmott, *Derivatives: The Theory and Practice of Financial Engineering* chapter 29 (1998) (describing circumstances where delta hedging an option position (*i.e.,* replication trading) can move the price of the underlying asset, violating an assumption of certain option pricing models that replication trading has no influence on the price of the underlying asset).

[313] The Commission believes that, in the circumstance of option assignment, one business day is a reasonable amount of time to come into compliance because the markets for commodities subject to federal limits under § 150.2 are generally liquid.

[314] In the December 2013 Position Limits Proposal, the Commission proposed to define an ''intermarket spread position'' as ''a long position in a commodity derivative contract in a particular commodity at a particular designated contract market or swap execution facility and a short position in another commodity derivative contract in that same commodity away from that particular designated contract market or swap execution facility.'' The Commission also proposed to define an ''intramarket spread position'' as ''a long position in a commodity derivative contract in a particular commodity and a short position in another commodity contract in the same commodity on the same designated contract market or swap execution facility.'' *See* December 2013 Position Limits Proposal, 78 FR at 75699–700.

the Commission proposed to define an ''intermarket spread position'' to mean ''a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, at a particular designated contract market, and a short (long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or its by-products, away from that particular designated contract market.'' Similarly, the Commission proposed in the 2016 Supplemental Position Limits Proposal to define an ''intramarket spread position'' to mean ''a long position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, and a short position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or its by-products, on the same designated contract market.''

The Commission expressed the view that the expanded definitions proposed in the 2016 Supplemental Position Limits Proposal would take into account that a market participant may take positions in multiple commodity derivative contracts to establish an intermarket spread position or an intramarket spread position. The expanded definitions would also take into account that such spread positions may be established by taking positions in derivative contracts in the same commodity, in similar commodities, or in the products or by-products of the same or similar commodities. By way of example, the Commission noted that the expanded definitions would include a short position in a crude oil derivative contract and long positions in a gasoline derivative contract and a diesel fuel derivative contract (collectively, a reverse crack spread).

Comments Received: The Commission did not receive any comments in response to the definitions of ''intermarket spread position'' and ''intramarket spread position'' proposed in the December 2013 Position Limits Proposal [315] or in response to the 2016 Supplemental Position Limits Proposal.

Commission Reproposal: The Commission has determined to repropose the definitions of the terms ''intermarket spread position'' and ''intramarket spread position'' as proposed in the 2016 Supplemental Position Limits Proposal.

k. Long Position

Proposed Rule: The term ''long position'' is currently defined in § 150.1(g) to mean ''a long call option, a short put option or a long underlying futures contract.'' The Commission proposed to update the definition to make it also applicable to swaps such that a long position would include a long futures-equivalent swap.

Commission Reproposal: Though no commenters suggested changes to the definition of ''long position,'' the Commission is concerned that the proposed definition does not clearly articulate that futures and options contracts are subject to position limits on a futures-equivalent basis in terms of the core referenced futures contract. Longstanding market practice has applied position limits on futures and options on a futures-equivalent basis, and the Commission believes that practice ought to be made explicit in the definition in order to prevent confusion. Thus, the Commission is reproposing an amended definition to clarify that a long position is ''on a futures-equivalent basis, a long call option, a short put option, a long underlying futures contract, or a swap position that is equivalent to a long futures contract.'' This clarification is consistent with the clarification to the definition of futures-equivalent basis proposed in the 2016 Supplemental Position Limits Proposal. Though the substance of the definition is fundamentally unchanged, the revised language should prevent unnecessary confusion over the application of futures-equivalency to different kinds of commodity derivative contracts.

l. Physical Commodity

Proposed Rule: The December 2013 Position Limits Proposal would amend § 150.1 by adding in a definition of the term ''physical commodity'' for position limit purposes. Congress used the term ''physical commodity'' in CEA sections 4a(a)(2)(A) and 4a(a)(2)(B) to mean commodities ''other than excluded commodities as defined by the Commission.'' Therefore, the Commission interprets ''physical commodities'' to include both exempt and agricultural commodities, but not excluded commodities, and proposes to define the term as such.[316]

Comments Received: The Commission received no comments on the proposed definition.

Commission Reproposal: The Commission has determined to repropose the definition as originally proposed.

m. Pre-enactment Swap and Pre-Existing Position

Proposed Rule: The December 2013 Position Limits Proposal would amend § 150.1 by adding in new definitions of the terms ''pre-enactment swap'' and ''pre-existing position'' for position limit purposes. Under the definitions proposed in the December 2013 Position Limits Proposal, ''pre-enactment swap'' means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act, while ''pre-existing position'' means any position in a commodity derivative contract acquired in good faith prior to the effective date of any bylaw, rule, regulation or resolution that specifies an initial speculative position limit level or a subsequent change to that level.

Comments Received: The Commission received no comments on the proposed definitions either of the terms ''pre-enactment swap'' or ''pre-existing position.''

Commission Reproposal: The Commission has determined to repropose both definitions as previously proposed.

n. Referenced Contract

Proposed Rule: Part 150 currently does not include a definition of the phrase ''referenced contract,'' which was introduced and adopted in vacated part 151.[317] As was noted when part 151 was adopted, the Commission identified 28 core referenced futures contracts and proposed to apply aggregate limits on a futures equivalent basis across all derivatives that met the definition of referenced contracts.[318] The definition of referenced contract proposed in the December 2013 Position Limits Proposal was similar to that of vacated part 151,

[315] As noted above, the definitions of ''intermarket spread position'' and ''intramarket spread position'' were included.

[316] For position limits purposes, proposed § 150.1 would define ''physical commodity'' to mean any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a(20) of the Act.

[317] Vacated § 151.1 defined ''Referenced Contract'' to mean ''on a futures-equivalent basis with respect to a particular Core Referenced Futures Contract, a Core Referenced Futures Contract listed in § 151.2, or a futures contract, options contract, swap or swaption, other than a basis contract or contract on a commodity index that is: (1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular Core Referenced Futures Contract; or (2) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular Core Referenced Futures Contract for delivery at the same location or locations as specified in that particular Core Referenced Futures Contract.''

[318] Position Limits for Futures and Swaps, 76 FR at 71629.

but there were certain differences, including an exclusion of guarantees of swaps and the incorporation of other terms into the definition of referenced contract.

In the December 2013 Position Limits Proposal, the term ''referenced contract'' was proposed to be defined in § 150.1 to mean, on a futures-equivalent basis with respect to a particular core referenced futures contract, a core referenced futures contract listed in § 150.2(d) of this part, or a futures contract, options contract, or swap, other than a guarantee of a swap, a basis contract, or a commodity index contract: (1) That is: (a) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or (b) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract; and (2) where: (a) Calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction; (b) commodity index contract means an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same; (c) spread contract means either a calendar spread contract or an intercommodity spread contract; and (d) intercommodity spread contract means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Comments Received: The Commission received numerous comments [319] regarding various aspects of the definition of ''referenced contract.'' Some were generally supportive of the proposed definition while others suggested changes. One commenter expressly stated its support for speculative limits on futures, options, and swaps because each financial instrument ''can be used to develop market power and increase volatility.'' [320] Another commenter expressed its support for the exclusion of guarantees of swaps from the definition of referenced contract.[321] These comments and the Commission's response are detailed below.

Commission Reproposal: The Commission is reproposing the definition of referenced contract with two substantive modifications from the original proposal, both of which are discussed further below. First, the Commission is now proposing to amend the definition of ''referenced contract'' to expressly exclude trade options. Second, the Reproposal would clarify the meaning of ''indirectly linked.'' The Reproposal also moves four definitions that were embedded in the proposed definition of referenced contract, specifically ''calendar spread contract,'' ''commodity index contract,'' ''spread contract,'' and ''intercommodity spread contract,'' to their own definitions in § 150.1, while otherwise retaining those definitions as proposed. In addition, the Reproposal makes non-substantive modifications to the definition of referenced contract to make it easier to read.

Comments Received: In response to a specific request for comment in the December 2013 Position Limits Proposal, many commenters recommended excluding trade options from the definition of referenced contract.[322]

Commission Reproposal: In response to numerous comments, the reproposed definition of ''referenced contract'' expressly excludes trade options that meet the requirements of § 32.3. The Commission notes that in its trade options final rule,[323] the cross-reference to vacated part 151 position limits was deleted from § 32.3(c). At that time, the Commission stated its belief that federal speculative position limits should not apply to trade options, as well as its intention to address trade options in the context of the any final rulemaking on position limits.[324] Therefore, the Commission is reproposing the definition of ''referenced contract'' to expressly exclude trade options that meet the requirements of § 32.3 of this chapter.

Comments Received: Commenters asserted that certain aspects of the definition of referenced contract are unclear and/or unworkable. For example, commenters suggested that the concept of ''indirectly linked'' is unclear and so market participants may not know whether a particular contract is subject to limits.[325] Some commenters believe that the definition is overbroad and captures products that they state do not affect price discovery or impair hedging and are not truly economically-equivalent.[326] Commenters request that the Commission support its determination regarding which contracts are economically equivalent by providing a description of the methodology used to determine the contracts considered to be economically-equivalent, including examples of over-the-counter (''OTC'') and FBOT contracts.[327] One commenter stated that support is necessary because ''mechanically assign[ing]'' the label of economically-equivalent to any contract that references a core referenced futures contract does not make it equivalent.[328]

Commission Reproposal: The Commission agrees with commenters that there is a need to clarify the meaning of ''indirectly linked.'' The Commission notes that including contracts that are ''indirectly linked'' to the core referenced futures contract under the definition of referenced contract is intended to prevent the evasion of position limits through the creation of an economically equivalent contract that does not directly reference the core referenced futures contract price. Under the reproposed definition, ''indirectly linked'' means a contract that settles to a price based on another derivative contract that, either directly or through linkage to another derivative contract, has a settlement price based on

[319] The commenters included AGA, APGA, Atmos, API, Better Markets, BG Group, Calpine, Citadel, CME, CMOC, COPE, DEU, EEI, EPSA, FIA, ICE, IECA, ISDA/SIFMA, GFMA, IATP, MFA, NEM, NFP, NGSA, OLAM, PAAP, SCS, and Vectra.

[320] CL–IECA–59713 at 4.

[321] CL–IECAssn–59679 at 31.

[322] *See, e.g.,* CL–FIA–59595 at 4 and 19, CL–EEI–EPSA–59602 at 3, CL–ISDA/SIFMA–59611 at 3 and 34, CL–NEM–59620 at 2, CL–DEU–59627 at 7, CL–AGA–59632 at 4–5, CL–AGA–60382 at 10, CL–Olam–59658 at 3, CL–BG Group–59656 at 4, CL–BG Group–60383 at 4, CL–COPE–59662 at 5 and 8, CL–Calpine–59663 at 5, CL–PAAP–59664 at 4, CL–NGSA–59673 at 27–33, CL–ICE–59669 at 13, CL–EPSA–60381 at 4–5, CL–A4A–59714 at 5, CL–NFP–59690 at 7–8, CL–Working Group–59693 at 55–58, CL–API–59694 at 7, CL–IECAssn–59679 at 22, CL–IECAssn–59957 at 6–9, CL–Atmos–59705 at 4, CL–APGA–59722 at 9, CL–EEI–59945 at 5–6, CL–EPSA–55953 at 6–7, and CL–SCS–60399 at 3.

[323] Trade Options, 81 FR 14966 (Mar. 21, 2016).

[324] *Id.* at 14971.

[325] *See, e.g.,* CL–CMC–59634 at 14, and CL–COPE–59662 at 7, n. 20 (stating ''[i]t is one thing if the Commission means a reference to a contract that itself directly references a core referenced futures contract. It is more troubling and likely unworkable if the Commission means a more subjective economic link to a delivery location that is used in a core referenced futures contract. At a minimum, the Commission should provide examples of indirect linkage that triggers referenced contract status'').

[326] *See, e.g.,* CL–COPE–59662 at 7, and CL–BG Group–59656 at 4.

[327] *See, e.g.,* CL–MFA–59606 at 4 and 15–16.

[328] CL–COPE–59950 at 7.

the price of a core referenced futures contract or based on the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location specified in that particular core referenced futures contract. Therefore, contracts that settle to the price of a referenced contract, for example, would be indirectly linked to the core referenced futures contract (*e.g.,* a swap that prices to the ICE Futures US Henry LD1 Fixed Price Futures (H) contract, which is a referenced contract that settles directly to the price of the NYMEX Henry Hub Natural Gas (NG) core referenced futures contract).

On the other hand, an outright derivative contract whose settlement price is based on an index published by a price reporting agency (''PRA'') that surveys cash market transaction prices (even if the cash market practice is to price at a differential to a futures contract) would not be directly or indirectly linked to the core referenced futures contract.[329] Similarly, a derivative contract whose settlement price was based on the same underlying commodity at a different delivery location (*e.g.,* ultra-low sulfur diesel delivered at L.A. Harbor) would not be linked, directly or indirectly, to the core referenced futures contract. The Commission is publishing an updated *CFTC Staff Workbook of Commodity Derivative Contracts Under the Regulations Regarding Position Limits for Derivatives* along with this release, which provides a non-exhaustive list of referenced contracts and may be helpful to market participants in determining categories of contracts that fit within the definition. Under the Reproposal, as always, market participants may request clarification from the Commission when necessary.

Regarding comments that the definition is overbroad and captures products that commenters state do not affect price discovery or are not truly economically-equivalent, the Commission notes that commenters seem to be confusing the statutory definitions of ''significant price discovery function'' (in CEA section 4a(a)(4)) and ''economically equivalent'' (in CEA section 4a(a)(5)). As a matter of course, contracts can be economically equivalent without serving a significant price discovery function. The Commission notes that there is no unpublished methodology used to determine which contracts are referenced contracts. Instead, the Commission proposed, and, following notice and comment, is now reproposing a definition for referenced contracts, and contracts that fit under that definition will be subject to federal speculative position limits.

Comments Received: Several commenters suggested that cash-settled contracts should not be subject to position limits.[330] One commenter asserted that non-deliverable cash-settled contracts are ''fundamentally different'' from deliverable commodity contracts and should not be subject to position limits.[331] The commenter also asserted that subjecting penultimate-day contracts such as options to a limit structure would make managing an option portfolio ''virtually impossible'' and would result in confusion and uncertainty.[332]

Commission Reproposal: The Commission has determined not to make any changes in the Reproposal that would broadly exempt cash-settled contracts from position limits. Cash-settled contracts are economically equivalent to deliverable contracts, and Congress has required that the Commission impose limits on economically equivalent swaps. The Commission notes that Congress took action twice to address this issue. In CEA section 4a(a)(5)(A), Congress required the Commission to adopt position limits for swaps that are economically equivalent to futures or options on futures or commodities traded on a futures exchange, for which the Commission has adopted position limits. Previously, in the CFTC Reauthorization Act of 2008,[333] Congress imposed a core principle for position limitations on swaps that are significant price discovery contracts.[334] In addition, because cash-settled referenced contracts are economically equivalent to the physical delivery contract in the same commodity, a trader has an incentive to manipulate one contract in order to benefit the other.[335] The Commission notes that a trader with positions in both the physically delivered and cash-settled referenced contracts would have, in the absence of position limits, increased ability to manipulate one contract to benefit positions in the other.

Moreover, if speculators were incentivized to abandon physical delivery contracts for cash-settled contracts so as to avoid position limits, it could result in degradation of the physical delivery contract markets that position limits are intended and designed to protect.

Comments Received: One commenter asked the Commission to confirm that a non-transferable repurchase right granted in connection with a hedged commodity transaction does not count towards position limits, citing CME Group and ICE Futures rules to that effect. The commenter is concerned that such a transaction could be deemed a commodity option and therefore legally a swap, but that it believed the transaction satisfies the criteria for exemption from definition as a swap.[336]

Commission Reproposal: As the commenter notes, whether the contract is subject to position limits depends on whether it is a swap. The Commission points out that the release adopting the definition of swap noted the Commission's belief that its forward contract interpretation ''provides sufficient clarity with respect to the forward contract exclusion from the swap and future delivery definitions.'' [337] Also in that release, the Commission noted that commodity options are swaps.[338] Separately, the Commission adopted Commission § 32.3, providing an exemption from the commodity option definition for trade options; the exemption was recently further amended.[339] The commenter should apply these rules to determine whether a given contract is a swap. In addition, the Commission notes that under Commission § 140.99, the commenter may request clarification or exemptive relief regarding whether a non-transferable repurchase right falls under the definition of a ''swap.'' To the extent the commenter seeks a clarification or change to the definition of a swap, the current rulemaking has not been expanded to revisit that definition.

[329] The Commission notes that while the outright derivative contract would not be indirectly linked to the core referenced contract, a derivative contract that settles to the difference between the core referenced futures contract and the PRA index would be directly linked because it settles in part to the core referenced futures contract price.

[330] *See, e.g.,* CL–Vectra–60369 at 3, and CL–Citadel–59717 at 9.

[331] CL–Vectra–60369 at 3.

[332] *Id.*

[333] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008),

[334] CEA section 2(h)(7) (2009).

[335] Under the reproposed definition, a cash-settled contract must be linked, directly or indirectly, to the core referenced futures contract or the same underlying commodity in the same delivery location in order to be considered a ''referenced contract.''

[336] CL–Olam–59658 at 8–9.

[337] *See,* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule (''Swap Definition Rulemaking''), 77 FR 48208, 48231 (Aug. 13, 2012).

[338] *Id.* at 48237.

[339] *See* Commodity Options, 77 FR 25320, 75326 (Apr. 27, 2012); *see also* Trade Options, 81 FR 14966 (Mar. 21, 2016).

Comments Received: One commenter[340] requested clarification that a bid, offer, or indication of interest for an OTC swap that does not constitute a binding transaction will not count towards position limits, noting that current CME Rule 562 provides that such bids or offers would be in violation of the limit.

Commission Reproposal: The Reproposal does not change the definition originally proposed in response to the comment requesting clarification that a bid, offer, or indication of interest for an OTC swap that does not constitute a binding transaction will not count towards position limits. Nevertheless, the Commission clarifies that under the Reproposal, such bids, offers, or indications of interest do not count toward position limits.[341]

Comments Received: One commenter requested that the Commission exclude from the definition of referenced contract any agreement, contract, and transaction exempted from swap regulations by virtue of an exemption order, interpretation, no-action letter, or other guidance; the commenter stated that it believes the Commission can use its surveillance capacity and anti-manipulation authority, along with its MOU with FERC, to monitor these nonfinancial commodity transactions as well as the market participants relying on the exemptive relief.[342]

Commission Reproposal: The Reproposal does not change the proposed definition in response to the comment requesting that the Commission exclude from the definition of referenced contract any agreement, contract, and transaction exempted from swap regulations by virtue of an exemption order, interpretation, no-action letter, or other guidance. The Commission notes that any contract that is not a commodity derivative contract, including one that has been excluded from the definition of swap, is not subject to position limits. The commenter is requesting a broad exclusion from the definition of referenced contract, based on other regulatory relief which may have been adopted for a variety of policy reasons unrelated to position limits. Consequently, in light of the many and varied policy reasons for issuing an exemption order, interpretation, no-action letter or other guidance from swap regulation, each such action would need to be considered in the context of the goals of the Commission's position limits regime. Rather than issuing a blanket exemption from the definition of referenced contract for any agreement, contract, and transaction exempted from swap regulations, therefore, the Commission believes it would be better to consider each such action on its own merits prior to issuing an exemption from position limits. Under the Reproposal, if a market participant desires to extend a previously taken exemptive action by exempting certain agreements, contracts, and transactions from the definition of referenced contract, the market participant can request that the particular exemption order, interpretation, no-action letter, or other guidance be so extended. This would allow the Commission to consider the particular action taken and the merits of that particular exemption in the context of the position limits regime.

The Commission notes that in the particular exemptive order cited by the commenter,[343] certain delineated non-financial energy transactions between certain specifically defined entities were exempted, pursuant to CEA sections 4(c)(1) and 4(c)(6), from all requirements of the CEA and Commission regulations issued thereunder, subject to certain anti-fraud, anti-manipulation, and record inspection conditions. All entities that meet the requirements for the exemption provided by the Federal Power Act 201(f) Order are, therefore, already exempt from position limits compliance for all transactions that meet the Order's conditions.

Comments Received: Commenters were divided with respect to the exclusion of ''commodity index contracts'' from the definition of referenced contract. As a result of the exclusion, the position of a market participant who enters into a commodity index contract with a dealer will not be subject to position limits. One commenter supported the exclusion of commodity index contracts from the definition of referenced contracts.[344] The commenter was concerned, however, that a dealer who offsets his or her exposure in such contracts by purchasing futures contracts on the constituent components of the commodity index will be subject to position limits in the referenced contracts. The commenter urged the Commission to recognize as a bona fide hedge ''the offsetting nature of the dealer's position by exempting the futures contracts that a dealer acquires to hedge its commitments under commodity index contracts.''[345] Alternatively, the Commission should ''modify the definition of 'referenced contract' and the definition of 'commodity derivative contract' by excluding core referenced futures contracts and related futures contracts, options contracts or swaps that are offset on an economically equivalent basis by the constituent portions of commodity index contracts.''[346] Another commenter supported the Commission's proposal to exclude swaps that reference indices such as the Goldman Sachs Commodity Index (GSCI) from the definition of a referenced contract.[347]

One commenter asked that the Commission reconsider excluding commodity index contracts from the definition of referenced contract.[348] Another commenter urged that commodity index contracts should be included in the definition of referenced contract in conjunction with (1) a class limit (as was proposed for vacated part 151, but not included in final part 151); and (2) a lower position limit set at a level ''aimed to maintain no more than'' 30 percent speculation in each commodity (based on COT report classifications) that is reset every 6 months.[349] The same commenter noted that trading by passive, long only

[340] *See, e.g.,* CL–MFA–59606 at 5 and 23.

[341] The Commission notes that it is discussing bids, offers, and indications of interest in the context of whether these would violate position limits, and is not addressing other issues such as whether or not their use may indicate spoofing in violation of CEA section 4(c)(a)(5).

[342] CL–NFP–59690 at 14–15.

[343] *See* the Between NFP Electrics Exemptive Order (Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives, 78 FR 19670 (Apr. 2, 2013) (''Federal Power Act 201(f) Order''). *See also* CL–NFP–59690 at 14–15. The Federal Power Act 201(f) Order exempted all ''Exempt Non-Financial Energy Transactions'' (as defined in the Federal Power Act 201(f) Order) that are entered into solely between ''Exempt Entities'' (also as defined in the Federal Power Act 201(f) Order, namely any electric facility or utility that is wholly owned by a government entity as described in the Federal Power Act ('FPA') section 201(f); (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative's status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing.). *See* Federal Power Act 201(f) Order at 19688.

[344] CL–GFMA–60314 at 4.

[345] *Id.*

[346] *Id.*

[347] CL–CMOC–59720 at 4.

[348] CL–IATP–59701 at 2.

[349] CL–Better Markets–59716 at 1–35, and particularly at 32.

commodity index fund speculators does not provide liquidity, but rather takes net liquidity, dilutes the pool of market information to be less reflective of fundamental forces, causes volatility, and causes an increased frequency of contango attributed to frequent rolls from selling a nearby contract and buying a deferred (second month) contract. The commenter noted that, broadly, speculators in commodity futures historically constituted between 15 and 30 percent of open interest without meaningfully disrupting the market and providing beneficial intermediation between hedging producers and hedging consumers.[350]

Commission Reproposal: The Commission is reproposing the provision excluding commodity index contracts from the definition of referenced contract as previously proposed.

Regarding commenters who requested that the Commission alter the proposed definition to include commodity index derivative contracts, the Commission notes that if it were to include such contracts, the Commission's rules would allow netting of such positions in commodity index contracts with other offsetting referenced contracts. The ability to net such commodity index derivative contracts positions with other offsetting referenced contracts would eliminate the need for a bona fide hedging exemption for such contracts. Thus, the Commission believes such netting would contravene Congressional intent, as expressed in CEA section 4a(c)(B)(i) in its requirement to permit a pass-thru swap offset only if the counterparty's position would qualify as a bona fide hedge.

Another commenter suggested including commodity index contracts under the definition of referenced contract in conjunction with a class limit (*e.g.,* a separate limit for commodity index contracts compared to all other categories of derivative contracts). The commenter suggested that the limit be set at a level aimed at maintaining a particular ratio of speculative trading in the market. In response to this commenter, the Commission declines in this Reproposal to propose class limits because it believes any adoption of a class limit would require a rationing scheme wherein unrelated legal entities would be limited by the positions of other unrelated legal entities. Further, the Commission is concerned that class limits (including the one proposed by the commenter) could impair liquidity in the relevant markets.[351] The Commission also notes that it currently does not collect information to effectively enforce any ratio of speculative trading, and has not done so since the Commission eliminated Series '03 reporting in 1981.[352] The Reproposal does not make any changes to the definition of referenced contract pursuant to this comment.

Finally, in response to the commenter who suggested that, in addition to excluding commodity index contracts as proposed, the Commission should recognize as bona fide hedge positions those positions that offset a position in a commodity index derivative contract by using the component futures contracts, the Commission observes that it still believes, as discussed in the December 2013 Position Limits Proposal, that financial products do not meet the temporary substitute test. As such, the offset of financial risks arising from financial products is inconsistent with the statutory definition of a bona fide hedging position. The Commission also declines in this Reproposal to accept the commenter's request to exempt these offsetting positions using its authority under CEA section 4a(a)(7) because it does not believe that permitting the offset of financial risks furthers the purposes of the Commission's position limits regime as described in CEA section 4a(a)(3)(B). Finally, the commenter suggested as an alternative that the Commission modify the definition of referenced contract to broadly exclude any derivative contracts that are used to offset commodity index exposure. However, the Commission believes such a broad exclusion would, at best, be too difficult to administer and, at worst, provide an easy vehicle for entities to evade position limits regulations.

Comments Received: One commenter suggested that the Commission unnecessarily limited the scope of permissible netting by not recognizing cross-commodity netting, recommending either a threshold correlation factor of 60 percent or an approach that would permit pro rata netting to the extent of demonstrated correlation.[353]

Commission Reproposal: The Commission believes that recognizing cross-commodity netting as requested by the commenter would substantially expand the definition of referenced contract and, thus, may weaken: (1) The protection of the price discovery function in the core referenced futures contract; (2) the prevention of excessive speculation; and (3) the prevention of market manipulation. Therefore, this Reproposal does not change the definition of referenced contract to accommodate cross-commodity netting.

Comments Received: One commenter requested that all ''nonfinancial commodity derivatives'' used by commercial end-users for hedging purposes be expressly excluded from the definition of referenced contract (and so excluded from position limits). The commenter also suggested that the Commission allow an end-user to identify a swap as being used to ''hedge or mitigate commercial risks'' at the time the swap is executed and noted that such trades are highly-customized bilateral agreements that are difficult to convert into futures equivalents.[354] The commenter also requested that ''customary commercial agreements'' be excluded from referenced contract definition. The commenter stated that these contracts may reference a core referenced futures contract or may be misinterpreted as directly or indirectly linking to a core referenced futures contract, but that the Commission has already determined that Congress did not intend to regulate such agreements as swaps.[355]

Commission Reproposal: This Reproposal does not amend the definition of referenced contract in response to the request that ''nonfinancial commodity derivatives'' used by commercial end-users for hedging purposes be expressly excluded from the definition of referenced contract. The Commission understands the comment to mean that when a particular transaction qualifies for the end-user exemption, it should also be exempt from position limits by excluding such transactions from the definition of ''referenced contract.'' The commenter quotes language from the end-user exemption definition, which was issued to provide relief from the clearing and trade execution mandates. The Commission notes that under the CEA's statutory language, the commercial end user exemption

[350] CL–Better Markets–59716 at 5, and CL–Better Markets–60401 at 4, 16–17.

[351] *See also,* December 2013 Position Limits Proposal, 78 FR at 75741.

[352] The Commission's Series '03 reports required large traders to classify how much of their position was speculative and how much was hedging and formed the basis of the earliest versions of the CFTC Commitments of Traders Reports. *See* ''Reporting Requirements for Contract Markets, Futures Commission Merchants, Members of Exchanges and Large Traders,'' 46 FR 59960 (Dec. 8, 1981) (eliminating the routine of Series '03 reports by large traders).

[353] CL–ISDA/SIFMA–59611 at 3 and 32–33.

[354] CL–NFP–59690 at 9–12.

[355] CL–NFP–59690 at 13 (citing to Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208 (Aug. 13, 2012).

definition is broader than the bona fide hedging definition. Under the canons of statutory construction, when Congress writes one section differently than another, the differences should be assumed to have different meaning. Thus, the Commission believes that the more restrictive language in the bona fide hedging definition should be applied here. The definition of bona fide hedging position, as proposed in the December 2013 Position Limits Proposal, as amended by the 2016 Supplemental Position Limits Proposal, and as reproposed here, would be consistent with the differences in the two definitions, as adopted by Congress. The Commission notes that under this Reproposal, commercial end-users may rely on any applicable bona fide hedge exemption.

In response to the commenter's concern regarding ''customary commercial agreements,'' the Commission reiterates its belief that contracts that are exempted or excluded from the definition of ''swap'' are not considered referenced contracts and so are not subject to position limits.

o. Short Position

Proposed Rule: The term ''short position'' is currently defined in § 150.1(c) to mean a short call option, a long put option, or a short underlying futures contract. In the December 2013 Position Limits Proposal, the Commission proposed to amend the definition to state that a short position means a short call option, a long put option or a short underlying futures contract, or a short futures-equivalent swap. This proposed revision reflects the fact that under the Dodd-Frank Act, the Commission is charged with applying the position limits regime to swaps.

Comments Received: The Commission received no comments regarding the proposed amendment to the definition of ''short position.''

Commission Reproposal: Though no commenters suggested changes to the definition of ''short position,'' the Commission is concerned that the proposed definition, like the proposed definition of ''long position'' described supra, does not clearly articulate that futures and options contracts are subject to position limits on a futures-equivalent basis in terms of the core referenced futures contract. Longstanding market practice has applied position limits to futures and options on a futures-equivalent basis, and the Commission believes that practice ought to be made explicit in the definition in order to prevent confusion. Thus, in this Reproposal, the Commission is proposing to amend the definition to clarify that a short position is on a futures-equivalent basis, a short call option, a long put option, a short underlying futures contract, or a swap position that is equivalent to a short futures contract. Though the substance of the definition is fundamentally unchanged, the revised language should prevent unnecessary confusion over the application of futures-equivalency to different kinds of commodity derivative contracts.

p. Speculative Position Limit

The term ''speculative position limit'' is currently not defined in § 150.1. In the December 2013 Position Limits Proposal, the Commission proposed to define the term ''speculative position limit'' to mean ''the maximum position, either net long or net short, in a commodity derivatives contract that may be held or controlled by one person, absent an exemption, such as an exemption for a bona fide hedging position. This limit may apply to a person's combined position in all commodity derivative contracts in a particular commodity (all-months-combined), a person's position in a single month of commodity derivative contracts in a particular commodity, or a person's position in the spot-month of commodity derivative contacts in a particular commodity. Such a limit may be established under federal regulations or rules of a designated contract market or swap execution facility. An exchange may also apply other limits, such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.'' [356]

As explained in the December 2013 Position Limits Proposal, the proposed definition is similar to definitions for position limits used by the Commission for many years,[357] as well as glossaries published by the Commission for many years.[358] For example, the December 2013 Position Limits Proposal noted that the version of the staff glossary currently posted on the CFTC Web site defines speculative position limit as ''[t]he maximum position, either net long or net short, in one commodity future (or option) or in all futures (or options) of one commodity combined that may be held or controlled by one person (other than a person eligible for a hedge exemption) as prescribed by an exchange and/or by the CFTC.''

The Commission received no comments on the proposed definition, and is reproposing the definition without amendment.

q. Spot-Month

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to adopt a definition of ''spot-month'' that expands upon the current § 150.1 definition.[359] The definition, as proposed, specifically addressed both physical-delivery contracts and cash-settled contracts, and clarified the duration of ''spot-month.'' Under the proposed definition, the ''spot-month'' for physical-delivery commodity derivatives contracts would be the period of time beginning at of the close of trading on the trading day preceding the first day on which delivery notices could be issued or the close of trading on the trading day preceding the third-to-last trading day, until the contract was no longer listed for trading (or available for transfer, such as through exchange for physical transactions). The proposed definition included similar, but slightly different language for cash-settled contracts, providing that the spot month would begin at the earlier of the start of the period in which the underlying cash-settlement price was calculated or the close of trading on the trading day preceding the third-to-last trading day and would continue until the contract

[356] December 2013 Position Limits Proposal, 78 FR at 75825.

[357] *Id.* at 75701. As noted in the December 2013 Position Limits Proposal, ''the various regulations and defined terms included use of maximum amounts 'net long or net short,' which limited what any one person could 'hold or control,' 'one grain on any one contract market' (or in 'in one commodity' or 'a particular commodity'), and 'in any one future or in all futures combined.' For example, in 1936, Congress enacted the CEA, which authorized the CFTC's predecessor, the CEC, to establish limits on speculative trading. Congress empowered the CEC to 'fix such limits on the amount of trading . . . as the [CEC] finds is necessary to diminish, eliminate, or prevent such burden.' [CEA section 6a(1) (Supp. II 1936)] It also noted that the first speculative position limits were issued by the CEC in December 1938, 3 FR 3145, Dec. 24, 1938, and that those first speculative position limits rules provided, also in § 150.1, for limits on position and daily trading in grain for future delivery, and adopted a maximum amount ''net long or net short position which any one person may hold or control in any one grain on any one contract market'' as 2,000,000 bushels ''in any one future or in all futures combined.'' *Id.*

[358] For example, the December 2013 Position Limits Proposal noted that the Commission's annual report for 1983 includes in its glossary ''Position Limit: the maximum position, either net long or net short, in one commodity future combined which may be held or controlled by one person as prescribed by any exchange or by the CFTC.'' *Id.*

[359] December 2013 Position Limits Proposal, 78 FR at 75701–02; As noted in in the December 2013 Position Limits Proposal, the definition proposed would be an expansion upon the definition currently found in § 150.1, but greatly simplified from the definition adopted in vacated § 151.3 (in the Part 151 regulations, the ''spot month'' definition in § 151.1 simply cited to the ''spot month'' definition provided in § 151.3).

cash-settlement price was determined. In addition, the proposed definition included a proviso that, if the cash-settlement price was determined based on prices of a core referenced futures contract during the spot month period for that core referenced futures contract, then the spot month for that cash-settled contract would be the same as the spot month for that core referenced futures contract.[360]

Comments Received: The Commission received several comments regarding the definition of spot month.[361] One commenter noted that the definition of the spot month for federal limits does not always coincide with the definition of spot month for purposes of any exchange limits and assumes that the Commission did not intend for this to happen. For example, the commenter noted the proposed definition of spot month would commence at the close of trading on the trading day preceding the first notice day, while the ICE Futures US definition commences as of the opening of trading on the second business day following the expiration of regular option trading on the expiring futures contract. Regarding the COMEX contracts, the commenter stated that the exchange spot month commences at the close of business, rather than at the close of trading, which would allow market participants to incorporate exchange of futures for related position transactions (EFRPs) that occur after the close of trading, but before the close of business.[362] Finally, the commenter requested the Commission ensure the definition of spot month for federal limits is the same as the definition of spot month for exchange limits for all referenced contracts.[363]

Two commenters urged the Commission to reconsider its proposed definition of spot month for cash-settled contracts that encompasses the entire period for calculation of the settlement price, preferring the current exchange practice which is to apply the spot month limit during the last three days before final settlement.[364] One commenter noted its concern that the proposed definition would discourage use of calendar month average price contracts.[365]

Another commenter recommended that the Commission define ''spot month'' in relation to each core referenced futures contract and all related physically-settled and cash-settled referenced contracts, to assure that the definition works appropriately in terms of how each underlying nonfinancial commodity market operates, and to ensure that commercial end-users of such nonfinancial commodities can effectively use such referenced contracts to hedge or mitigate commercial risks.[366]

The Commission also received the recommendation from one commenter that the Commission should publish a calendar listing the spot month for each Core Referenced Futures Contract to provide clarity to market participants and reduce the cost of identifying and tracking the spot month.[367]

Commission Reproposal: For core referenced futures contracts, the Commission agrees with the commenter that the definition of spot month for federal limits should be the same as the definition of spot month for exchange limits. The Commission is therefore the definition of spot month in this Reproposal generally follows exchange practices. In the reproposed version, spot month means the period of time beginning at the earlier of the close of business on the trading day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market, or the close of business on the trading day preceding the third-to-last trading day, until the contract expires for physical delivery core referenced futures contracts,[368] except for the following: (a) ICE Futures U.S. Sugar No. 11 (SB) referenced contract for which the spot month means the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract; (b) ICE Futures U.S. Sugar No. 16 (SF) referenced contract,[369] for which the spot month means the period of time beginning on the third-to-last trading day of the contract month until the contract expires [370] and (c) Chicago Mercantile Exchange Live Cattle (LC) referenced contract, for which the spot month means the period of time beginning at the close trading on the fifth business day of the contract month.[371]

As noted above, in the December 2013 Position Limits Proposal, spot month was proposed to be defined to begin at the earlier of: (1) ''the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization''; or (2) ''the close of trading on the trading day preceding the third-to-last trading day''—based on the comment letters received, the proposed definition resulted in some confusion.[372] The Commission observes that the current definition also seems to be a source of some confusion when it defines ''spot month,'' in current CFTC Regulation 150.1(a), to begin ''at the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization.''

The Commission understands current DCM practice for physical-delivery contracts permitting delivery before the close of trading generally is that the spot month begins at the start of the first business day on which the clearing house can issue ''stop'' notices to a clearing member carrying a long position, or, at the close of business on the day preceding the first business day on which the clearing house can issue ''stop'' notices to a clearing member carrying a long position, but current DCM rules vary somewhat. For some ICE contracts,[373] the spot month includes ''any month for which delivery notices have been or may be issued,'' [374] and begins at the open of trading; [375] the

[360] *See id.* at 75825–6.

[361] *See, e.g.,* CL–FIA–59595 at 10, CL–NFP–59690 at 19, CL–NGSA–59673 at 44, and CL–ICE–59669 at 5–6.

[362] CL–FIA–59595 at 10.

[363] *Id.*

[364] *See, e.g.,* CL–NGSA–59673 at 44, CL–ICE–59669 at 5–6.

[365] *See,* CL–ICE–59669 at 5–6.

[366] CL–NFP–59690 at 19.

[367] CL–FIA–59595 at 10–11.

[368] As noted above, this Reproposal does not address the three cash-settled contracts (Class III Milk, Feeder Cattle, and Lean Hogs) which, under the December 2013 Position Limits Proposal, were included in the list of core referenced futures contracts. Therefore, the reproposed spot month definition does not address those three contracts.

[369] While the Commission realized that Sugar 16 does not currently have a spot month, its delivery period takes place after the last trading day (similar to crude oil). Therefore, the Reproposal amends the spot month definition for Sugar No. 16 to mirror the three day period for other contracts that deliver after the end of trading.

[370] In regard to the modifier ''until the contract expires,'' the Commission views ''expires'' as meaning the end of delivery period or until cash-settled.

[371] In response to FIA's comment, CL–FIA–59595 at 10, the Commission notes that the spot periods for exchange-set limits on COMEX products begin at the close of trading and not the close of business. *See http://www.cmegroup.com/market-regulation/position-limits.html.* However, the Commission understands that CME Group staff determines compliance with spot month limits in conjunction with the receipt of futures large trader reports. In consideration of the practicality of this approach, and in light of the definition of reportable position, the Commission believes that it would be more practical, clear, and consistent with existing exchange practices, for the spot month to begin ''at the close of the market.'' *See* CFTC Regulation 15.00(p).

[372] As a note of clarification, in light of the confusion of some commenters, position limits apply to open positions; once the position isn't open the limits don't apply.

[373] *See, e.g.,* Cotton No. 2.

[374] *See* ICE Rule 6.19.

[375] *See, e.g.,* Cotton No. 2 Position Limits and Position Accountability information: ''ICE (1) Delivery Month: Cocoa, Coffee ''C'', Cotton, World Cotton, FCOJ, Precious Metals—on and after First Notice Day Sugar#11 on and after the Second

CME spot month, as noted above, begins at the close of trading. However, the Commission understands that the amended ''spot month'' definition, as reproposed herein, would be consistent with the existing spot month practices of exchanges when enforcing the start of the spot month limits in any of the 25 core referenced futures contracts, based on the timing of futures large trader reports, discussed below.

Furthermore, based on Commission staff discussions with staff from several DCMs regarding exchange current practices, the Commission believes that the spot month should begin at the same time as futures large trader reports are submitted—that is, under the definition of reportable position, the spot month should begin ''at the close of the market.'' [376] The Commission views the ''close of the market'' as consistent with ''the close of business.''

In consideration of the practicality of this approach, and in light of the definition of ''reportable position,'' the Commission believes that it would be more practical, clear, and consistent with existing exchange practices, for the spot month to begin ''at the close of business.'' In addition, as noted by one commenter,[377] when the exchange spot month commences at the close of business, rather than at the close of trading, it would allow market participants to incorporate exchange of futures for related position transactions (''EFRPs'') [378] that occur after the close of trading, but before the close of business.

The Commission points out an additional correction made to the reproposed definition, changing it from ''preceding the first day on which delivery notices can be issued *to* the clearing organization of a contract market'' to ''preceding the first day on which delivery notices can be issued by the clearing organization of a contract market'' [emphasis added]. The Commission understands that the spot periods on the exchanges commence the day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market, not the first day on which notices can be issued to the clearing organization. The ''spot month'' definition in this Reproposal, therefore, has been changed to correct this error.

The revisions included in the reproposed definition addresses the concerns of the commenter who suggested the Commission define the spot month according to each core referenced futures contract and for cash-settled and physical delivery referenced contracts that are not core referenced futures contracts, although for clarity and brevity the Commission has chosen to highlight contracts that are the exception to the general definition rather than list each of the 25 core referenced futures contracts and multitude of referenced contracts separately.

In response to the commenters' concern regarding cash-settled referenced contracts, the Reproposal changes the definition of spot month to agree with the limits proposed in § 150.2. In the December 2013 Position Limits Proposal, the Commission defined the spot month for certain cash-settled referenced contracts, including calendar month averaging contracts, to be a longer period than the spot month period for the related core referenced futures contract. However, the Commission did not propose a limit for such contracts in proposed § 150.2, rendering superfluous that aspect of the proposed definition of spot month, at this time. The Commission is reproposing the definition of spot month without this provision, thereby addressing the concerns of the commenters regarding the impact of the definition on calendar month averaging contracts outside of the spot month for the relevant core referenced futures contract. In order to make clearer the relevant spot month periods for referenced contracts other than core referenced futures contracts, the Commission has included subsection (3) of the definition that states that the spot month for such referenced contracts is the same period as that of the relevant core referenced futures contract.

The Commission believes that the revised definition reproposed here sufficiently clarifies the applicable spot month periods, which can also be determined via exchange rulebooks and defined contract specifications, such that a defined calendar of spot months is not necessary. Further, a published calendar would need to be revised every year to update spot month periods for each contract and each expiration. The Commission believes this constant revision may lead to more confusion than it is meant to correct.

r. Spot-Month, Single-Month, and All-Months-Combined Position Limits

Proposed Rule: In addition to a definition for ''spot month,'' current part 150 includes definitions for ''single month,'' and for ''all-months'' where ''single month'' is defined as ''each separate futures trading month, other than the spot month future,'' and ''all-months'' is defined as ''the sum of all futures trading months including the spot month future.''

As noted in the December 2013 Position Limits proposal, vacated part 151 retained only the definition for spot month, and, instead, adopted a definition for ''spot-month, single-month, and all-months-combined position limits.'' The definition specified that, for Referenced Contracts based on a commodity identified in § 151.2, the maximum number of contracts a trader could hold was as provided in § 151.4.

In the December 2013 Position Limits Proposal, as noted above, the Commission proposed to amend § 150.1 by deleting the definitions for ''single month,'' and for ''all-months,'' but, unlike the vacated part 151, the proposal did not include a definition for ''spot-month, single-month, and all-months-combined position limits.'' Instead, it proposed to adopt a definition for ''speculative position limits'' that should obviate the need for these definitions.[379]

Comments Received: The Commission received no comments regarding the deletion of these definitions.

Commission Reproposal: This Reproposal, consistent with the December 2013 Position Limits Proposal, eliminates the definitions for ''single month,'' and for ''all-months,'' for the reasons provided above.

s. Swap and Swap Dealer

Proposed Rule: While the terms ''swap'' and ''swap dealer'' are not currently defined in § 150.1, the December 2013 Position Limits Proposal amended § 150.1 to define these terms as they are defined in section 1a of the Act and as further defined in section 1.3 of this chapter.'' [380]

Comments Received: The Commission received no comments on these definitions.

Business Day following the expiration of the regular option contract traded on the expiring futures contract.'' *https://www.theice.com/products/254/Cotton-No-2-Futures.*

[376] *See* current § 15.00(p).

[377] CL–FIA–59595 at 10.

[378] The Commission notes that DCM determinations of allowable blocks, EFRPs, and transfer trades, in regards to position limits, must also consider compliance with DCM Core Principle 9; discussion of the interplay is beyond the scope of this Reproposal.

[379] *See* Section III.A.1.r (Spot-month, single-month, and all-months-combined position limits) above for a discussion of the proposed definition of ''speculative position limit.''

[380] 7 U.S.C. 1a(47) and 1a(49); § 1.3(xxx) (''swap'') and § 1.3(ggg) (''swap dealer''). *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596 (May 23, 2012); *see also,* Swap Definition Rulemaking.

Commission Reproposal: The Commission has determined to repropose these definitions as originally proposed, for the reasons provided above.

2. Bona Fide Hedging Definition

a. Bona Fide Hedging Position (BFH) Definition—Background

Prior to the 1974 amendments to the CEA, the definition of a bona fide hedging position was found in the statute. The 1974 amendments authorized the newly formed Commission to define a bona fide hedging position.[381] The Commission published a final rule in 1977, providing a general definition of a bona fide hedging position in § 1.3(z)(1).[382] The Commission listed certain positions, meeting the requirements of the general definition of a bona fide hedging position, in § 1.3(z)(2) (*i.e.,* enumerated bona fide hedging positions). The Commission provided an application process for market participants to seek recognition of non-enumerated bona fide hedging positions in §§ 1.3(z)(3) and 1.48.

During the 1980's, exchanges were required to incorporate the Commission's general definition of bona fide hedging position into their exchange-set position limit regulations.[383] While the Commission had established position limits on only a few commodity futures contracts in § 150.2, Commission rule § 1.61 (subsequently incorporated into § 150.5) required DCMs to establish limits on commodities futures not subject to federal limits. The Commission directed in § 1.61(a)(3) (subsequently incorporated into § 150.5(d)(1)) that no DCM regulation regarding position limits would apply to bona fide hedging positions as defined by a DCM in accordance with § 1.3(z)(1).

In 1987, the Commission provided interpretive guidance regarding the bona fide hedging definition and risk management exemptions for futures in financial instruments (now termed excluded commodities).[384] This guidance permitted exchanges, for purposes of exchange-set limits on excluded commodities, to recognize risk management exemptions.[385]

In the 1990's, the Commission allowed exchanges to experiment with substituting position accountability levels for position limits.[386] The CFMA, in 2000, codified, in DCM Core Principle 5, position accountability as an acceptable practice.[387] The CFMA, however, did not address the definition of a bona fide hedging position.

With the passing of the CFMA in 2000, the Commission's requirements for exchanges to adopt position limits and associated bona fide hedging exemptions, in § 150.5, were rendered mere guidance. That is, exchanges were no longer required to establish limits and no longer required to use the Commission's general definition of a bona fide hedging position. Nonetheless, the Commission continued to guide exchanges to adopt position limits, particularly for the spot month in physical-delivery physical commodity derivatives, and to provide for exemptions.

The Farm Bill of 2008 authorized the Commission to regulate swaps traded on exempt commercial markets (ECM) that the Commission determined to be a significant price discovery contract (SPDC).[388] The Commission implemented these provisions in part 36 of its rules.[389] The Commission provided guidance to ECMs in complying with Core Principle IV regarding position limitations or accountability.[390] That guidance provided, as an acceptable practice for cleared trades, that the ECM's position limit rules may exempt bona fide hedging positions.

In 2010, the Dodd-Frank Act added a directive, for purposes of implementation of CEA section 4a(a)(2), for the Commission to define a bona fide hedging position for physical commodity derivatives consistent with, in the Commission's opinion, the reasonably certain statutory standards in CEA section 4a(c)(2). Those statutory standards build on, but differ slightly from, the Commission's general definition in rule 1.3(z)(1).[391] The Commission interprets those statutory standards as directing the Commission to narrow the bona fide hedging position definition for physical commodities.[392] The Commission discusses those differences, below.

b. BFH Definition Summary

Under the December 2013 Position Limits Proposal, the Commission proposed a new definition of bona fide hedging position, to replace the current definition in § 1.3(z), that would be applicable to positions in excluded commodities and in physical commodities.[393] The proposed definition was organized into an opening paragraph and five numbered paragraphs. In the opening paragraph, for positions in either excluded commodities or physical commodities, the proposed definition would have applied two general requirements: The incidental test; and the orderly trading requirement. For excluded commodities, the Commission proposed in paragraph (1) a definition that conformed to the Commission's 1987

[381] Those amendments to CEA section 4a(3), subsequently re-designated § 4a(c)(1), 7 U.S.C. 6a(c)(1), provide that no rule of the Commission shall apply to positions which are shown to be bona fide hedging positions, as such term is defined by the Commission. *See,* sec. 404 of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389 (Oct. 23, 1974). *See* 2013 Position Limits Proposal, 78 FR at 75703 for additional discussion of the history of the definition of a bona fide hedging position.

[382] 42 FR 42748 (Aug. 24, 1977). Previously, the Secretary of Agriculture, pursuant to section 404 of the Commodity Futures Trading Commission Act of 1974 (Pub. L. 93–463), promulgated a definition of bona fide hedging transactions and positions. 40 FR 111560 (March 12, 1975). That definition, largely reflecting the statutory definition previously in effect, remained in effect until the newly-established Commission defined that term. *Id.*

[383] 46 FR 50938 at 50945 (Oct. 16, 1981).

[384] 52 FR 34633 (Sept. 14, 1987) and 52 FR 27195 (July 20, 1987).

[385] *See* December 2013 Position Limits Proposal, 78 FR at 75704.

[386] Exchange rules for position accountability levels require a market participant whose position exceeds an accountability level to consent automatically to requests of the exchange: (1) To provide information about a position; and (2) to not increase or to reduce a position, if so ordered by the exchange. In contrast, a speculative position limit rule does not authorize an exchange to order a market participant to reduce a position. Rather, a position limit sets a maximum permissible size for a speculative position. The Commission notes that it may require a market participant to provide information about a position, for example, by issuing a special call under § 18.05 to a trader with a reportable position in futures contracts.

[387] DCM Core Principle 5 is codified in CEA section 5(d)(5), 7 U.S.C. 7(d)(5). *See* Section 111 of the Commodity Futures Modernization Act of 2000, Pub. L. No. 106–554, 114 Stat. 2763 (Dec. 21, 2000) (CFMA).

[388] *See* § 13201 of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008) (Farm Bill of 2008). These provisions were subsequently superseded by the Dodd-Frank Act.

[389] 66 FR 42270 (Aug. 10, 2001). Part 36 was removed and reserved to conform to the amendments to the CEA by the Dodd-Frank Act.

[390] 17 CFR part 36, App. B (2010).

[391] It should be noted that a 2011 final rule of the Commission would have amended the definition of a bona fide hedging position in § 1.3(z), to be applicable only to excluded commodities, and would have added a new definition of a bona fide hedging position to Part 151, to be applicable to physical commodities. Position Limits for Futures and Swaps, 76 FR 71626 (Nov.18, 2011). However, prior to the compliance date for that 2011 rulemaking, a federal court vacated most provisions of that rulemaking, including the amendments to the definition of a bona fide hedging position. *International Swaps and Derivatives Ass'n* v. *United State Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012). Because the Commission has not instructed **Federal Register** to roll back the 2011 changes to the CFR, the current definition of a bona fide hedging position is found in the 2010 version of the Code of Federal Regulations. 17 CFR 1.3(z) (2010).

[392] *See* December 2013 Position Limits Proposal, 78 FR at 75705.

[393] *See* December 2013 Position Limits Proposal, 78 FR at 75702–23. In doing so, the Commission proposed to remove and reserve § 1.3(z).

interpretations permitting risk management exemptions in excluded commodity contracts. For physical commodities, the Commission proposed in paragraph (2) to amend the current general definition to conform to CEA section 4a(c) and to remove the application process in §§ 1.3(z)(3) and 1.48, that permits market participants to seek recognition of non-enumerated bona fide hedging positions. Rather, the Commission proposed that a market participant may request either a staff interpretative letter under § 140.99 [394] or seek CEA section 4a(a)(7) exemptive relief.[395] Paragraphs (3) and (4) listed enumerated exemptions. Paragraph (5) listed the requirements for cross-commodity hedges of enumerated exemptions.

In response to comments on the December 2013 Position Limits Proposal, in the 2016 Supplemental Proposal, the Commission amended the proposed definition of bona fide hedging position.[396] The amended definition proposed in the 2016 Supplemental Proposal would no longer apply the two general requirements (the incidental test and the orderly trading requirement). For excluded commodities, the Commission again proposed paragraph (1) of the definition, substantially as in 2013. For physical commodities, the Commission again proposed to conform paragraph (2) more closely to CEA section 4a(c), but also proposed an application process for market participants to seek recognition of non-enumerated bona fide hedging positions, without the need to petition the Commission. The Commission again proposed paragraphs (3) through (5).

In response to comments on both the December 2013 Position Limits Proposal and the 2016 Supplemental Proposal, the Commission is now reproposing the definition of bona fide hedging position, generally as proposed in the 2016 Supplemental Proposal, but with a few further amendments. First, for excluded commodities, the Commission clarifies further the discretion of exchanges in recognizing risk management exemptions. Second, for physical commodities, the Commission: (a) Clarifies the scope of the general definition of a bona fide hedging position; (b) conforms that general definition more closely to CEA section 4a(c) by including recognition of positions that reduce risks attendant to a swap that was used as a hedge; and, (c) re-organizes additional requirements for enumerated hedges and requirements for other recognition as a non-enumerated bona fide hedging position, apart from the general definition.

c. BFH Definition Discussion—Remove Incidental Test and Orderly Trading Requirement

Proposed Rule: As noted above, the Commission proposed to retain, in its December 2013 Position Limits Proposal,[397] then proposed to remove, in its 2016 Supplemental Position Limits Proposal,[398] two general requirements contained in the § 1.3(z)(1) definition of bona fide hedging position: the incidental test; and the orderly trading requirement. The incidental test requires, for a position to be recognized as a bona fide hedging position, that the ''purpose is to offset price risks incidental to commercial cash, spot, or forward operations.'' The orderly trading requirement mandates that ''such position is established and liquidated in an orderly manner in accordance with sound commercial practices.''

Comments Received: Commenters generally objected to retaining the incidental test and the orderly trading requirement in the definition of bona fide hedging position, as proposed in 2013.[399] A number of commenters supported the Commission's 2016 Supplemental Proposal to remove the incidental test and the orderly trading requirement.[400]

Incidental Test: Commenters objected to the incidental test, because that test is not included in the standards in CEA section 4a(c) for the Commission to define a bona fide hedging position for physical commodities.[401]

However, other commenters noted their belief that eliminating the incidental test would permit swap dealers or purely financial entities to avail themselves of bona fide hedging exemptions, to the detriment of commercial hedgers.[402]

Orderly trading requirement: One commenter urged the Commission to eliminate the orderly trading requirement, because this requirement does not apply to over-the-counter markets, the Commission does not define orderly trading in a bi-lateral market, and this requirement imposes a duty on end users to monitor market activities to ensure they do not cause a significant market impact; additionally, the commenter noted the anti-disruptive trading prohibitions and polices apply regardless of whether the orderly trading requirement is imposed.[403] Similarly, another commenter urged the Commission to exempt commercial end-users from the orderly trading requirement, arguing that an orderly trading requirement unreasonably requires commercial end-users to monitor markets to measure the impact of their activities without clear guidance from the Commission on what would constitute significant market impact.[404]

Other commenters to the 2013 Proposal requested the Commission interpret the orderly trading requirement consistently with the Commission's disruptive trading practices interpretation (*i.e.,* a standard of intentional or reckless conduct) and not to apply a negligence standard.[405] Yet another commenter requested clarification on the process the Commission would use to determine whether a position has been established and liquidated in an orderly manner, whether any defenses may be available, and what would be the consequences of failing the requirement.[406]

However, one commenter is concerned that eliminating the orderly trading requirement for bona fide hedging for swaps positions would discriminate against market participants in the futures and options markets. The commenter noted that, if the Commission eliminates this requirement, the Commission could not use its authority effectively to review exchange-granted exemptions for swaps from position limits to prevent or diminish excessive speculation.[407]

Commission Reproposal: In the reproposed definition of bona fide hedging position, the Commission is eliminating the incidental test and the orderly trading requirement.

Incidental Test: Under the Reproposal, the incidental test has been eliminated, because the Commission views the economically appropriate test (discussed below) as including the concept of the offset of price risks

[394] Section 140.99 sets out general procedures and requirements for requests to Commission staff for exemptive, no-action and interpretative letters.

[395] *See* December 2013 Position Limits Proposal, 78 FR 75719.

[396] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38462–64.

[397] 78 FR at 75706.

[398] 81 FR at 38462.

[399] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38462.

[400] *See, e.g.,* CL–NCFC–60930 at 2, CL–FIA–60937 at 5 and 23, and CL–IECAssn–60949 at 5–7.

[401] *See, e.g.,* CL–CME–58718 at 47, and CL–NGFA–60941 at 2.

[402] *See, e.g.,* CL–IATP–60951 at 4, CL–AFR–60953 at 2, CL–Better Markets–60928 at 5, and CL–Rutkowski–60962 at 1.

[403] *See* CL–COPE–59662 at 13.

[404] *See* CL–DEU–59627 at 5–7.

[405] *See, e.g.,* CL–FIA–59595 at 5, 33–34, CL–EEI–EPSA–59602 at 14–15, CL–ISDA/SIFMA–59611 at 4, 39, CL–CME–59718 at 67, and CL–ICE–59669 at 11.

[406] *See* CL–Working Group–59693 at 14.

[407] *See* CL–IATP–60951 at 4.

incidental to commercial cash, spot, or forward operations. It was noted in the 2013 Position Limits Proposal that, ''The Commission believes the concept of commercial cash market activities is also embodied in the economically appropriate test for physical commodities in [CEA section 4a(c)(2)].'' [408] It should be noted the incidental test has been part of the regulatory definition of bona fide hedging since 1975,[409] but that the requirement was not explained in the 1974 proposing notice (''proposed definition otherwise deviates in only minor ways from the hedging definition presently contained in [CEA section 4a(3)]'').[410]

The Commission is not persuaded by the commenters who believe eliminating the incidental test would permit financial entities to avail themselves of a bona fide hedging exemption, because the incidental test is essentially embedded in the economically appropriate test. In addition, for a physical-commodity derivative, the reproposed definition, in mirroring the statutory standards of CEA section 4a(c), requires a bona fide hedging position to be a substitute for a transaction taken or to be taken in the cash market (either for the market participant itself or for the market participant's pass-through swap counterparty), which generally would preclude financial entities from availing themselves of a bona fide hedging exemption (in the absence of qualifying for a pass-through swap offset exemption, discussed below).

Orderly Trading Requirement: The Reproposal also eliminates the orderly trading requirement. That provision has been a part of the regulatory definition of bona fide hedging since March 12, 1975 [411] and previously was found in the statutory definition of bona fide hedging position prior to the 1974 amendment removing the statutory definition from CEA section 4a(3). However, the Commission is not aware of a denial of recognition of a position as a bona fide hedging position, as a result of a lack of orderly trading. Further, the Commission notes that the meaning of the orderly trading requirement is unclear in the context of the over-the-counter (OTC) swap market or in the context of permitted off-exchange transactions (*e.g.,* exchange of futures for physicals).

In regard to the anti-disruptive trading prohibitions of CEA section 4c(a)(5), those prohibitions apply to trading on registered entities, but not to OTC transactions. It should be noted that the anti-disruptive trading prohibitions in CEA section 4c(a)(5) make it unlawful to engage in trading on a registered entity that ''demonstrates intentional or reckless disregard for orderly execution of trading during the closing period'' (emphasis added); however, the Commission has not, under the authority of CEA section 4c(a)(6), prohibited the intentional or reckless disregard for the orderly execution of transactions on a registered entity outside of the closing period.

The Commission notes that an exchange may impose a general orderly trading on all market participants. Market participants may request clarification from exchanges on their trading rules. The Commission does not believe that the absence of an orderly trading requirement in the definition of bona fide hedging position would discriminate against any particular trading venue for commodity derivative contracts.

d. BFH Definition Discussion—Excluded Commodities

Proposed Rule: In both the 2013 Position Limits Proposal and the 2016 Supplement Proposal, the proposed definition of bona fide hedging position for contracts in an excluded commodity included a standard that the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (the economically appropriate test) and also specified that such position should be either (i) specifically enumerated in paragraphs (3) through (5) of the definition of bona fide hedging position; or (ii) recognized as a bona fide hedging position by a DCM or SEF consistent with the guidance on risk management exemptions in proposed Appendix A to part 150.[412] As noted above, the 2016 Supplemental Proposal would eliminate the two additional general requirements (the incidental test and the orderly trading requirement).

Comments Received: One commenter believed that, to avoid an overly restrictive definition due to the limited set of examples provided by the Commission, only the general definition of a bona fide hedging position should be applicable to hedges of an excluded commodity.[413]

Commission Reproposal: After consideration of comments and review of the record, the Commission has determined in the Reproposal to apply the economically appropriate test to enumerated exemptions, as proposed.[414] However, the Reproposal amends the proposed definition of a bona fide hedging position for an excluded commodity, to clarify that an exchange may otherwise recognize risk management exemptions in an excluded commodity, without regard to the economically appropriate test. Regarding risk management exemptions, the Commission notes that Appendix A (which codifies the Commission's two 1987 interpretations of the bona fide hedging definition in the context of excluded commodities) includes examples of risk altering transactions, such as a temporary increase in equity exposure relative to cash bond holdings. Such risk altering transactions appear inconsistent with the Commission's interpretation of the economically appropriate test. Accordingly, the Reproposal removes the economically appropriate test from the guidance for exchange-recognized risk management exemptions in excluded commodities.

Regarding an exchange's obligation to comply with core principles pertaining to position limits on excluded commodities, as discussed further in § 150.5, the Commission clarifies that under the Reproposal, exchanges have reasonable discretion as to whether to adopt the Commission's definition of a bona fide hedging position, including whether to grant risk management exemptions, such as those that would be consistent with, but not limited to, the examples in Appendix A to part 150. That is, the set of examples in Appendix A to part 150 is non-restrictive, as it is guidance. The Reproposal also makes minor wording changes in Appendix A to part 150, including to clarify an exchange's reasonable discretion in granting risk management exemptions and to eliminate a reference to the orderly trading requirement which has been deleted, as discussed above, but otherwise is adopting Appendix A as proposed.

e. BFH Definition Discussion—Physical Commodities General Definition

As noted in its proposal, the core of the Commission's approach to defining bona fide hedging over the years has focused on transactions that offset a

[408] *See* December 2013 Position Limits Proposal, 78 FR at 75707.

[409] 40 FR 11560 (March 12, 1975).

[410] 39 FR 39731 (Nov. 11, 1974).

[411] 40 FR 11560 (Mar. 12, 1975).

[412] December 2013 Position Limits Proposal, 78 FR at 75707; 2016 Supplemental Position Limits Proposal, 81 FR at 38505.

[413] CL–BG Group–59656 at 9.

[414] The Commission did not propose to apply to excluded commodities any of the additional standards in the general definition applicable to hedges of a physical commodity.

recognized price risk.[415] Once a bona fide hedge is implemented, the hedged entity should be price insensitive because any change in the value of the underlying physical commodity is offset by the change in value of the entity's physical commodity derivative position.

Because a firm that has hedged its price exposure is price neutral in its overall physical commodity position, the hedged entity should have little incentive to manipulate or engage in other abusive market practices to affect prices. By contrast, a party that maintains a derivative position that leaves it with exposure to price changes is not neutral as to price and, therefore, may have an incentive to affect prices. Further, the intention of a hedge exemption is to enable a commercial entity to offset its price risk; it was never intended to facilitate taking on additional price risk.

The Commission recognizes there are complexities to analyzing the various commercial price risks applicable to particular commercial circumstances in order to determine whether a hedge exemption is warranted. These complexities have led the Commission, from time to time, to issue rule changes, interpretations, and exemptions. Congress, too, has periodically revised the Federal statutes applicable to bona fide hedging, most recently in the Dodd-Frank Act.

CEA section 4a(c)(1),[416] as re-designated by the Dodd-Frank Act, authorizes the Commission to define bona fide hedging positions ''consistent with the purposes of this Act.'' CEA section 4a(c)(2), as added by the Dodd-Frank Act, provides new requirements for the Commission to define bona fide hedging positions in physical commodity derivatives ''[f]or the purposes of implementation of [CEA section 4a(a)(2)] for contracts of sale for future delivery or options on the contracts of commodities [traded on DCMs].'' [417]

General Definition: The Commission's proposed general definition for physical commodity derivative contracts, mirroring CEA section 4a(c)(2)(a), specifies a bona fide hedging position is one that:

(a) *Temporary substitute test:* represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in the physical marketing channel;

(b) *Economically appropriate test:* is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(c) *Change in value requirement:* arises from the potential change in the value of assets, liabilities, or services, whether current or anticipated.

In addition to the above, the Commission's proposed general definition, mirroring CEA section 4a(c)(2)(B)(i), also recognizes a bona fide hedging position that:

(d) *Pass-through swap offset:* reduces risks attendant to a position resulting from a swap that was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction under the general definition above.

The Commission proposed another provision, based on the statutory standards, to recognize as a bona fide position that:

(e) *Pass-through swap:* is itself the swap executed opposite a pass-through swap counterparty, provided that the risk of that swap has been offset.

The Commission received a number of comments on the December 2013 Position Limits Proposal and the 2016 Supplemental Proposal. Those concerning the incidental test and the orderly trading requirement are discussed above. Others are discussed below.

i. Temporary Substitute Test and Risk Management Exemptions

Proposed Rule: The temporary substitute test is discussed in the 2013 Position Limits Proposal at 75708–9. As the Commission noted in the proposal, it believes that the temporary substitute test is a necessary condition for classification of positions in physical commodities as bona fide hedging positions. The proposed test mirrors the statutory test in CEA section 4a(c)(2)(a)(i). The statutory test does not include the adverb ''normally'' to modify the verb ''represents'' in the phrase ''represents a substitute for transactions taken or to be taken at a later time in a physical marketing channel.'' Because the definition in § 1.3(z)(1) includes the adverb ''normally,'' the Commission interpreted that provision to be merely a temporary substitute criterion, rather than a test. Accordingly, the Commission previously granted risk management exemptions for persons to offset the risk of swaps and other financial instruments that did not represent substitutes for transactions or positions to be taken in a physical marketing channel. However, given the statutory change in direction, positions that reduce the risk of such speculative swaps and financial instruments would no longer meet the requirements for a bona fide hedging position under the proposed definition in § 150.1.

Comments Received: A number of commenters urged the Commission not to deny risk-management exemptions for financial intermediaries who utilize referenced contracts to offset the risks arising from the provision of diversified, commodity-based returns to the intermediaries' clients.[418]

However, other commenters noted the ''proposed rules properly refrain from providing a general exemption to financial firms seeking to hedge their financial risks from the sale of commodity-related instruments such as index swaps, Exchange Traded Funds (ETFs), and Exchange Traded Notes (ETNs),'' because such instruments are inherently speculative and may overwhelm the price discovery function of the derivative market.[419]

Commission Reproposal: The Reproposal would retain the temporary substitute test, as proposed. The Commission interprets the statutory temporary substitute test as more stringent than the temporary substitute criterion in § 1.3(z)(1); [420] that is, the Commission views the statutory test as narrowing the standards for a bona fide hedging position. Further, the Commission believes that retaining a risk management exemption for swap intermediaries, without regard to the purpose of the counterparty's swap, would fly in the face of the statutory restrictions on pass-through swap offsets (requiring the position of the pass-through swap counterparty to

[415] December 2013 Position Limits Proposal, 78 FR at 75702–3.

[416] 7 U.S.C. 6a(c)(1).

[417] The Reproposal provides for a phased approach to implementation of CEA section 4a(a)(2), to reduce the potential administrative burden on exchanges and market participants, and to facilitate adoption of monitoring policies, procedures and systems. *See, e.g.,* December 2013 Position Limits Proposal, 78 FR at 75725. The first phase of implementation of CEA section 4a(a)(2), in this Reproposal, initially sets federal limits on 25 core referenced futures contracts and their associated referenced contracts. The Commission is establishing a definition of bona fide hedging position for physical commodities in connection with its implementation of CEA section 4a(a)(2), applicable to federal limits. However, the Reproposal does not mandate adoption of that definition of a bona fide hedging position for purposes of exchange-set limits in contracts that are not yet subject to a federal limit. *See* below regarding guidance and requirements under reproposed § 150.5 for exchange-set limits in physical commodities.

[418] *See, e.g.,* CL–FIA–59595 at 5, 34–35; CL–AMG–59709 at 2, 12–15; and CL–CME–59718 at 67–69.

[419] *See, e.g.,* CL–Sen. Levin–59637 at 8, and CL–Better Markets–60325 at 2.

[420] *See* December 2013 Position Limits Proposal, 78 FR at 75709.

qualify as a bona fide hedging transaction).[421]

Proposed Rule on risk management exemption grandfather provisions: The Commission proposed in § 150.2(f) and § 150.3(f) to grandfather previously granted risk-management exemptions, as applied to pre-existing positions.[422]

Comments Received: Commenters requested that the Commission extend the grandfather relief to permit pre-existing risk management positions to be increased after the effective date of a limit.[423] Commenters also requested that the Commission permit the risk associated with a pre-existing position to be offset by a futures position in a deferred contract month, after the liquidation of an offsetting position in a nearby futures contract month.[424]

Some commenters urged the Commission not to deny risk-management exemptions for financial intermediaries who utilize referenced contracts to offset the risks arising from the provision of diversified commodity-based returns to the intermediaries' clients.[425]

In contrast, other commenters noted that the proposed rules ''properly refrain'' from providing a general exemption to financial firms seeking to hedge their financial risks from the sale of commodity-related instruments such as index swaps, ETFs, and ETNs because such instruments are ''inherently speculative'' and may overwhelm the price discovery function of the derivative market.[426] Another commenter noted, because commodity index contracts are speculative, the Commission should not provide a regulatory exemption for such contracts.[427]

Commission Reproposal: The Reproposal clarifies and expands the relief in § 150.3(f) (previously granted exemptions) by: (1) Clarifying that such previously granted exemptions may apply to pre-existing financial instruments that are within the scope of existing § 1.47 exemptions, rather than only to pre-existing swaps; and (2) recognizing exchange-granted non-enumerated exemptions in non-legacy commodity derivatives outside of the spot month (consistent with the Commission's recognition of risk management exemptions outside of the spot month), and provided such exemptions are granted prior to the compliance date of the final rule, once adopted, and apply only to pre-existing financial instruments as of the effective date of that final rule. These two changes are intended to reduce the potential for market disruption by forced liquidations, since a market intermediary would continue to be able to offset risks of pre-effective-date financial instruments, pursuant to previously-granted federal or exchange risk management exemptions.

The Reproposal clarifies that the Commission will continue to recognize the offset of the risk of a pre-existing financial instrument as bona fide using a derivative position, including a deferred derivative contract month entered after the effective date of a final rule, provided a nearby derivative contract month is liquidated. However, under the Reproposal, such relief will not be extended to an increase in positions after the effective date of a limit, because that appears contrary to Congressional intent to narrow the definition of a bona fide hedging position, as discussed above.

ii. Economically Appropriate Test

Commission proposal: The economically appropriate test is discussed in the 2013 Position Limits Proposal at 75709–10. The proposed economically appropriate test mirrors the statutory test, which, in turn, mirrors the test in current § 1.3(z)(1).

Comments received: Several commenters requested that the Commission broadly interpret the phrase ''economically appropriate'' to include more than just price risk, stating that there are other types of risk that are economically appropriate to address in the management of a commercial enterprise including operational risk, liquidity risk, credit risk, locational risk, and seasonal risk.[428]

Commenters suggested that if the Commission objected to expanding its interpretation of ''economically appropriate'' risks, then the Commission should allow the exchanges to utilize discretion in their interpretations of the economically appropriate test.[429] Another commenter believed that the Commission should provide ''greater flexibility'' in the various bona fide hedging tests, because hedging that reduces all the various types of risk should be deemed ''economically appropriate.''[430] Commenters suggested that a broader view of the types of risks considered to be ''economically appropriate'' should not be perceived as being at odds with the Commission's view of ''price risk'' because all of these risks can inform and determine price, noting that firms evaluate different risks and determine a price impact based on a combination of their likelihood of occurrence and the price impact in the event of occurrence.[431]

Commission Reproposal: The Reproposal does not broaden the interpretation of the phrase ''economically appropriate.'' The Commission notes that it has provided interpretations and guidance over the years as to the meaning of ''economically appropriate.''[432] The Commission reiterates its view that, to satisfy the economically appropriate test and the change in value requirement of CEA section 4a(c)(2)(A)(iii), the purpose of a bona fide hedging position must be to offset price risks incidental to a commercial enterprise's cash operations.[433]

The Commission notes that an exchange is permitted to recognize non-enumerated bona fide hedging positions under the process of § 150.9, discussed below, subject to assessment of the particular facts and circumstances, where price risk arises from other types of risk. The Reproposal does not, however, allow the exchanges to utilize unbounded discretion in interpreting ''economically appropriate'' in such recognitions. The Commission believes that such a broad delegation is not authorized by the CEA and, in the Commission's view, would be contrary to the reasonably certain statutory standard of the economically appropriate test. Further, as explained in the discussion of § 150.9, exchange determinations will be subject to the Commission's *de novo* review.

Comments on gross vs. net hedging: A number of commenters requested that the Commission recognize as bona fide both ''gross hedging'' and ''net hedging,'' without regard to overall risk.[434] Commenters generally requested, as ''gross hedging,'' that an enterprise should be permitted the flexibility to use either a long or short derivative to offset the risk of any cash position, identified at the discretion of

[421] *See* CEA section 4a(c)(2)(B)(i).

[422] *See* December 2013 Position Limits Proposal, 78 FR at 75734–5 and 75739–41.

[423] *See, e.g.,* CL–AMG–59709 at 2, 18.

[424] *See, e.g., id.* at 18–19.

[425] CL–FIA–59595 at 5,34–35; CL–AMG–59709 at 2, 12–15; and CL–CME–59718 at 67–69.

[426] CL–Sen. Levin–59637 at 8; and CL–Better Markets–60325 at 2.

[427] CL–CMOC–59720 at 4–5.

[428] *See, e.g.,* CL–NCGA–NGSA–60919 at 4, CL–EEI–EPSA–60925 at 14, CL–API–60939 at 2, CL–CMC–60950 at 4–5, CL–NCFC–60930 at 2, CL–ADM–60934 at 2–6, CL–FIA–60937 at 5 and 20, CL–NGFA–60941 at 4, and CL–Associations–60972 at 2.

[429] *See, e.g.,* CL–CMC–60950 at 4–5, and CL–Olam–59946 at 2–4.

[430] CL–ICE–60929 at 10.

[431] *See, e.g.,* CL–ADM–60934 at 2–6, and CL–API–60939 at 2.

[432] *See* December 2013 Position Limits Proposal, 78 FR at 75709–10.

[433] *Id.* at 75710.

[434] *See, e.g.,* CL–MGEX–60936 at 11, CL–CMC–60950 at 6, CL–Associations–60972 at 2.

the commercial enterprise, irrespective of the commercial enterprise's net cash market position.[435] For example, a commenter contended that a commercial enterprise should be able to hedge fixed-price purchase contracts (*e.g.,* with a short futures position), without regard to the enterprise's fixed-price sales contracts, even if such a short derivative position may increase the enterprise's risk.[436] One commenter stated that the ''new proposed interpretation'' of the ''economically appropriate'' test requires a commercial enterprise to include, and consider for purposes of bona fide hedging, portions of its portfolio it would not otherwise consider in managing risk.[437] Another commenter did not agree that market participants should be required to calculate risk on a consolidated basis, because this approach would require commercial entities to build out new systems. As an alternative, that commenter requests the Commission recognize current risk management tools.[438]

Commission Reproposal: The Reproposal retains the Commission's interpretation, as proposed, of economically appropriate gross hedging: that in circumstances where net hedging does not measure all risk exposures, an enterprise may appropriately enter into, for example, a calendar month spread position as a gross hedge. A number of comments misconstrued the Commission's historical interpretation of gross and net hedging. The Commission has not recognized selective identification of cash positions to justify a position as bona fide; rather, the Commission has permitted a regular practice of excluding certain commodities, products, or by-products, in determining an enterprise's risk position.[439] As proposed, the Reproposal requires such excluded commodities to be *de minimis* or difficult to measure, because a market participant should not be permitted to ignore material cash market positions and enter into derivative positions that increase risk while avoiding a position limit restriction; rather, such a market participant's speculative activity must remain below the level of the speculative position limit.

Note, however, under a partial reading of a preamble to a 1977 proposal, the Commission has appeared to recognize gross hedging, without regard to net risk, as bona fide; the Commission noted in 1977 that: ''The previous statutory definition of bona fide hedging transactions or positions contained in section 4a of the Act before amendment by the CFTC Act and the present definition permit persons to classify as hedging any purchase or sale for future delivery which is offset by their gross cash position irrespective of their net cash position.'' [440] However, under a full reading of that 1977 proposal, the Commission made clear that gross hedging was appropriate in circumstances where ''net cash positions do not necessarily measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or types of the cash commodity.'' [441] Thus, the 1977 proposal noted the Commission ''does not intend at this time to alter the provisions of the present definition with respect to the hedging of gross cash position.'' [442] At the time of the 1977 proposal, the ''present definition'' had been promulgated in 1975 by the Administrator of the Commodity Exchange Authority based on the statutory definition; and the Administrator had interpreted the statutory definition to recognize gross hedging as bona fide in the context of a merchant who ''may hedge his fixed-price purchase commitments by selling futures and *at the same time* hedge his fixed-price sale commitments by buying futures,'' rather than hedging only his net position.[443]

Comments on specific, identifiable risk: Commenters requested the Commission consider as economically appropriate any derivative position that a business can reasonably demonstrate reduces or mitigates one or more specific, identifiable risks related to individual or aggregated positions or transactions, based on its own business judgment and risk management policies, whether risk is managed enterprise-wide or by legal entity, line of business, or profit center.[444] One commenter disagreed with what it called a ''one-size-fits-all'' risk management paradigm that requires market participants to calculate risk on a consolidated basis because this approach would require commercial entities to build out new systems in order to manage risk this way. The commenter requests that the Commission instead recognize that current risk management tools are used effectively for positions that are below current limits and those tools remain effective above position limit levels as well.[445]

Commission Reproposal: The Reproposal declines to assess the bona fides of a position based solely on whether a commercial enterprise can identify any particular cash position within an aggregated person, the risks of which such derivative position offsets. The Commission believes that such an approach would run counter to the aggregation rules in § 150.4 and would permit an enterprise to cherry pick cash market exposures to justify exceeding position limits, with either a long or short derivative position, even though such derivative position increases the enterprise's risk.

The Commission views a derivative position that increases an enterprise's risk as contrary to the plain language of CEA section 4a(c) and the Commission's bona fide hedging definition, which requires that a bona fide hedging position ''is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.'' [446]

If a transaction that increases a commercial enterprise's overall risk should be considered a bona fide hedging position, this would result in position limits not applying to certain positions that should be considered speculative. For example, assume an enterprise has entered into only two cash forward transactions and has no inventory. The first cash forward transaction is a purchase contract (for a particular commodity for delivery at a particular later date). The second cash forward transaction is a sales contract (for the same commodity for delivery on the same date as the purchase contract). Under the terms of the cash forward contracts, the enterprise may take delivery on the purchase contract and re-deliver the commodity on the sales contract. Such an enterprise does not have a net cash market position that exposes it to price risk, because it has both purchased and sold the same commodity for delivery on the same date (such as cash forward contracts for the same cargo of Brent crude oil). The enterprise could establish a short derivative position that would offset the risk of the purchase contract; however, that would increase the enterprise's price risk. Alternatively, the enterprise

[435] *See, e.g.,* CL–Olam–59658 at 4–6.

[436] CL–FIA–59595 at 20–21.

[437] CL–Working Group–60947 at 15.

[438] CL–CMC–60950 at 5.

[439] *See, e.g.,* instructions to Form 204.

[440] 42FR 14832 at 14834 (Mar. 16, 1977).

[441] *Id.*

[442] *Id.*

[443] *See,* Letter from Roger R. Kauffman, Adm'r, Commodity Exchange Authority, to Reid Bondurant, Cotton Exchange (Feb. 13, 1959) (emphasis added), cited in CL–Olam–59658 at 5.

[444] *See, e.g.,* CL–API–59694 at 4, CL–IECAssn–59679 at 10–11, CL–APGA–59722 at 9–10, CL–NCFC–59942 at 5, CL–EEI–EPSA–59602 at 15, and CL–EEI-Sup–60386 at 7.

[445] CL–CMC–60950 at 5.

[446] CEA section 4a(c)(2)(A)(ii).

could establish a long derivative position that would offset the risk of the sales contract; however, that would increase the enterprise's price risk. If price risk reduction at the level of the aggregate person is not a requirement of a bona fide hedging position, such an enterprise could establish either a long or short derivative position, at its election, and claim an exemption from position limits for either derivative position, ostensibly as a bona fide hedging position. If either such position could be recognized as bona fide, position limits would simply not apply to such an enterprise's derivative position, even though the enterprise had no price risk exposure to the commodity prior to establishing such derivative position and created price risk exposure to the commodity by establishing the derivative position. Based on the Commission's experience and expertise, it believes that such a result (entering either a long or short derivative position, whichever the market participant elects) simply cannot be recognized as a legitimate risk reduction that should be exempt from position limits; rather, such a position should be considered speculative for purposes of position limits.

The Commission notes that a commercial enterprise that wishes to separately manage its operations, in separate legal entities, may, under the aggregation requirements of § 150.4, establish appropriate firewalls and file a notice for an aggregation exemption, because separate legal entities with appropriate firewalls are treated as separate persons for purposes of position limits. The Commission explained that an aggregation exemption was appropriate in circumstances where the risk of coordinated activity is mitigated by firewalls.[447]

Comments on processing hedge: A commenter requested the Commission recognize, as bona fide, a long or short derivative position that offsets either inputs or outputs in a processing operation, based on the business judgment of the commercial enterprise that it might not be an appropriate time to hedge both inputs and outputs, and requested the Commission withdraw the processing hedge example on pages 75836–7 of the 2013 Position Limits Proposal (proposed example 5 in Appendix C to part 150).[448]

Commission Reproposal: For the reasons discussed above regarding gross hedging and specific, identifiable risks, the Reproposal does not recognize as a bona fide hedging position a derivative position that offsets either inputs or outputs in a processing operation, absent additional facts and circumstances. The Commission reiterates its view that, as explained in the Commission's 2013 Position Limits Proposal, by way of example, processing by a soybean crush operation or a fuel blending operation may add relatively little value to the price of the input commodity. In such circumstances, it would be economically appropriate for the processor or blender to offset the price risks of both the unfilled anticipated requirement for the input commodity and the unsold anticipated production; such a hedge would, for example, fully lock in the value of soybean crush processing.[449] However, under such circumstances, merely entering an outright derivative position (*i.e.,* either a long position or a short position, at the processor's election) appears to be risk increasing, since the price risk of such outright position appears greater than, and not offsetting of, the price risk of anticipated processing and, thus, such outright position would not be economically appropriate to the reduction of risks.

Comments on economically appropriate anticipatory hedges: Commenters requested the Commission recognize derivative positions as economically appropriate to the reduction of certain anticipatory risks, such as irrevocable bids or offers.[450]

Commission Reproposal: The Commission has a long history of providing for the recognition, in § 1.3(z)(2), as enumerated bona fide hedging positions, of anticipatory hedges for unfilled anticipated requirements and unsold anticipated production, under the process of § 1.48.[451] The Reproposal continues to enumerate those two anticipatory hedges, along with two new anticipatory hedges for anticipated royalties and contracts for services, as discussed below.

The Commission did not propose an enumerated exemption for binding, irrevocable bids or offers as the Commission believes that an analysis of the facts and circumstances would be necessary prior to recognizing such an exemption. Consequently, the Reproposal does not provide for such an enumerated exemption. However, the Commission withdraws the view that a binding, irrevocable bid or offer fails to meet the economically appropriate test.[452] Rather, the Commission will permit exchanges, under § 150.9, to make a facts-and-circumstances determination as to whether to recognize such and other anticipatory hedges as non-enumerated bona fide hedges, consistent with the Commission's recognition ''that there can be a gradation of probabilities that an anticipated transaction will occur.'' [453]

iii. Change in Value Requirement

Commission proposal: To satisfy the change in value requirement, the hedging position must arise from the potential change in the value of: (I) Assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising; (II) liabilities that a person owes or anticipates incurring; or (III) services that a person provides, purchases, or anticipates providing or purchasing.[454] The proposed definition incorporated the potential change in value requirement in current § 1.3(z)(1).[455] This provision largely mirrors the provision of CEA section 4a(c)(2)(A)(iii).[456]

Comments on change in value: One commenter urged a more narrow definition of bona fide hedging that restricts exemptions to ''commercial entities that deal exclusively in the production, processing, refining, storage, transportation, wholesale or retail distribution, or consumption of physical commodities.'' [457] However, numerous commenters urged the Commission to enumerate new exemptions consistent with the change in value requirement, such as for merchandising, as discussed below.

Commission Reproposal: The Reproposal retains the change in value requirement as proposed, which mirrors CEA section 4a(c)(2)(A)(iii). Rather than further restrict the types of commercial entities who may avail themselves of a

[447] *See* discussion under section II.B.3 (*Criteria for Aggregation Relief in Rule 150.4(b)(2)(i)*) of the 2016 Final Aggregation Rule.

[448] CL–Cargill–59638 at 2–4.

[449] December 2013 Position Limits Proposal, 78 FR at 75709.

[450] *See, e.g.,* CL–Cargill–59638 at 2–4.

[451] 17 CFR 1.3(z)(2) and 1.48 (2010).

[452] December 2013 Position Limits Proposal, 78 FR at 75720.

[453] *Id.* at 75719.

[454] *Id.* at 75710.

[455] 17 CFR 1.3(z) (2010).

[456] As noted in the December 2013 Position Limits Proposal, 78 FR at 75710, CEA section 4a(c)(2)(A)(iii)(II) uses the phrase ''liabilities that a person owns or anticipates incurring.'' The Commission interprets the word ''owns'' to be a typographical error, and interprets the word ''owns'' to be ''owes.'' A person may owe on a liability, and may anticipate incurring a liability. If a person ''owns'' a liability, such as a debt instrument issued by another, then such person owns an asset. Because assets are included in CEA section 4a(c)(2)(A)(iii)(I), the Commission interprets ''owns'' to be ''owes.''

[457] CL–PMAA–NEFI–60952 at 2.

bona fide hedging exemption under the change in value requirement, the Commission notes that the reproposed definition also reflects the statutory requirement under the temporary substitute test, that the hedging position be a substitute for a position taken or to be taken in a physical marketing channel, either by the market participant or the market participant's pass-through swap counterparty.

Comments on anticipatory merchandising or storage: Numerous commenters asserted the Commission should recognize anticipatory merchandising as a bona fide hedge, as included in CEA section 4a(c)(A)(iii), such as (1) a merchant desiring to lock in the price differential between an unfixed price forward commitment and an anticipated offsetting unfixed price forward commitment, where there is a reasonable basis to infer that an offsetting transaction was likely to occur (such as in anticipation of shipping), (2) a bid or offer, where there is a reasonably anticipated risk that such bid or offer will be accepted, or (3) an anticipated purchase and/or anticipated storage of a commodity, prior to anticipated merchandising (or usage).[458]

Commenters recommended the Commission recognize unfilled storage capacity as the basis of a bona fide hedge of, either (1) anticipated rents (*e.g.,* a type of anticipated asset or liability), (2) anticipated merchandising, or (3) anticipated purchase and storage prior to usage.[459] By way of example, one commenter contended anticipated rent on a storage asset is like an option and the appropriate hedge position should be dynamically adjusted.[460] Also by way of example, another commenter suggested enumerated hedges should include (1) offsetting long and short positions in commodity derivative contracts as hedges of storage or transportation of the commodity underlying such contracts; and (2) positions that hedge the value of assets owned, or anticipated to be owned, used to produce, process, store or transport the commodity underlying the derivative.[461]

Commission Reproposal: The Commission notes that an exchange, under reproposed § 150.9, as discussed below, is permitted to recognize anticipated merchandising or anticipated purchase and storage, as potential non-enumerated bona fide hedging positions, subject to assessment of the particular facts and circumstances, including such information as the market participant's activities (taken or to be taken) in the physical marketing channel and arrangements for storage facilities. While the Commission previously discussed its doubt that storage hedges generally will meet the economically appropriate test, because the value fluctuations in a calendar month spread in a commodity derivative contract will likely have at best a low correlation with value fluctuations in expected returns (*e.g.,* rents) on unfilled storage capacity,[462] the Commission now withdraws that discussion of doubt and, as reproposed, would review exchange-granted non-enumerated bona fide hedging exemptions for storage with an open mind.

The Commission does not express a view as this time on one commenter's assertion that the anticipated rent on a storage asset is like an option; the commenter did not provide data regarding the relationship between calendar spreads and the ''profitability of filling storage.'' The Commission notes that, under the Reproposal, an exchange could evaluate the particulars of such a situation in an application for a non-enumerated hedging position.

Similarly, as reproposed, an exchange could evaluate the particulars of other situations, such as a commenter's example of storage or transportation hedges. The Commission notes that it is not clear from the comments how the value fluctuations of calendar month or location differentials are related to the fluctuations in value of storage or transportation. Regarding a commenter's examples of assets owned or anticipated to be owned, it is not clear how the value fluctuations of whatever would be the relevant hedging position (*e.g.,* long, short, or calendar month spread) are related to the fluctuations in value of whatever would be the particular assets (*e.g.,* tractors, combines, silos, semi-trucks, rail cars, pipelines) to be used to produce, process, store or transport the commodity underlying the derivative.

Comments on unfixed price commitments: Commenters recommended the Commission recognize, as a bona fide hedge, the fixing of the price of an unfixed price commitment, for example, to reduce the merchant's operational risk and potentially to acquire a commodity through the delivery process on a physical-delivery futures contract.[463] Another commenter provided an example of a preference to shift unfixed-price exposure on cash commitments from daily index prices to the first-of-month price under the NYMEX Henry Hub Natural Gas core referenced futures contract.[464] A commenter suggested that the interpretation of a fixed price contract should include ''basis priced contracts which are purchases or sales with the basis value fixed between the buyer and the seller against a prevailing futures'' contract; the commenter noted such basis risk could be hedged with a calendar month spread to lock in their purchase and sale margins.[465] Another commenter requested the Commission explicitly recognize index price transactions as appropriate for a bona fide hedging exemption, citing concerns that the price of an unfixed price forward sales contract may fall below the cost of production.[466]

Commission Reproposal: The Commission affirms its belief that a reduction in a price risk is required under the economically appropriate test of CEA section 4a(c)(2)(A)(ii); consistent with the economically appropriate test, a potential change in value (*i.e.,* a price risk) is required under CEA section 4a(c)(2)(A)(iii). In both the reproposed and proposed definitions of bona fide hedging position, the incidental test would require a reduction in price risk. Although the Reproposal deletes the incidental test from the first paragraph of the bona fide hedging position definition (as discussed above), the Commission notes that it interprets risk in the economically appropriate test as price risk, and does not interpret risk to include operational risk. Interpreting risk to include operational risk would broaden the scope of a bona fide hedging position beyond the Commission's historical interpretation

[458] *See, e.g.,* CL–FIA–59595 at 30–31, CL–FIA–60303 at 6, CL–EEI–EPSA–59602 at 17–18, CL–EEI–59945 at 6, CL–CMC–60950 at 6, CL–CMC–60391 at 4–5, CL–CMC–60318 at 5, CL–CMC–59634 at 3, 20–22, CL–Cargill–59638 at 2–4, CL–ADM–59640 at 2–3, CL–Olam–59946 at 4, CL–BG Group–59656 at 10–11, CL–ASCA–59667 at 2, CL–NGSA–60379 at 5, CL–NGSA–59674 at 2, 18–24, CL–Working Group–60383 at 15, CL–Working Group–59937 at 5–6, 10–12, CL–Working Group–59656 at 16–18, 21–23, 26, CL–API–59694 at 5–6, CL–MSCGI–59708 at 2–3, 18–20, CL–CME–59718 at 56–57, 59, CL–Armajaro–59729 at 1, CL–AFBF–59730 at 2, CL–NCFC–59942 at 2–4, CL–ICE–60310 at 4, CL–ICE–60387 at 9, CL–ISDA/SIFMA–59611 at 37–38, CL–COPE–59662 at 15–16, and CL–GSC–59703 at 3–4.

[459] *See, e.g.,* CL–Cargill–59638 at 2–4, CL–CME–59718 at 57–58, CL–NEM–59586 at 4, CL–FIA–59595 32–33, CL–ISDA/SIFMA–59611 at 4, CL–CMC–59634 at 5, CL–LDC–59643 at 2, CL–BG Group-59656 at 10, CL–COPE–59950 at 5, CL–COPE–59662 at 14–15, CL—Working Group–59693 at 23–26, CL–GSC–59703 at 2–3, CL–AFBF–59730 at 2, CL–SEMP–59926 at 6–7, CL–EDF–60398 at 8–9, CL–EDF–59961 at 2–3, CL–Andersons–60256 at 1–3, and CL–SEMP–60384 at 4–5.

[460] CL–ISDA/SIFMA–59611, Annex B at 7.

[461] CL–EEI–EPSA–60925 at 13.

[462] December 2013 Position Limits Proposal, 78 FR at 75718.

[463] *See, e.g.,* CL–Olam–59946 at 4, and CL–NCFC –59942 at 2–4.

[464] CL–NCGA–NGSA–60919 at 4–5.

[465] CL–NGFA–60941 at 4.

[466] CL–NCGA–NGSA–60919 at 5.

and may have adverse impacts that are inconsistent with the policy objectives of limits in CEA section 4a(a)(3)(B).

The Commission has consistently required a bona fide hedging position to be a position that is shown to reduce price risk in the conduct and management of a commercial enterprise.[467] By way of background, the Commission notes, in promulgating the definition of bona fide hedging position in § 1.3(z), it explained that a bona fide hedging position ''must be economically appropriate to risk reduction, such risks must arise from operation of a commercial enterprise, and the price fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash market value of the assets, liabilities or services being hedged.'' [468] As noted above, the Dodd-Frank Act added CEA section 4a(c)(2), which copied the economically appropriate test from the Commission's definition in § 1.3(z)(1). Thus, the Commission believes it is reasonable to interpret that statutory standard in the context of the Commission's historical interpretation of § 1.3(z).

While the Commission has enumerated a calendar month spread as a bona fide hedge of offsetting unfixed-price cash commodity sales and purchases, the Reproposal will permit an exchange, under reproposed § 150.9, to conduct a facts-and-circumstances, case-by-case review to determine whether a calendar month spread is appropriately recognized as a bona fide hedging position for only a cash commodity purchase *or* sales contract. For example, assume a merchant enters into an unfixed-price sales contract (*e.g.,* priced at a fixed differential to a deferred month futures contract), and immediately enters into a calendar month spread to reduce the risk of the fixed basis moving adversely. It may not be economically appropriate to recognize as bona fide a long futures position in the spot (or nearby) month and a short futures position in a deferred calendar month matching the merchant's cash delivery obligation, in the event the spot (or nearby) month price is higher than the deferred contract month price (referred to as backwardation, and characteristic of a spot cash market with supply shortages), because such a calendar month futures spread would lock in a loss and may be indicative of an attempt to manipulate the spot (or nearby) futures price.

Regarding the risk of an unfixed price forward sales contract falling below the cost of production, the Reproposal enumerates a bona fide hedging exemption for unsold anticipated production; the Commission clarifies, as discussed below, that such an enumerated hedge is available regardless of whether production has been sold forward at an unfixed (that is, index) price.

Comments on cash and carry: Commenters requested the Commission enumerate, as a bona fide hedging position, a ''cash and carry'' trade, where a market participant enters a nearby long futures position and a deferred short futures position, with the intention to take delivery and carry the commodity for re-delivery.[469]

Commission Reproposal: The Reproposal does not propose to enumerate a cash and carry trade as a bona fide hedging position. A cash and carry trade appears to fail the temporary substitute test, since such market participant is not using the derivative contract as a substitute for a position taken or to be taken in the physical marketing channel. The long futures position in the cash and carry trade is in lieu of a purchase in the cash market. In the 2016 Supplemental Proposal, the Commission asked whether, and subject to what conditions (*e.g.,* potential facilitation of liquidity for a bona fide hedger of inventory), a cash and carry position might be recognized by an exchange as a spread exemption under § 150.10, subject to the Commission's *de novo* review.[470] This issue is discussed under § 150.10, regarding exchange recognition of spread exemptions.

iv. Pass-Through Swap Offsets and Offsets of Hedging Swaps

Commission proposal: The Commission proposed to recognize as bona fide a commodity derivative contract that reduces the risk of a position resulting from a swap executed opposite a counterparty for which the position at the time of the transaction would qualify as a bona fide hedging position.[471] This proposal mirrors the requirements in CEA section 4a(c)(B)(i). The proposal also clarified that the swap itself is a bona fide hedging position to the extent it is offset. However, the Commission proposed that it would not recognize as bona fide hedges an offset in physical-delivery contracts during the shorter of the last five days of trading or the time period for the spot month in such physical-delivery commodity derivative contract (the ''five-day'' rule, discussed further below).

Comments received: As noted above, commenters recommended that the Commission's bona fide hedging definition should reflect the standards in CEA section 4a(c). One commenter suggested that the Commission broaden the pass-through swap offset provisions to accommodate secondary pass-through transactions among affiliates within a corporate organization to make ''the most efficient and effective use of their existing corporate structures.'' [472]

Commission Reproposal: The Commission agrees that the bona fide hedging definition, in general, and the pass-through swap provision, in particular, should more closely reflect the statutory standards in CEA section 4a(c). Under the proposed definition, a market participant who reduced the risk of a swap, where such swap was a bona fide hedging position for that market participant, would not have received recognition for the swap offset as a bona fide hedging position, as this provision in CEA section 4a(c)(2)(B)(ii) was not mirrored in the proposed definition.[473] To adhere more closely to the statutory standards, the Reproposal recognizes such offset as a bona fide hedging position. Consistent with the proposal for offset of a pass-through swap, the Reproposal imposes a five-day rule restriction on the offset in a physical-delivery contract of a swap used as a bona fide hedge; however, as reproposed, an exchange listing a physical-delivery contract may recognize, on a case-by-case basis, such offset as a non-enumerated bona fide hedging position pursuant to the process in reproposed § 150.9.

The Reproposal retains and clarifies in subparagraph (ii)(A) that the bona fides of a pass-through swap may be

[467] The Commission distinguishes operational risk, which may arise from a potential failure of a counterparty to a cash market forward transaction, from price risks in the conduct and management of a commercial enterprise.

[468] 42 FR 14832 at 14833 (March 16, 1977) (proposed definition). The Commission also adopted the incidental test (requiring that the ''purpose is to offset price risks incidental to commercial cash or spot operations''). 42 FR 42748 at 42751 (Aug. 24, 1977) (final definition). Previously, the Secretary of Agriculture promulgated a definition of bona fide hedging position that required a purpose ''to offset price risks incidental to commercial cash or spot operations.'' 40 FR 11560 at 11561 (Mar. 12, 1975).

[469] *See, e.g.,* CL–Armajaro–59729 at 2.

[470] 2016 Supplemental Position Limits Proposal, 81 FR at 38479.

[471] December 2013 Position Limits Proposal, 78 FR at 75710.

[472] CL–NCGA–NGSA–60919 at 8–9.

[473] For example, assume a market participant entered a swap as a bona fide hedging position and, subsequently, offset (that is, lifted) that hedge using a futures contract. The Commission's original proposal would not have recognized the lifting of the hedge as a bona fide hedging transaction, although the statute does.

determined at the time of the transaction by the intermediary. The clarification is intended to reduce the burden on such intermediary of otherwise needing to confirm the continued bona fides of its counterparty over the life of the pass-through swap.

In addition, the Reproposal retains, as proposed, application of the five-day rule to pass-through swap offsets in a physical-delivery contract. However, the Commission notes that under the Reproposal, an exchange listing a physical-delivery contract may recognize, on a case-by-case basis, a pass-through swap offset (in addition to the offset of a swap used as a bona fide hedge), during the last five days of trading in a spot month, as a non-enumerated bona fide hedge pursuant to the process in reproposed § 150.9.

Further, the Reproposal retains the recognition of a pass-through swap itself that is offset, not just the offsetting position (and, thus, permitting the intermediary to exclude such pass-through swap from position limits, in addition to excluding the offsetting position).

Regarding the request to broaden the pass-through swap offset provisions to accommodate secondary pass-through transactions among affiliates, the Commission declines in this Reproposal to broaden the pass-through swap offset exemption beyond the provisions in CEA section 4a(c)(2)(B)(i). However, the Commission notes that a group of affiliates under common ownership is required to aggregate positions under the Commission's requirements in § 150.4, absent an applicable aggregation exemption. In the circumstance of aggregation of positions, recognition of a secondary pass-through swap transaction would not be necessary among such an aggregated group, because the group is treated as one person for purposes of position limits.

v. Additional Requirements for Enumeration or Other Recognition

Commission proposal: In 2013, the Commission proposed in subparagraph (2)(i)(D) of the definition of a bona fide hedging position, that, in addition to satisfying the general definition of a bona fide hedging position, a position would not be recognized as bona fide unless it was enumerated in paragraph (3), (4), or (5)(discussed below), or recognized as a pass-through swap offset or pass-through swap.[474] In 2016, in response to comments on the 2013 proposed definition, the Commission proposed, in subparagraph (2)(i)(D)(2) of the definition, to also recognize as bona fide any position that has been otherwise recognized as a non-enumerated bona fide hedging position by either a designated contract market or a swap execution facility, each in accordance with § 150.9(a), or by the Commission.[475]

Comments received: Commenters objected to the requirement for a position to be specifically enumerated in order to be recognized as bona fide, noting that the enumerated requirement is not supported by the legislative history of the Dodd-Frank Act, conflicts with longstanding Commission practice and precedent, and may be overly restrictive due to the limited set of specific enumerated hedges.[476] Other commenters recommended that the Commission expand the list of enumerated bona fide hedge positions, to encompass all transactions that reduce risks in the conduct and management of a commercial enterprise, such as anticipatory merchandising hedges and other general examples.[477]

Commission Reproposal: In response to comments, the Reproposal retains, as proposed in 2016, a proposed definition that recognizes as bona fide, in addition to enumerated positions, any position that has been otherwise recognized as a non-enumerated bona fide hedging position by either a designated contract market or a swap execution facility, each in accordance with reproposed § 150.9(a), or by the Commission. These provisions for recognition of non-enumerated positions are included in re-designated subparagraph (2)(iii)(C) of the reproposed definition of a bona fide hedging position.

The Commission notes that it is not possible to list all positions that would meet the general definition of a bona fide hedging position. However, the Commission observes that the commenters' many general examples, which they recommended be included in the list of enumerated bona fide hedging positions, generally did not provide sufficient context or facts and circumstances to permit the Commission to evaluate whether recognition as a non-enumerated bona fide hedging position would be warranted. Context would be supplied, for instance, by the provision of the particular market participant's historical activities in the physical marketing channel and such participant's estimate, in good faith, of its reasonably expected activities to be taken in the physical marketing channel.

In a clarifying change, the Commission notes that the Reproposal has re-designated the provisions proposed in subparagraph (2)(i)(D), in new subparagraph 2(iii), regarding the additional requirements for recognition of a position in a physical commodity contract as a bona fide hedging position. Concurrent with this re-designation, the Commission notes the Reproposal re-organizes, also for clarity, the application of the five-day rule to pass-through swaps and hedging swaps in subparagraph (2)(iii)(B), as discussed above.[478]

3. Enumerated Hedging Positions

a. Proposed Enumerated Hedges

In paragraph (3) of the proposed definition of a bona fide hedging position, the Commission proposed four enumerated hedging positions: (i) Hedges of inventory and cash commodity purchase contracts; (ii) hedges of cash commodity sales contracts; (iii) hedges of unfilled anticipated requirements; and (iv) hedges by agents.[479]

Comments received: Numerous commenters objected to the provision in proposed subparagraph (3)(iii)(A) that would have limited recognition of a hedge for unfilled anticipated requirements to one year for agricultural commodities. For example, commenters noted a need to hedge unfilled anticipated requirements for sugar for a time period longer than twelve months.[480] Similarly, other commenters noted there may be a need to offset risks arising from investments in processing capacity in agricultural commodities for a period in excess of twelve months.[481]

Other commenters recommended the Commission (1) remove the restriction that unfilled anticipated requirement hedges by a utility be ''required or encouraged to hedge by its public utility commission'' because most public utility commissions do not require or encourage such hedging, (2) expand the reach beyond utilities, by including

[474] December 2013 Position Limits Proposal, 78 FR at 75711.

[475] 2016 Supplemental Position Limits Proposal, 81 FR at 38505.

[476] *See, e.g.,* CL–CME–59718 at 47–53, and CL–BG Group–59656 at 9.

[477] *See, e.g.,* CL–FIA–59595 at 32, CL–FIA–60303 at 6, CL–API–60939 at 3, CL–AGA–60943 at 4, CL–CMC–60950 at 6–9, CL–EEI–EPSA–60925 at 13, and CL–FIA–60937 at 5 and 21.

[478] However, as noted above, as reproposed, an exchange listing a physical-delivery contract may recognize, on a case-by-case basis, a pass-through swap offset, or the offset of a swap used as a bona fide hedge, during the last five days of trading in a spot month, as a non-enumerated bona fide hedge pursuant to the process in reproposed § 150.9.

[479] December 2013 Position Limits Proposal, 78 FR at 75713.

[480] *See, e.g.,* Ex Parte No-869, notes of Feb. 25, 2015 ex parte meeting with The Hershey Company, The J.M. Smucker Co., Louis Dreyfus Commodities, Noble Americans Corp., *et al.*

[481] *See, e.g.,* CL–NGFA–60941 at 8.

entities designated as providers of last resort who serve the same role as utilities, and (3) clarify the meaning of unfilled anticipated requirements, consistent with CFTC Staff Letter No. 12–07.[482]

Commission Reproposal: The Reproposal retains the enumerated exemptions as proposed, with two amendments. First, the Commission agrees with the commenters' request to remove the twelve month constraint on hedging unfilled anticipated requirements for agricultural commodities, as that provision appears no longer to be a necessary prudential constraint. Second, the Commission agrees with the commenters' request to remove the condition that a utility be ''required or encouraged to hedge by its public utility commission.'' Accordingly, the condition that a utility be ''required or encouraged to hedge by its public utility commission'' is omitted from the reproposed definition. The Commission notes that under the Reproposal, a market participant, who is not a utility, may request that an exchange consider recognizing a non-enumerated exemption, as it is not clear who would be appropriately identified as a ''provider of last resort'' and under what circumstance such person would reasonably estimate its unfilled requirements.

Consistent with CFTC Staff Letter No. 12–07, the Commission affirms its belief that unfilled anticipated requirements are those anticipated inputs that are estimated in good faith and that have not been filled. Under the Reproposal, an anticipated requirement may be filled, for example, by fixed-price purchase commitments, holdings of commodity inventory by the market participant, or unsold anticipated production of the market participant. However, an unfixed-price purchase commitment does not fill an anticipated requirement, in that the market participant's price risk to the input has not been fixed.

b. Proposed Other Enumerated Hedges Subject to the Five-Day Rule

In paragraph (4) of the proposed definition of a bona fide hedging position, the Commission proposed four other enumerated hedging positions: (i) Hedges of unsold anticipated production; (ii) hedges of offsetting unfixed-price cash commodity sales and purchases; (iii) hedges of anticipated royalties; and (iv) hedges of services.[483] The Commission proposed to apply the five-day rule to all such positions.

Comments received on the five-day rule: Numerous commenters requested that the five-day rule be removed from the Commission's other enumerated bona fide hedging positions, as that condition is not included in CEA section 4a(c).

Commission Reproposal on the five-day rule: The Commission is retaining the prudential condition of the five-day rule in the other enumerated hedging positions. The Commission has a long history of applying the five-day rule, in its legacy agricultural federal position limits, to hedges of unsold anticipated production and hedges of offsetting unfixed-price cash commodity sales and purchases. However, as discussed in relation to reproposed § 150.9, the Commission will permit an exchange, in effect, to remove the five-day rule on a case-by-case basis in physical-delivery contracts, as a non-enumerated bona fide hedging position, by applying the exchange's experience and expertise in protecting its own physical-delivery market.

Comments on other enumerated exemptions: As noted above, commenters recommended removing the twelve-month limitation on agricultural production, as unnecessarily short in comparison to the expected life of investment in production facilities.[484]

Commission Reproposal on other enumerated exemptions: The Reproposal removes the twelve-month limitations on unsold anticipated agricultural production and hedges of services for agricultural commodities. As noted above, that provision appears no longer to be a necessary prudential constraint. Otherwise, the Reproposal retains the other enumerated exemptions, as proposed.

c. Proposed Cross-Commodity Hedges

In paragraph (5) of the proposed definition of a bona fide hedging position, the Commission proposed to recognize as bona fide cross-commodity hedges.[485] Cross-commodity hedging would be conditioned on: (i) The fluctuations in value of the position in the commodity derivate contract (or the commodity underlying the commodity derivative contract) being substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap (the substantially related test); and (ii) the five-day rule being applied to positions in any physical-delivery commodity derivative contract. The Commission proposed a non-exclusive safe harbor for cross-commodity hedges that would have two factors: A qualitative factor; and a quantitative factor.

Comments on cross-commodity hedges: Numerous commenters requested the Commission withdraw the safe harbor quantitative ''test,'' and noted such test is impracticable where there is no relevant cash market price series for the commodity being hedged.[486] Some commenters requested the Commission retain a qualitative approach to assessing whether the fluctuations in value of the position in the commodity derivate contract are substantially related to the fluctuations in value of the actual or anticipated cash position.

One commenter urged the Commission to clarify that market participants need not treat as enumerated cross-commodity hedges strategies where the cash position being hedged is the same cash commodity as the commodity underlying the futures contract even if the cash commodity is not deliverable against the contract. The commenter believes that this clarification would verify that non-deliverable grades of certain commodities could be deemed as the same cash commodity and thus not be deemed a cross-commodity hedge subject to the five-day rule.[487]

Commenters requested the Commission not apply a five-day rule to cross-commodity hedges or, alternatively, permit exchanges to determine the appropriate facts and circumstances where a market participant may be permitted to hold such positions into the spot month,

[482] *See, e.g.,* CL–Working Group–59693 at 27–28, CL–EEI–EPSA–55953 at 19. CFTC Staff Letter No. 12–07 notes that unfilled anticipated requirements may be recognized as the basis of a bona fide hedging position or transaction under Commission Regulation 151.5(a)(2)(ii)(C) when a commercial enterprise has entered into long-term, unfixed-price supply or requirements contracts as the price risk of such ''unfilled'' anticipated requirements is not offset by an unfixed price forward contract as the price risk remains with the commercial, even though the commercial enterprise has contractually assured a supply of the commodity. Instead, the price risk continues until the forward contract's price is fixed; once the price is fixed on the supply contract, the commercial enterprise no longer has price risk and the derivative position, to the extent the position is above an applicable speculative position limit, must be liquidated in an orderly manner in accordance with sound commercial practices.

[483] December 2013 Position Limits Proposal, 78 FR at 75714.

[484] *See, e.g.,* CL–NGFA–60941 at 8.

[485] December 2013 Position Limits Proposal, 78 FR at 75716.

[486] *See, e.g.,* CL–ICE–60929 at 16, CL–NCGA–NGSA–60919 at 6–7, CL–NCFC–60930 at 2–3, CL–API–60939 at 2, CL–NGFA–60941 at 8, CL–EEI–EPSA–60925 at 10, and CL–IECAssn–60949 at 5–7.

[487] CL–CME–60926 at 6.

noting that a cross-commodity hedge in a physical-delivery contract may be the best hedge of its commercial exposure.[488]

Commission Reproposal: The Reproposal retains the cross-commodity hedge provision in paragraph (5) of the definition of a bona fide hedging position as proposed. However, for the reasons requested by commenters and because of confusion regarding application of a safe harbor, the Reproposal does not include the safe harbor quantitative test. If questions arise regarding the bona fides of a particular cross-commodity hedge, it would, as reproposed, be reviewed based on facts and circumstances, including a market participant's qualitative review of a particular cross-commodity hedge.

The Reproposal retains the five-day rule, because a market participant who is hedging the price risk of a non-deliverable cash commodity has no need to make or take delivery on a physical-delivery contract. However, the Commission notes that an exchange may consider, on a case-by-case basis in physical-delivery contracts, whether to recognize such cross-commodity positions as non-enumerated bona fide hedges during the shorter of the last five days of trading or the time period for the spot month, by applying the exchange's experience and expertise in protecting its own physical-delivery market, under the process of § 150.9.

4. Commodity Trade Options Deemed Cash Equivalents

Commission proposal: The Commission requested comment as to whether the Commission should use its exemptive authority under CEA section 4a(a)(7) to provide that the offeree of a commodity option would be presumed to be a pass-through swap counterparty for purposes of the offeror of the trade option qualifying for the pass-through swap offset exemption.[489] Alternatively, the Commission, noting that forward contracts may serve as the basis of a bona fide hedging position exemption, proposed that it may similarly include trade options as one of the enumerated bona fide hedging exemptions. The Commission noted, for example, such an exemption could be similar to the enumerated exemption for the offset of the risk of a fixed-price forward contract with a short futures position.

Comments on trade option exemptions: Commenters requested that the Commission clarify that hedges of commodity trade options be recognized as bona fide hedges, as would be available for other cash positions.[490]

Commission Reproposal: The Commission agrees with the commenters and has determined to address the request that commodity trade options should be recognized as the basis for a bona fide hedging position, as would be available for other cash positions. The reproposed definition of a bona fide hedging position adds new paragraph (6), specifying that a commodity trade option meeting the requirements of § 32.3 may be deemed a cash commodity purchase or sales contract, as the case may be, provided that such option is adjusted on a futures-equivalent basis. The reproposed definition also provides non-exclusive guidance on making futures-equivalent adjustments to a commodity trade option. For example, the guidance provides that the holder of a trade option, who has the right, but not the obligation, to call the commodity at a fixed price, may deem that trade option, converted on a futures-equivalent basis, to be a position in a cash commodity purchase contract, for purposes of showing that the offset of such cash commodity purchase contract is a bona fide hedging position.

Because the price risk of an option, including a trade option with a fixed strike price, should be measured on a futures-equivalent basis,[491] the Commission has determined that under the reproposed definition, a trade option should be deemed equivalent to a cash commodity purchase or sales contract only if adjusted on a futures-equivalent basis. The Commission notes that it may not be possible to compute a futures-equivalent basis for a trade option that does not have a fixed strike price. Thus, under the reproposed definition, a market participant may not use a trade option as a basis for a bona fide hedging position until a fixed strike price reasonably may be determined.

5. App. C to Part 150—Examples of Bona Fide Hedging Positions for Physical Commodities

Commission proposal: The Commission proposed a non-exhaustive list of examples meeting the requirements of the proposed definition of a bona fide hedging position, noting that market participants could see whether their practices fall within the list.[492]

Comments on examples: Comments regarding the processing hedge example number 5 of proposed Appendix C to part 150 are discussed above. Another commenter requested the Commission affirm that aggregation is required pursuant to an express or implied agreement when that agreement is to trade referenced contracts, and that aggregation is not triggered by the condition in example number 7 of proposed Appendix C to part 150, where a Sovereign grants an option to a farmer at no cost, conditioned on the farmer entering into a fixed-price forward sale.[493]

Commission Reproposal: The Commission agrees with the commenter that aggregation is required pursuant to an express or implied agreement when that agreement is to trade referenced contracts. Proposed example number 7 was focused on recognizing the legitimate public policy objectives of a sovereign furthering the development of a cash spot and forward market in agricultural commodities. To avoid confusion regarding the aggregation policy under rule 150.4, in the Reproposal, the Commission has revised example number 7, and has provided an interpretation that a farmer's synthetic position of a long put option may be deemed a pass-through swap, for purposes of a sovereign who has granted a cash-settled call option at no cost to such farmer in furtherance of a public policy objective to induce such farmer to sell production in the cash market. The Commission notes the combination of a farmer's forward sale agreement and a granted call option is approximately equivalent to a purchased put option. A farmer anticipating production or holding inventory may use such a long position in a put option as a bona fide hedging position.

The Reproposal also includes a number of conforming amendments and corrections of typographical errors. Specifically, it conforms example number 4 regarding a utility to the

[488] *See, e.g.,* CL–FIA–60937 at 22, CL–CCI–60935 at 8–9.

[489] December 2013 Position Limits Proposal, 78 FR at 75711. The Commission also requested comment on whether it would be appropriate to exclude commodity trade options from the definition of referenced contract. As discussed above, the Commission has determined to exclude trade options from the definition of referenced contract. Previous to this reproposed rule, the Commission observed that federal position limits should not apply to trade options. 81 FR 14966 at 14971 (Mar. 21, 2016).

[490] *See, e.g.,* CL–EEI–EPSA–60925 at 15.

[491] *See* the discussion of the definition of futures-equivalent in reproposed § 150.1, above.

[492] December 2013 Position Limits Proposal, 78 FR at 75739, 75828.

[493] CL–FIA–59595 at 35, CL–FIA–59566 at 3–7, citing December 2013 Position Limits Proposal, 78 FR at 75837.

changes to paragraph (3)(iii)(B) of the bona fide hedging position definition, as discussed above. The references in the examples to a 12-month restriction on hedges of agricultural commodities have also been removed because the Reproposal eliminates those proposed restrictions from the reproposed enumerated bona fide hedging positions, as discussed above. In addition, based on discussions with cotton merchants, example number 6, regarding agent hedging, has been amended from a generic example to a specific illustration of the hedge of cotton equities purchased by a cotton merchant from a producer, under the USDA loan program. Finally, the Reproposal corrects typographical errors in example number 12, regarding the hedge of copper inventory and the cross-hedge of copper wire inventory, to correctly reflect the 25,000 pound unit of trading in the Copper core referenced futures contract, and deletes the unnecessary reference to the price relationship between the nearby and deferred Copper futures contracts.

B. § 150.2—Position Limits

1. Setting Levels of Spot Month Limits

In the December 2013 Position Limits Proposal, the Commission proposed to establish speculative position limits on 28 core referenced futures contracts in physical commodities.[494]

As stated in the December 2013 Position Limits Proposal, the Commission proposed to set the initial spot month position limit levels for referenced contracts at the existing DCM-set levels for the core referenced futures contracts because the Commission believed this approach to be consistent with the regulatory objectives of the Dodd-Frank Act amendments to the CEA and many market participants are already used to those levels.[495] The Commission also stated that it was considering setting initial spot month limits based on estimated deliverable supplies submitted by CME Group Inc. (''CME'') in 2013.[496] The Commission suggested that it might use the exchange's estimated deliverable supplies if it could verify that they are reasonable.[497] The Commission further stated that it was considering another alternative of using, in the Commission's discretion, the recommended level, if any, of the spot month limit as submitted by each DCM listing a core referenced futures contract (if lower than 25 percent of estimated deliverable supply).[498]

2. Verification of Estimated Deliverable Supply

The Commission received comment letters from CME, Intercontinental Exchange (''ICE'') and Minneapolis Grain Exchange, Inc. (''MGEX'') containing estimates of deliverable supply. CME submitted updated estimates of deliverable supply for CBOT Corn (C), Oats (O), Rough Rice (RR), Soybeans (S), Soybean Meal (SM), Soybean Oil (SO), Wheat (W), and KC HRW Wheat (KW); COMEX Gold (GC), Silver (SI), Platinum (PL), Palladium (PA), and Copper (HG); NYMEX Natural Gas (NG), Light Sweet Crude Oil (CL), NY Harbor ULSD (HO), and RBOB Gasoline (RB).[499] ICE submitted estimates of deliverable supply for Cocoa (CC), Coffee C (KC), Cotton No. 2 (CT), FCOJ–A (OJ), Sugar No. 11 (SB), and Sugar No. 16 (SF).[500] MGEX submitted an estimate of deliverable supply for Hard Red Spring Wheat (MWE).[501]

The Commission is verifying that the estimates for C, O, RR, S, SM, SO, W, and KW submitted by CME are reasonable. The Commission is verifying that the estimate for MWE submitted by MGEX is reasonable. The Commission is verifying that the estimates for CC, KC, CT, OJ, SB, and SF submitted by ICE are reasonable. The Commission is verifying that the estimates for GC, SI, PL, PA, and HG submitted by CME are reasonable. Finally, the Commission is verifying that the estimates for NG, CL, HO, and RB submitted by CME are reasonable. In verifying that all of these estimates of deliverable supply are reasonable, Commission staff reviewed the exchange submissions and conducted its own research. Commission staff reviewed the data submitted, confirmed that the data submitted accurately reflected the source data, and considered whether the data sources were authoritative. Commission staff considered whether the assumptions made by the exchanges in the submissions were acceptable, or whether alternative assumptions would lead to similar results. In response to Commission staff questions about the exchange submissions, the Commission received revised estimates from exchanges. In some cases, Commission staff conducted trade source interviews. Commission staff replicated the calculations included in the submissions.

[494] *See generally* December 2013 Position Limits Proposal, 78 FR at 75725. The 28 core referenced futures contracts for which initial limit levels were proposed are: Chicago Board of Trade (''CBOT'') Corn, Oats, Rough Rice, Soybeans, Soybean Meal, Soybean Oil and Wheat; Chicago Mercantile Exchange Feeder Cattle, Lean Hog, Live Cattle and Class III Milk; Commodity Exchange, Inc., Gold, Silver and Copper; ICE Futures U.S. Cocoa, Coffee C, FCOJ–A, Cotton No. 2, Sugar No. 11 and Sugar No. 16; Kansas City Board of Trade Hard Winter Wheat (on September 6, 2013, CBOT and the Kansas City Board of Trade (''KCBT'') requested that the Commission permit the transfer to CBOT, effective December 9, of all contracts listed on the KCBT, and all associated open interest); Minneapolis Grain Exchange Hard Red Spring Wheat; and New York Mercantile Exchange (''NYMEX'') Palladium, Platinum, Light Sweet Crude Oil, NY Harbor ULSD, RBOB Gasoline and Henry Hub Natural Gas.

[495] December 2013 Position Limits Proposal, 78 FR at 75727. Several commenters supported establishing the initial levels of spot month speculative position limit levels at the levels then established by DCMs and listed in Appendix D to part 150, December 2013 Position Limits Proposal, 78 FR at 75739–40 (generally stating that the then current levels are high enough and raising them could cause problems with contract performance. *E.g.,* CL–WGC–59558 at 1–2; CL–Sen. Levin–59637 at 7; CL–AFBF–59730 at 3; CL–NGFA–59956 at 2; CL–NGFA–60312 at 3; CL–NCBA–59624 at 3; CL–Bakers–59691 at 1. Several commenters expressed the view that DCMs are best able to determine appropriate spot month limits and the Commission should defer to their expertise. *E.g.,* CL–NCBA–59624 at 3; CL–Cactus–59660 at 3; CL–TCFA–59680 at 3; CL–NGFA–59610 at 2; CL–MGEX–59635 at 2; CL–MGEX–59932 at 2; CL–MGEX–60380 at 1; CL–ICE–60311 at 1; CL–Thornton–59729 at 1.

[496] December 2013 Position Limits Proposal, 78 FR at 75727. The CME July 1, 2013 deliverable supply estimates are available on the Commission's Web site at *http://www.cftc.gov/idc/groups/public/@swaps/documents/file/cmegroupdeliverable070113.pdf; see also* December 2013 Position Limits Proposal, 78 FR at 75727, n. 406. Several commenters supported using the alternative level of spot-month position limits based on CME's deliverable supply estimates as listed in Table 9 of the December 2013 Position Limits Proposal, generally stating that the alternative estimates are more up to date than the deliverable supply estimates underlying the spot month speculative position limits currently established by the DCMs, and therefore more appropriate for use in setting federal limits. *E.g.,* CL–FIA–59595 at 3, 8; CL–EEI–EPSA–59602 at 9; CL–CMC–59634 at 14; CL–Olam–59658 at 1, 3; CL–BG Group–59656 at 6; CL–COPE–59662 at 21; CL–Calpine–59663 at 3; CL–NGSA–59673 at 37; CL–NGSA–59900 at 11; CL–Working Group–59693 at 58–59; CL–CME–60406 at 2–3 and App. A; CL–CME–60307 at 4; CL–CME–59718 at 3, 20–23; CL–Sempra–59926 at 3–4; CL–BG Group–59937 at 2–3; CL–EPSA–59953 at 2–3; CL–ICE–59966 at 5–6; CL–ICE–59962 at 5; CL–US Dairy–59597 at 4; CL–Rice Dairy–59601 at 1; CL–NMPF–59652 at 4; CL–FCS–59675 at 5.

[497] December 2013 Position Limits Proposal, 78 FR at 75727. The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness commented that the CFTC must update estimates of deliverable supply, rather than relying on existing exchange-set spot month limit levels. CL–Chamber–59684 at 6–7.

[498] December 2013 Position Limits Proposal, 78 FR at 75728.

[499] CL–CME–61007 at 5. *See also* CL–CME–61011; CL–CME–61012; CL–CME–60785 (earlier submission of deliverable supply estimates); CL–CME–60435 (earlier submission of deliverable supply estimates); CL–CME–60406 (earlier submission of deliverable supply estimates). The Commission did not receive an estimate for Live Cattle (LC).

[500] CL–ICE–60786. ICE also submitted an estimate for Henry Hub natural gas. CL–ICE–60684.

[501] CL–MGEX–61038 at Exhibit A; *see also* CL–MGEX–60938 at 2 (earlier submission of deliverable supply estimate).

In verifying the exchange estimates of deliverable supply, the Commission is not endorsing any particular methodology for estimating deliverable supply beyond what is already set forth in Appendix C to part 38 of the Commission's regulations.[502] As circumstances change over time, exchanges may need to adjust the methodology, assumptions and allowances that they use to estimate deliverable supply to reflect then current market conditions and other relevant factors. The Commission anticipates that it will base initial spot-month position limits on the current verified exchange estimates as and to the extent described below, unless an exchange provides additional updates during the Reproposal comment period that the Commission can verify as reasonable.

3. Single-Month and All-Months-Combined Limits

Commission Proposal: In the December 2013 Position Limits Proposal, the Commission proposed to set the level of single-month and all-months-combined limits (collectively, non-spot month limits) based on total open interest for all referenced contracts in a commodity.[503] The Commission also proposed to estimate average open interest based on the largest annual average open interest computed for each of the past two calendar years, using either month-end open contracts or open contracts for each business day in the time period, as the Commission finds in its discretion to be reliable.[504] For setting the levels of initial non-spot month limits, the Commission proposed to use open interest for calendar years 2011 and 2012 in futures contracts, options thereon, and in swaps that are significant price discovery contracts that are traded on exempt commercial markets.[505] The Commission explained that it had reviewed preliminary data submitted to it under part 20, but preliminarily decided not to use it for purposes of setting the initial levels of single-month and all-months-combined position limits because the data prior to January 2013 was less reliable than data submitted later.[506] The Commission noted that it was considering using part 20 data, should it determine such data to be reliable, in order to establish higher initial levels in a final rule.[507]

In the June 2016 Supplemental Proposal, the Commission noted that, since the December 2013 Position Limits Proposal, the Commission worked with industry to improve the quality of swap position data reported to the Commission under part 20.[508] The Commission also noted that, in light of the improved quality of such swap position data reporting, the Commission intended to rely on part 20 swap position data, given adjustments for obvious errors (*e.g.,* data reported based on a unit of measure, such as an ounce, rather than a futures-equivalent number of contracts), to establish initial levels of federal non-spot month limits on futures and swaps in a final rule.

Comments Received: Commenters requested that the Commission delay the imposition of hard non-spot month limits until it has collected and evaluated complete open interest data.[509]

Commission Reproposal: The Commission has determined that certain part 20 large trader position data, after processing and editing by Commission staff as described below,[510] is reliable. The Commission has determined to repropose the initial non-spot month position limit levels based on the combination of such adjusted part 20 swaps data and data on open interest in physical commodity futures and options from the relevant exchanges, as described below. The Commission is using two 12-month periods of data, covering a total of 24 months, rather than two calendar years of data, as is practicable, in reproposing the initial non-spot month position limit levels.

Data Editing

Commission staff analyzed and evaluated the quality of part 20 data for the period from July 1, 2014 through June 30, 2015 (''Year 1''), and the period from July 1, 2015 through June 30, 2016 (''Year 2'').[511] The Commission used open contracts as reported for each business day in the time periods, rather than month-end open contracts, primarily because it lessens the impact of missing data. Averaging generally also smooths over errors in reporting when there is both under- and over-reporting, both of which the Commission observed in the part 20 data. By calculating a daily average for each month for each reporting entity,[512] one calculates a reporting entity's open contracts on a ''representative day'' for each month. The Commission then summed the open contracts for each reporting entity on this representative day, to determine the average open interest for a particular month.[513]

First, for each of Year 1 and Year 2, Commission staff identified all reported positions in swaps that do not satisfy the definition of referenced contract as proposed in the December 2013 Position Limits Proposal[514] and removed those positions from the data set. For example, swaps settled using the price of the LME Gold PM Fix contract do not meet the definition of referenced contract for the gold core referenced futures contract (GC) but positions reported based on these types of swaps represented 14% of records submitted

[502] 17 CFR part 38, Appendix C.

[503] December 2013 Position Limits Proposal, 78 FR at 75729. The Commission currently sets the single-month and all-months-combined limits based on total open interest for a particular commodity futures contract and options on that futures contract, on a futures-equivalent basis.

[504] December 2013 Position Limits Proposal, 78 FR at 75730.

[505] *Id.*

[506] December 2013 Position Limits Proposal, 78 FR at 75733. Thus, the initial levels as proposed in the December 2013 Position Limits Proposal represented the lower bounds for the initial levels that the Commission would establish in final rules.

[507] December 2013 Position Limits Proposal, 78 FR at 75734. The Commission also stated that it was considering using data from swap data repositories, as practicable. *Id.* The Commission has determined that it is not yet practicable to use data from swap data repositories.

[508] 2016 Supplemental Position Limits Proposal, 81 FR at 38459.

[509] *E.g.,* CL–FIA–59595 at 3, 14; CL–EEI–EPSA–59602 at 10–11; CL–MFA–60385 at 4–7; CL–MFA–59606 at 22–23; CL–ISDA/SIFMA–59611 at 28–29; CL–CMC–59634 at 13; CL–Olam–59658 at 3; CL–COPE–59662 at 22; CL–Calpine–59663 at 4; CL–CCMC–59684 at 4–5; CL–NFP–59690 at 20; CL–Just Energy–59692 at 4; CL–Working Group–59693 at 62.

[510] Where relevant and practicable, Commission staff consulted and followed the Office of Management and Budget Standards and Guidelines for Statistical Surveys, September 2006, available at *https://www.whitehouse.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf.*

[511] There is no part 20 swaps data for Sugar No. 16 (SF).

[512] A reporting entity is a clearing member or a swap dealer required to report large trader position data for physical commodity swaps, as defined in 17 CFR 20.1.

[513] Because there may be missing data, using open contracts for each business day in the time period that a reporting entity submits a report may overestimate open interest, compared to taking a straight average of the open contracts over all business days in the time period. However, the Commission believes it is reasonable to assume that the open position in swaps for a reporting entity failing to report for a particular business day is more accurately reflected by that reporting entity's average reported open swaps for the month, rather than zero. Hence, in choosing this approach, the Commission chooses to repropose higher non-spot month limit levels.

[514] This adjustment may have removed fewer than all of the reported positions in swaps that do not satisfy the definition of referenced contract as adopted, and therefore may have resulted in a higher level of open interest (which would result in a higher limit level). For instance, swaps reported under part 20 include trade options, and the Commission is reproposing an amended definition of ''referenced contract'' to expressly exclude trade options. *See* the discussion of the defined term ''referenced contract'' under § 150.1, above. Because part 20 does not require trade options to be identified, the Commission could not exclude records of trade options from open interest or position size.

under part 20 by reporting entities for gold swaps. The percentage of average daily open interest excluded from the adjusted part 20 swaps data resulting from this deletion are set forth in Table 1 below. Other adjustments to the data are described below. Because not all commodities required exclusion of non-referenced contracts, the Commission reports only the 11 commodities that required this type of exclusion.

TABLE III–B–1—PERCENT OF ADJUSTED AVERAGE DAILY OPEN INTEREST EXCLUDED AS NOT MEETING THE DEFINITION OF REFERENCED CONTRACT

Core referenced futures contract	Year 1 percent of excluded adjusted open interest (%)	Year 2 percent of excluded adjusted open interest (%)
Cotton No. 2 (CT)	0.22	0.00
Sugar No. 11 (SB)	0.05	0.00
Gold (GC)	42.59	0.00
Silver (SI)	48.10	0.00
Platinum (PL)	9.12	5.36
Palladium (PA)	56.87	6.87
Copper (HG)	37.58	0.25
Natural Gas (NG)	12.49	12.52
Light Sweet Crude (CL)	3.60	0.83
New York Harbor ULSD (HO)	0.96	1.74
RBOB Gasoline (RB)	1.34	1.30

Second, Commission staff checked and edited the remaining data to mitigate certain types of errors. Commission staff identified three general types of reporting errors and made edits to adjust the data for:

(i) Positions that were clearly reported in units of a commodity when they should have been reported in the number of gross futures-equivalent contracts. For example, a position in gold (GC) with a futures contract unit of trading of 100 ounces might be reported as 480,000 contracts, when other available information, reasonable assumptions, consultation with reporting entities and/or Commission expertise indicate that the position should have been reported as 4,800 contracts (that is, 480,000 ounces divided by 100 ounces per contract). Commission staff corrected such reported swaps position data and included the corrected data in the data set.

(ii) Positions that are not obviously reported in units of a commodity but appear to be off by one or more decimal places (*e.g.,* a position is overstated, but not by a multiple of the contract's unit of trading). For example, a position in COMEX gold is reported as 100,000 and the notional value might be reported as $13,000,000, when the price of gold is $1300 and the COMEX gold contract is for 100 ounces, indicating that the position should have been reported as 100 futures-equivalent contracts. Staff corrected such reported swaps position data and included the corrected data in the data set.

(iii) Positions reported multiple times per day or otherwise extremely different from surrounding days' reported open interest. In some cases, reporting entities submitted the same report using different reporting identifiers, for the same day. In other cases, a position would inexplicably spike for one day, to a multiple of other days' reported open interest. When Commission staff checked with the reporting entity, the reporting entity confirmed that the reports were, indeed, erroneous. Commission staff did not include such incorrectly reported duplicative swaps position data in its analysis. In other cases, positions that were clearly reported incorrectly, but for which Commission staff could discern neither a reason nor a reasonable adjustment, were not included. For example, Commission staff deleted all swap position data reports submitted by one swap dealer from its analysis because the reports were inexplicably anomalous in light of other available information, reasonable assumptions and Commission expertise. As another example, one reporting entity reported extremely large values for only certain types of positions. After speaking with the reporting entity, Commission staff determined that there was no systematic adjustment to be made, but that the actual positions were, in fact, small. Hence, Commission staff did not include such reported swaps position data in its analysis.

The number of principal records edited, resulting from the edits relating to the three types of edits to erroneous position reports noted above, is set forth in Table 2 below. A principal record is a report of a swaps open position where the reporting entity is a principal to the swap, as opposed to a counterparty record.

TABLE III–B–2—PERCENTAGE OF PRINCIPAL RECORDS ADJUSTED BY EDIT TYPE AND UNDERLYING COMMODITY, REFERENCED CONTRACTS ONLY

	Edit type	Number of records adjusted year 1 (%)	Number of records adjusted year 2 (%)
Corn (C)	(i)	0.00	0.0001
	(iii)	0.00	0.66
Oats (O)	(iii)	0.00	0.20
Rough Rice (RR)	(iii)	0.38	0.00

TABLE III–B–2—PERCENTAGE OF PRINCIPAL RECORDS ADJUSTED BY EDIT TYPE AND UNDERLYING COMMODITY, REFERENCED CONTRACTS ONLY—Continued

	Edit type	Number of records adjusted year 1 (%)	Number of records adjusted year 2 (%)
Soybeans (S)	(i)	0.00	0.03
	(iii)	2.38	1.46
Soybean Meal (SM)	(iii)	0.00	0.41
Soybean Oil (SO)	(iii)	9.15	4.93
Wheat (W)	(i)	0.00	0.01
	(iii)	1.77	0.71
Wheat (MWE)	(iii)	0.043	0.002
Wheat (KW)	(iii)	1.34	0.68
Cocoa (CC)	(i)	0.001	0.0005
	(iii)	1.79	0.25
Coffee C (KC)	(i)	0.00	0.01
	(iii)	5.33	0.60
Cotton No. 2 (CT)	(iii)	16.76	5.59
FCOJ–A (OJ)	(iii)	13.30	17.43
Sugar No. 11 (SB)	(i)	0.00	0.0009
	(iii)	1.21	0.54
Live Cattle (LC)	(i)	0.002	0.00
	(iii)	45.65	15.50
Gold (GC)	(i)	1.99	0.02
	(ii)	0.32	0.00
	(iii)	91.45	89.04
Silver (SI)	(i)	3.01	0.19
	(iii)	93.08	89.52
Platinum (PL)	(i)	2.75	0.01
	(ii)	0.33	0.01
	(iii)	23.51	21.11
Palladium (PA)	(i)	0.62	0.00
	(ii)	0.30	0.00
	(iii)	32.97	22.29
Copper (HG)	(i)	4.94	0.48
	(iii)	20.80	16.82
Natural Gas (NG)	(i)	0.01	1.03
	(iii)	7.68	3.80
Light Sweet Crude (CL)	(i)	0.001	0.003
	(iii)	9.53	8.43
New York Harbor ULSD (HO)	(i)	0.01	0.0006
	(iii)	29.58	4.33
RBOB Gasoline (RB)	(i)	0.22	0.60
	(iii)	30.46	24.62

Some records also appeared to contain errors attributable to other factors that Commission staff could detect and for which Commission staff can correct. For example, there were instances where the reporting entity misreported the ownership of the position, *i.e.,* principal vs. counterparty. Commission staff corrected the misreported ownership data and included the corrected data in the data set. Such corrections are important to ensure that data is not double counted. In Year 1, eight reporting entities required an adjustment to the reported position ownership information. In Year 2, five reporting entities required an adjustment to the reported position ownership information.

Third, in the part 20 large trader swap data, staff checked and adjusted the average daily open interest for positions resulting from inter-affiliate transactions and duplicative reporting of positions due to transactions between reporting entities. For an example of duplicative reporting by reporting entities (which is reporting in terms of futures-equivalent contracts), assume Swap Dealer A and Swap Dealer B have an open swap equivalent to 50 futures contracts, Swap Dealer A also has a swap equivalent to 25 futures contracts with End User X, and Swap Dealer B has a swap equivalent to 200 futures contracts with End User Y. The total open swaps in this scenario is equivalent to 275 futures contracts. However, Swap Dealer A will report a gross position of 75 contracts and Swap Dealer B will report a gross position of 250 contracts. Simply summing these two gross positions would overestimate the open swaps as 325 contracts—50 contracts more than there actually should be. For this reason, Commission staff used the counterparty accounts of each reporting entity to flag counterparty accounts of other reporting entities. Commission staff then used the daily average of the gross positions for these accounts to reduce the amount of average daily open swaps. Similarly, Commission staff flagged the counterparty accounts for entities that are affiliates of each reporting entity in order to adjust the amount of average daily open swaps. These adjustments to the Year 1 data are reflected in Table 3 below, and the corresponding adjustments to the Year 2 data are reflected in Table 4 below.

TABLE III–B–3—AVERAGE DAILY OPEN INTEREST IN YEAR 1 ADJUSTED FOR DUPLICATE AND AFFILIATE REPORTING BY UNDERLYING COMMODITY

Paired swaps for	Average adjusted daily open interest	Average adjusted daily open interest reporting entity duplication removed	Average adjusted daily open interest reporting entity duplication & affiliates removed
Corn (C)	655,492	522,566	359,715
Oats (O)	684	667	646
Rough Rice (RR)	916	640	362
Soybeans (S)	157,017	139,608	109,858
Soybean Meal (SM)	125,444	99,795	71,887
Soybean Oil (SO)	74,831	64,854	55,265
Wheat (W)	272,839	229,453	162,999
Wheat (MGE)	3,430	3,021	1,944
Wheat (KW)	14,918	14,213	9,436
Cocoa (CC)	15,207	13,792	11,257
Coffee C (KC)	31,540	28,539	24,164
Cotton No. 2 (CT)	51,442	42,806	35,102
FCOG–A (OJ)	160	142	121
Sugar No. 11 (SB)	279,355	256,887	211,994
Live Cattle (LC)	46,361	36,999	23,626
Gold (GC)	79,778	64,363	47,727
Silver (SI)	19,373	14,678	9,867
Platinum (PL)	25,145	24,530	21,566
Palladium (PA)	2,044	1,939	1,929
Copper (HG)	31,143	28,718	22,859
Natural Gas (NG)	4,100,419	3,603,368	2,866,128
Light Sweet Crude (CL)	2,039,963	1,875,660	1,587,450
NY Harbor ULSD (HO)	178,978	161,617	138,360
RBOB Gasoline (RB)	103,586	100,021	81,822

TABLE III–B–4—AVERAGE DAILY OPEN INTEREST IN YEAR 2 ADJUSTED FOR DUPLICATE AND AFFILIATE REPORTING BY UNDERLYING COMMODITY

Paired swaps for	Average adjusted daily open interest	Average adjusted daily open interest reporting entity duplication removed	Average adjusted daily open interest reporting entity duplication & affiliates removed
Corn (C)	1,265,639	960,088	641,014
Oats (O)	1,029	858	480
Rough Rice (RR)	396	250	4
Soybeans (S)	453,419	351,279	235,679
Soybean Meal (SM)	282,123	209,023	134,399
Soybean Oil (SO)	282,207	198,744	125,106
Wheat (W)	437,711	334,136	222,420
Wheat (MWE)	15,167	9,511	3,079
Wheat (KW)	65,533	47,722	29,563
Cocoa (CC)	141,526	100,564	56,853
Coffee C (KC)	97,128	74,739	51,846
Cotton No. 2 (CT)	137,295	99,496	60,477
FCOJ–A (OJ)	1,137	640	5
Sugar No. 11 (SB)	717,967	558,423	382,816
Live Cattle (LC)	102,131	77,783	52,330
Gold (GC)	62,804	50,054	36,029
Silver (SI)	9,306	6,207	3,510
Platinum (PL)	2,575	2,507	2,285
Palladium (PA)	889	857	823
Copper (HG)	82,479	65,187	47,365
Natural Gas (NG)	4,239,581	3,828,739	3,331,141
Light Sweet Crude (CL)	2,318,074	2,050,270	1,744,137
NY Harbor ULSD (HO)	170,316	117,004	65,721
RBOB Gasoline (RB)	102,094	66,560	30,477

Staff made numerous significant adjustments to the part 20 data for natural gas, due to numerous reports in units rather than the number of gross futures-equivalent contracts and the large number of reports of swaps that did not meet the definition of referenced contract.

The Commission continues to be concerned about the quality of data submitted in large trader reports pursuant to part 20 of the Commission's regulations. Commissioners and staff have expressed concerns about data reporting publicly on a variety of occasions.[515] Nevertheless, the Commission anticipates that over time part 20 submissions will become more reliable and intensive efforts by Commission staff to process and edit raw data will become less necessary. As stated in the December 2013 Position Limits Proposal, for setting subsequent levels of non-spot month limits, the Commission proposes to estimate average open interest in referenced contracts using data reported pursuant to parts 16, 20, and/or 45.[516] It is crucial, therefore, that market participants make sure they submit accurate data to the Commission, and resubmit data discovered to be erroneous, because subsequent limit levels will be based on that data. Reporting is at the heart of the Commission's market and financial surveillance programs, which are critical to the Commission's mission to protect market participants and promote market integrity. Failure to meet reporting obligations to the Commission by submitting reports and data that contain errors and omissions in violation of the part 20 regulations may subject reporting entities to enforcement actions and remedial sanctions.[517]

4. Setting Levels of Spot-Month Limits

In the December 2013 Position Limits Proposal, the Commission proposed to set the initial spot month speculative position limit levels for referenced contracts at the existing DCM-set levels for the core referenced futures contracts.[518] As an alternative, the Commission stated that it was considering using 25 percent of an exchange's estimate of deliverable supply if the Commission verified the estimate as reasonable.[519] As a further alternative, the Commission stated that it was considering setting initial spot month position limit levels at a recommended level, if any, submitted by a DCM (if lower than 25 percent of estimated deliverable supply).[520]

In determining the levels at which to repropose the initial speculative position limits, the Commission considered, without limitation, the recommendations of the exchanges as well as data to which the exchanges do not have access. In considering these and other factors, the Commission became very concerned about the effect of alternative limit levels on traders in the cash-settled referenced contracts. A DCM has reasonable discretion in establishing the manner in which it complies with core principle 5 regarding position limits.[521] As the Commission observed in the December 2013 Position Limits Proposal, ''there may be a range of spot month limits, including limits set below 25 percent of deliverable supply, which may serve as practicable to maximize . . . [the] policy objectives [set forth in section 4a(a)(3)(B) of the CEA].'' [522] The Commission must also consider the competitiveness of futures markets.[523] Thus, the Commission accepts the recommendations of the exchanges and has determined to repropose federal limits below 25 percent of deliverable supply, where setting a limit level at less than 25 percent of deliverable supply does not appear to restrict unduly positions in the cash-settled referenced contracts. The exchanges retain the ability to adopt lower exchange-set limit levels than the initial

[515] *See, e.g.,* CFTC Staff Advisory No. 15–66, available at *http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-66.pdf* (reminding swap dealers and major swap participants of their swap data reporting obligations); Remarks of Chairman Timothy Massad before the ABA Derivatives and Futures Law Committee, 2016 Winter Meeting, Jan. 22, 2016, available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-37* (improving data reporting).

[516] December 2013 Position Limits Proposal, 78 FR at 75734.

[517] The CFTC announced its first case enforcing the Reporting Rules in September 2015. *See* Order: Australia and New Zealand Banking Group Ltd. (''ANZ''), available at *http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfaustraliaorder091715.pdf* (the Order finds that during the period from at least March 1, 2013 through November 30, 2014, ANZ filed large trader reports that routinely contained errors).

[518] December 2013 Position Limits Proposal, 78 FR at 75727. One commenter urged the Commission to retain the legacy speculative limits for enumerated agricultural products. The ''enumerated'' agricultural products refer to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. This list of agricultural contracts includes nine currently traded contracts: Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (and Mini-wheat), Soybean Oil, Soybean Meal, Hard Red Spring Wheat, Hard Winter Wheat, and Cotton No. 2. *See* 17 CFR 150.2. The position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts on agricultural commodities have been subject to federal positions limits for decades. This commenter stated, ''There is no appreciable support within our industry or, as far as we know, from the relevant exchanges to move beyond current levels . . . . Changing current limits, as proposed in the rule, will have a negative impact on futures-cash market convergence and will compromise contract performance.'' CL–AFBF–59730 at 3. *Contra* CL–ISDA/SIFMA–59611 at 32 (setting initial spot-month limits at the existing exchange-set levels would be arbitrary because the exchange-set levels have not been calibrated to apply as ''a ceiling on the spot-month positions that a trader can hold across *all* exchanges for futures, options and swaps''); CL–ICE–59966 at 6 (''the Proposed Rule . . . effectively halves the present position limit in the spot month by aggregating across trading venues and uncleared OTC swaps''). *See also* CL–ISDA/SIFMA–59611 at 3 (the spot month limit methodology is ''both arbitrary and unjustified'').

[519] December 2013 Position Limits Proposal, 78 FR at 75727. The Commission also stated that if the Commission could not verify an exchange's estimate of deliverable supply for any commodity as reasonable, the Commission might adopt the existing DCM-set level or a higher level based on the Commission's own estimate, but not greater than would result from the exchange's estimated deliverable supply for a commodity.

One commenter was unconvinced that estimated deliverable supply is ''the appropriate metric for determining spot month position limits'' and opined that the ''real test'' should be whether limits ''allow convergence of cash and futures so that futures markets can still perform their price discovery and risk management functions.'' CL–NGFA–60941 at 2. Another commenter stated, ''While 25% may be a reasonable threshold, it is based on historical practice rather than contemporary analysis, and it should only be used as a guideline, rather than formally adopted as a hard rule. Deliverable supply is subject to numerous environmental and economic factors, and is inherently not susceptible to formulaic calculation on a yearly basis.'' CL–MGEX–60301 at 1. Another commenter expressed the view that the 25 percent formula is not ''appropriately calibrated to achieve the statutory objective'' set forth in section 4a(a)(3)(B)(i) of the CEA, 7 U.S.C. 6a(a)(3)(B)(i). CL–CME–60926 at 3. Another commenter opined that because the Commission ''has not established a relationship between 'estimated deliverable supply' and spot-month potential for manipulation or excessive speculation,'' the 25 percent formula is arbitrary. CL–ISDA/SIFMA–59611 at 31.

Several commenters opined that 25 percent of deliverable supply is too high. *E.g.,* CL–AFR–59685 at 2; CL-Tri-State Coalition for Responsible Investment-59682 at 1; CL–CMOC–59720 at 3; CL–WEED–59628 (''Only a lower limit would ensure market stability and prevent market manipulation.''); CL–Public Citizen-60313 at 1 (''There is no good reason for a single firm to take 25% of a market.''); CL–IECA–59964 at 3 (25 percent of deliverable supply ''is a lot of market power in the hands of speculators''). One commenter stated that ''position limits should be set low enough to restore a commercial hedger majority in open interest in each core referenced contract,'' CL–IATP–60323 at 5 (suggesting in a later submission that position limits at 5–10 percent of estimated deliverable supply in each covered contract applied on an aggregated basis might ''enable commercial hedgers to regain for all covered contracts their pre-2000 average share of 70 percent of agricultural contracts''). CL–IATP–60394 at 2. One commenter supported expanding position limits ''to ensure rough or approximate convergence of futures and underlying cash at expiration.'' CL–Thornton–59702 at 1.

Several commenters supported setting limits based on updated estimates of deliverable supply which reflect current market conditions. *E.g.,* CL–ICE–59966 at 5; CL–FIA–59595 at 8; CL–EEI–EPSA–59602 at 9; CL–MFA–59606 at 5; CL–CMC–59634 at 14; CL-Olam-59658 at 3; CL–CCMC–59684 at 6–7.

[520] December 2013 Position Limits Proposal, 78 FR at 75728.

[521] CEA section 5(d)(1)(B), 7 U.S.C. 7(d)(1)(B).

[522] December 2013 Position Limits Proposal, 78 FR at 75729.

[523] CEA section 15(a)(2)(B), 7 U.S.C. 19(a)(2)(B).

speculative position limit levels that the Commission reproposes today.

a. CME and MGEX Agricultural Contracts

As explained above, the Commission has verified that the estimates of deliverable supply for each of the CBOT Corn (C), Oats (O), Rough Rice (RR), Soybeans (S), Soybean Meal (SM), Soybean Oil (SO), Wheat (W) core referenced futures contract, the Hard Red Winter Wheat (KW) core referenced futures contract submitted by CME, and the Hard Red Spring Wheat (MWE) core referenced futures contract submitted by MGEX are reasonable.

Nevertheless, the Commission has determined to repropose the initial speculative spot month position limit levels for C, O, RR, S, SM, SO, W and KW at the recommended levels submitted by CME,[524] all of which are lower than 25 percent of estimated deliverable supply.[525] As is evident from the table set forth below, this also means that the Commission is reproposing the initial speculative position limit levels for these eight contracts as proposed in the December 2013 Position Limits Proposal. These initial levels track the existing DCM-set levels for the core referenced futures contracts;[526] therefore, as noted in the December 2013 Position Limits Proposal, many market participants are already used to these levels.[527] The Commission continues to believe this approach is consistent with the regulatory objectives of the Dodd-Frank Act amendments to the CEA.

TABLE III–B–5—CME AGRICULTURAL CONTRACTS—SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level [528]	25% of estimated deliverable supply [529]	Reproposed speculative limit level
C	600	900	600
O	600	900	600
RR	600	2,300	600
S	600	1,200	600
SM	720	2,000	720
SO	540	3,400	540
W [530]	600	1,000	600
KW	600	3,000	600

The Commission has also determined to repropose the initial speculative spot month position limit level for MWE at 1,000 contracts, which is the level requested by MGEX [531] and just slightly lower than 25 percent of estimated deliverable supply.[532] This is an increase from the previously proposed level of 600 contracts and is greater than the reproposed speculative spot month position limit levels for W and KW.[533] Upon deliberation, the Commission accepts the recommendation of MGEX.[534]

TABLE III–B–6—CME AND MGEX AGRICULTURAL CONTRACTS—SPOT MONTH

Core referenced futures contract	Basis of spot-month level	Limit level	Unique persons over spot month limit		Reportable persons spot month only
			Cash settled contracts	Physical delivery contracts	
Corn (C)	CME recommendation	**† 600**	0	36	1,050
	25% DS	900	0	20	
Oats (O)	CME recommendation	**† 600**	0	0	33
	25% DS	900	0	0	
Soybeans (S)	CME recommendation	**† 600**	0	22	929
	25% DS	1,200	0	14	
Soybean Meal (SM)	CME recommendation	**† 720**	0	14	381
	25% DS	2,000	0	*	

[524] CL–CME–61007 at 5.

[525] The Commission noted in the December 2013 Position Limits Proposal ''that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply.'' December 2013 Position Limits Proposal, 78 FR at 75729.

[526] *See* CL–CME–61007 (specifying lower exchange-set limit levels for W and RR in certain circumstances).

[527] December 2013 Position Limits Proposal, 78 FR at 75727.

[528] December 2013 Position Limits Proposal, 78 FR at 75839 (Appendix D to Part 150—Initial Position Limit Levels).

[529] Rounded up to the next 100 contracts.

[530] The W core referenced futures contract refers to soft red winter wheat, the KW core reference futures contract refers to hard red winter wheat, and the MWE core reference futures contract refers to hard red spring wheat; *i.e.,* the contracts are for different products.

[531] CL–MGEX–61038 at 2; *see also* CL–MGEX–60938 at 2 (earlier submission of deliverable supply estimate).

[532] The difference is due to rounding. The MGEX estimate of 4,005 contract equivalents for MWE deliverable would have supported a spot-month limit level of 1,100 contracts (rounded up to the next 100 contracts). The Commission noted in the December 2013 Position Limits Proposal ''that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply.'' December 2013 Position Limits Proposal, 78 FR at 75729.

[533] Most commenters who supported establishing the same level of speculative limits for each of the three wheat core referenced futures contracts focused on parity in the non-spot months. However, some commenters did support wheat party in the spot month. *See, e.g.,* CL–CMC–59634 at 15; CL–NCFC–59942 at 6.

[534] The difference between an estimate of 4,000 contracts, which would result in a limit level of 1,000, and 4,005 contracts, which results in a limit level of 1,100 contracts, is small enough that the Commission's prior statements regarding the 25% formula are instructive. As stated in the December 2013 Position Limits Proposal, the 25 percent formula ''is consistent with the longstanding acceptable practices for DCM core principle 5 which provides that, for physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply.'' December 2013 Position Limits Proposal, 78 FR at 75729. The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is an ''effective prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity.'' December 2013 Position Limits Proposal, 78 FR at 75729.

TABLE III–B–6—CME AND MGEX AGRICULTURAL CONTRACTS—SPOT MONTH—Continued

Core referenced futures contract	Basis of spot-month level	Limit level	Unique persons over spot month limit		Reportable persons spot month only
			Cash settled contracts	Physical delivery contracts	
Soybean Oil (SO)	CME recommendation	† **540**	0	21	397
	25% DS	3,400	0	0	
Wheat (W)	CME recommendation	† **600**	0	11	444
	25% DS	1,000	0	6	
Wheat (MWE)	Parity w/CME recommendation	† **600**	0	*	102
	25% DS	†† **1,000**	0	*	
Wheat (KW)	CME recommendation	† **600**	0	4	250
	25% DS (MW)	1,000	0	*	
	25% DS (KW)	3,000	0	*	
Rough Rice (RR)	CME recommendation	† **600**	0	0	91
	25% DS	2,300	0	0	

Reproposed speculative position limit levels are shown in **bold**.
''25% DS'' means 25 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract.
† Denotes existing limit level.
†† Limit level requested by MGEX.
* Denotes fewer than 4 persons.

The Commission's impact analysis reveals no traders in cash settled contracts in any of C, O, S, SM, SO, W, MWE, KW, or RR, and no traders in physical delivery contracts for O and RR, above the initial speculative limit levels for those contracts. The Commission found varying numbers of traders in the C, S, SM, SO, W, MWE, KW physical delivery contracts over the initial levels, but the numbers were very small for MWE and KW.[535] Because the levels that the Commission reproposes today for C, O, S, SM, SO, W, KW, and RR maintain the status quo for those contracts, the Commission assumes that some or possibly all of such traders over the initial levels are hedgers. Hedgers may have to file for an applicable exemption, but hedgers with bona fide hedging positions should not have to reduce their positions as a result of speculative position limits per se. Thus, the number of traders in the C, S, SM, SO, W and KW physical delivery contracts who would need to reduce speculative positions below the initial limit levels should be lower than the numbers indicated by the impact analysis. The Commission believes that setting initial speculative levels at 25 percent of deliverable supply would, based upon logic and the Commission's impact analysis, affect fewer traders in the C, S, SM, SO, W and KW physical delivery contracts. Consistent with its statement in the December 2013 Position Limits Proposal, the Commission believes that accepting the recommendation of the DCM to set these lower levels of initial spot month limits will serve the objectives of preventing excessive speculation, manipulation, squeezes and corners,[536] while ensuring sufficient market liquidity for bona fide hedgers in the view of the listing DCM and ensuring that the price discovery function of the market is not disrupted.[537]

b. Softs

As explained above, the Commission has verified that the estimates of deliverable supply for each of the IFUS Cocoa (CC), Coffee ''C'' (KC), Cotton No. 2 (CT), FCOJ–A (OJ), Sugar No. 11 (SB), and Sugar No. 16 (SF) core referenced futures contracts submitted by ICE are reasonable.

The Commission has determined to repropose the initial speculative spot month position limit levels for the CC, KC, CT, OJ, SB, and SF [538] core referenced futures contracts at 25 percent of estimated deliverable supply, based on the estimates of deliverable supply submitted by ICE.[539] As is evident from the table set forth below, this also means that the Commission is reproposing initial speculative position limit levels that are significantly higher than the levels for these six contracts as previously proposed. As stated in the December 2013 Position Limits Proposal, the 25 percent formula ''is consistent with the longstanding acceptable practices for DCM core principle 5 which provides that, for physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply.'' [540] The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is an ''effective prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity.'' [541]

TABLE III–B–7—IFUS SOFT AGRICULTURAL CONTRACTS—SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level [542]	25% of estimated deliverable supply [543]	Reproposed speculative limit level
CC	1,000	5,500	5,500

[535] Four or fewer traders.

[536] *Contra* CL–ISDA/SIFMA–59611 at 55 (proposed spot month limits ''are almost certainly far smaller than necessary to prevent corners or squeezes'').

[537] December 2013 Position Limits Proposal, 78 FR at 75729.

[538] One commenter supported considering ''tropicals (sugar/coffee/cocoa) . . . separately from those agricultural crops produced in the US domestic market.'' CL–Thornton–59702 at 1; *see also* CL–Armajaro–59729 at 1.

[539] CL–IFUS–60807.

[540] December 2013 Position Limits Proposal, 78 FR at 75729. The Commission also noted ''that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply.'' December 2013 Position Limits Proposal, 78 FR at 75729.

[541] December 2013 Position Limits Proposal, 78 FR at 75729.

TABLE III–B–7—IFUS SOFT AGRICULTURAL CONTRACTS—SPOT MONTH LIMIT LEVELS—Continued

Contract	Previously proposed limit level [542]	25% of estimated deliverable supply [543]	Reproposed speculative limit level
KC	500	2,400	2,400
CT	300	1,600	1,600
OJ	300	2,800	2,800
SB	5,000	23,300	23,300
SF	1,000	7,000	7,000

The Commission did not receive any estimate of deliverable supply for the CME Live Cattle (LC) core referenced futures contract from CME, nor did CME recommend any change in the limit level for LC. In the absence of any such update, the Commission is reproposing the initial speculative position limit level of 450 contracts. Of 616 reportable persons, the Commission's impact analysis did not reveal any unique person trading cash settled or physical delivery spot month contracts who would have held positions above this level for LC.

With respect to the IFUS CC, KC, CT, OJ, SB, and SF core referenced futures contracts, the Commission's impact analysis did not reveal any unique person trading cash settled spot month contracts who would have held positions above the initial levels that the Commission adopts today; as illustrated below, lower levels would mostly have affected small numbers of traders in physical delivery contracts.

TABLE III–B–8—IFUS SOFT AGRICULTURAL CONTRACTS—SPOT MONTH

Core referenced futures contract	Basis of spot-month level	Limit level	Unique persons over spot month limit		Reportable persons spot month only
			Cash settled contracts	Physical delivery contracts	
Cocoa (CC)	15% DS	3,300	0	0	164
	25% DS	†† **5,500**	0	0	
Coffee "C" (KC)	15% DS	1,440	0	*	336
	25% DS	†† **2,400**	0	*	
Cotton No. 2 (CT)	15% DS	960	0	*	122
	25% DS	†† **1,600**	0	0	
FCOJ–A (OJ)	15% DS	1,680	0	0	38
	25% DS	†† **2,800**	0	0	
Sugar No. 11 (SB)	15% DS	13,980	*	10	443
	25% DS	†† **23,300**	0	*	
Sugar No. 16 (SF)	15% DS	4,200	0	0	12
	†† 25% DS	†† **7,000**	0	0	

Reproposed speculative position limit levels are shown in **bold**.
"15% DS" means 15 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract and is included to provide information regarding the distribution of reportable traders.
"25% DS" means 25 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract.
†† Limit level requested by ICE.
* Denotes fewer than 4 persons.

c. Metals

As explained above, the Commission has verified that the estimates of deliverable supply for each of the COMEX Gold (GC), COMEX Silver (SI), NYMEX Platinum (PL), NYMEX Palladium (PA), and COMEX Copper (HG) core referenced futures contracts submitted by CME are reasonable.

Nevertheless, the Commission has determined to repropose the initial speculative spot month position limit levels for GC, SI, and HG at the recommended levels submitted by CME,[544] all of which are lower than 25 percent of estimated deliverable supply.[545] In the case of GC and SI, this is a doubling of the current exchange-set limit levels.[546] In the case of HG, the initial level is the same as the existing DCM-set level for the core referenced futures contract and lower than the level previously proposed.

TABLE III–B–9—CME METALS CONTRACTS—SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level [547]	25% of estimated deliverable supply [548]	Reproposed speculative limit level
GC	3,000	11,200	6,000

[542] December 2013 Position Limits Proposal, 78 FR at 75839–40 (Appendix D to Part 150—Initial Position Limit Levels).

[543] Rounded up to the next 100 contracts.

[544] CL–CME–61007 at 5.

[545] The Commission noted in the December 2013 Position Limits Proposal "that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply." December 2013 Position Limits Proposal, 78 FR at 75729.

[546] One commenter cautioned against raising limit levels for GC to 25 percent of deliverable supply, and expressed concern that higher federal limits would incentivize exchanges to raise their own limits. CL–WGC–59558 at 2–4.

TABLE III–B–9—CME METALS CONTRACTS—SPOT MONTH LIMIT LEVELS—Continued

Contract	Previously proposed limit level [547]	25% of estimated deliverable supply [548]	Reproposed speculative limit level
SI	1,500	5,600	3,000
PL	500	900	100
PA	650	900	−500
HG	1,200	1,100	1,000

The Commission has also determined to repropose the initial speculative spot month position limit level for PL at 100 contracts and PA at 500 contracts, which are the levels recommended by CME. In the case of PL and PA, the reproposed level is the same as the existing DCM-set level for the core referenced futures contract, and a decrease from the previously proposed levels of 500 and 650 contracts, respectively.

The Commission found varying numbers of traders in the GC, SI, PL, PA, and HG physical delivery contracts over the initial levels, but the numbers were very small except for PA.[549] Because the levels that the Commission reproposes today for PL, PA, and HG maintain the status quo for those contracts, the Commission assumes that some or possibly all of such traders over the reproposed levels are hedgers. The Commission reiterates the discussion above regarding agricultural contracts: hedgers may have to file for an applicable exemption, but hedgers with bona fide hedging positions should not have to reduce their positions as a result of speculative position limits per se. Thus, the number of traders in the metals physical delivery contracts who would need to reduce speculative positions below the reproposed limit levels should be lower than the numbers indicated by the impact analysis. And, while setting initial speculative levels at 25 percent of deliverable supply would, based upon logic and the Commission's impact analysis, affect fewer traders in the metals physical delivery contracts, consistent with its statement in the December 2013 Position Limits Proposal, the Commission believes that setting these lower levels of initial spot month limits will serve the objectives of preventing excessive speculation, manipulation, squeezes and corners,[550] while ensuring sufficient market liquidity for bona fide hedgers in the view of the listing DCM and ensuring that the price discovery function of the market is not disrupted.

TABLE III–B–10—CME METAL CONTRACTS—SPOT MONTH

Core referenced futures contract	Basis of spot-month level	Limit level	Unique persons over spot month limit		Reportable persons spot month only
			Cash settled contracts	Physical delivery contracts	
Gold (GC)	CME recommendation	**6,000**	*	*	518
	25% DS	11,200	0	0	
Silver (SI)	CME recommendation	**3,000**	0	0	311
	25% DS	5,600	0	0	
Platinum (PL)	CME recommendation	†**500**	13	*	235
	25% DS	900	10	*	
	50% DS	1,800	*	0	
Palladium (PA)	CME recommendation	†**100**	6	14	164
	25% DS	900	0	0	
Copper (HG)	CME recommendation	†**1,000**	0	*	493
	25% DS	1,100	0	*	

Reproposed speculative position limit levels are shown in **bold**.
"25% DS" means 25 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract.
"50% DS" means 50 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract and is included to provide information regarding the distribution of reportable traders.
† Denotes existing exchange-set limit level.
* Denotes fewer than 4 persons.

The Commission's impact analysis reveals no unique persons in the SI and HG cash settled referenced contracts, and very few unique persons in the cash settled GC referenced contract, whose positions would have exceeded the initial limit levels for those contracts. Based on the Commission's impact analysis, setting the initial federal spot month limit levels for PL and PA at the lower levels recommended by CME would impact a few traders in PL and PA cash settled contracts.

The Commission has carefully considered the numbers of unique persons that would be impacted by each of the cash-settled and physical-delivery spot month limits in the PL and PA referenced contracts. The Commission notes those limits would appear to impact more traders in the physical-delivery PA contract than in the cash-settled PA contract, while fewer traders would be impacted in the physical-delivery PL contract than in the cash-settled PL contract (in any event, few traders would appear to be affected).[551]

[547] December 2013 Position Limits Proposal, 78 FR at 75840 (Appendix D to Part 150—Initial Position Limit Levels).

[548] Rounded up to the next 100 contracts.

[549] Fewer than four unique persons.

[550] *Contra* CL–ISDA/SIFMA–59611 at 55 (proposed spot month limits "are almost certainly far smaller than necessary to prevent corners or squeezes").

[551] In this regard, the Commission notes that CME did not have access to the Commission's impact analysis when CME recommended levels for its physical-delivery core referenced futures contracts.

The Commission also observed the distribution of those cash-settled traders over time; as reflected in the open interest table discussed below regarding setting non-spot month limits, it can be readily observed that open interest in each of the cash-settled PL and PA referenced contracts was markedly lower in the second 12-month period (year 2) than in the prior 12-month period (year 1). Accordingly, the Commission accepts the CME recommended levels in PL and PA referenced contracts.

d. Energy

As explained above, the Commission has verified that the estimates of deliverable supply for each of the NYMEX Natural Gas (NG), Light Sweet Crude (CL), NY Harbor ULSD (HO), and RBOB Gasoline (RB) core referenced futures contracts submitted by CME are reasonable.

The Commission has determined to repropose the initial speculative spot month position limit levels for the NG, CL, HO, and RB core referenced futures contracts at 25 percent of estimated deliverable supply which, in the case of CL, HO, and RB is higher than the levels recommended by CME.[552] As is evident from the table set forth below, this also means that the Commission is reproposing speculative position limit levels that are significantly higher than the levels for these four contracts as previously proposed. As stated in the December 2013 Position Limits Proposal, the 25 percent formula ''is consistent with the longstanding acceptable practices for DCM core principle 5 which provides that, for physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply.'' [553] The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is an ''effective prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity.'' [554]

TABLE III–B–11—CME ENERGY CONTRACTS—SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level [555]	25% of estimated deliverable supply [556]	Reproposed speculative limit level
NG	1,000	2,000	2,000
CL	3,000	10,400	10,400
HO	1,000	2,900	2,900
RB	1,000	6,800	6,800

The levels that CME recommended for NG, CL, HO, and RB are twice the existing exchange-set spot month limit levels. Nevertheless, the Commission is reproposing speculative spot month limit levels at 25 percent of deliverable supply for CL, HO, and RB because the Commission believes that higher levels will lessen the impact on a number of traders in both cash settled and physical delivery contracts. For NG, the Commission is reproposing the physical delivery limit at 25% of deliverable supply, as recommended by CME; [557] the Commission is also reproposing a conditional spot month limit exemption of 10,000 for cash-settled contracts in natural gas only.[558] This exemption would to some degree maintain the status quo in natural gas because each of the NYMEX and ICE cash-settled natural gas contracts, which settle to the final settlement price of the physical delivery contract, include a conditional spot month limit exemption of 5,000 contracts (for a total of 10,000 contracts).[559] However, neither the

[552] CL–CME–61007 at 5. One commenter opined that 25 percent of deliverable supply would result in a limit level that is too high for natural gas, and suggest 5 percent as an alternative that ''would provide ample liquidity and significantly reduce the potential for excessive speculation.'' CL–Industrial Energy Consumers of America–59964 at 3. Another commenter supported increasing ''the spot-month position limit levels for Henry Hub Natural Gas referenced contracts to be consistent with CME Group's or ICE's estimates of deliverable supply and more generally the significant new sources of natural gas.'' CL–NGSA–59674 at 3.

[553] December 2013 Position Limits Proposal, 78 FR at 75729.

[554] December 2013 Position Limits Proposal, 78 FR at 75729.

[555] December 2013 Position Limits Proposal, 78 FR at 75840 (App. D to part 150—Initial Position Limit Levels).

[556] Rounded up to the next 100 contracts.

[557] One commenter expressed concern about setting the spot month limit for natural gas swaps at the same level as for the physically settled futures contract, because some referenced contracts cease to be economically equivalent ''during the limited window at expiry.'' CL–BG Group–59937 at 3.

[558] This exemption for up to 10,000 contracts would be five times the spot month limit of 2,000 contracts, consistent with the December 2013 Position Limits Proposal. *See* December 2013 Position Limits Proposal, 78 FR at 75736–8. Under vacated § 151.4, the Commission would have applied a spot-month position limit for cash-settled contracts in natural gas at a level of five times the level of the limit for the physical delivery core referenced futures contract. *See* Position Limits for Futures and Swaps, 76 FR 71626, 71687 (Nov. 18, 2011).

[559] Some commenters supported retaining a conditional spot month limit in natural gas. *E.g.,* CL–ICE–60929 at 12 (''Any changes to the current terms of the Conditional Limit would disrupt present market practice for no apparent reason. Furthermore, changing the limits for cash-settled contracts would be a significant departure from current rules, which have wide support from the broader market as evidenced by multiple public comments supporting no or higher cash-settled limits.''). *Contra* CL-Sen. Levin–59637 at 7 (''The proposed higher limit for cash settled contracts is ill-advised. It would not only raise the affected position limits to levels where they would be effectively meaningless, it would also introduce market distortions favoring certain contracts and certain exchanges over others, and potentially disrupt important markets, including the U.S. natural gas market that is key to U.S. manufacturing.''); CL-Public Citizen–59648 at 5 (''Congress, in allowing an exemption for bona fide hedgers but not pure speculators, could not possibly have intended for the Commission to implement position limits that allow market speculators to hold 125 percent of the estimated deliverable supply. Once again, while this exception for cash-settled contracts would avoid market manipulations such as corners and squeezes (since cash-settled contracts give no direct control over a commodity), it does not address the problem of undue speculative influence on futures prices.''); CL-Better Markets-60401 at 17 (''There is no justification for treating cash and physically-settled contracts differently in any month, and settlement characteristics should not be a determinant of the ability to exceed the limits in any month.''). One commenter urged the Commission ''to eliminate the requirement that traders hold no physical-delivery position in order to qualify for the conditional spot-month limit exemption'' in order to maintain liquidity in the NYMEX natural gas futures contract. CL–BG Group–59656 at 6–7. *See also* CL–NGSA–59674 at 38–39 (supporting the higher conditional spot month limit in natural gas without restricting positions in the underlying physical delivery contract); CL–EEI–EPSA–59602 at 10 (the Commission should permit ''market participants to rely on higher speculative limits for cash-settled contracts while still holding a position in the physical-delivery contract''); CL–APGA–59722 at 8 (the Commission should condition the spot month limit exemption for cash settled natural gas contracts by precluding a trader from holding more than one quarter of the deliverable supply in physical inventory). *Cf.* CL–CME–59971 at 3 (eliminate the five times natural gas limit because it ''encourages participants to depart from, or refrain from establishing positions in, the primary physical delivery contract market and instead opt for the cash-settled derivative contract market, especially during the last three trading days when the five times limit applies. By encouraging departure from the primary contract market, the five

NYMEX and ICE penultimate contracts, which settle to the daily settlement price on the next to last trading day of the physical delivery contract, nor OTC swaps, are currently subject to any spot month position limit. In addition, the Commission's impact analysis suggests that a conditional spot month limit exemption greater than 25% of deliverable supply for cash settled contracts in natural gas would potentially benefit many traders.

TABLE III–B–12—ENERGY CONTRACTS—SPOT MONTH

Core referenced futures contract	Basis of spot-month level	Limit level	Unique persons over spot month limit		Reportable persons spot month only
			Cash settled contracts	Physical delivery contracts	
Natural Gas (NG)	CME recommendation	**2,000**	131	16	1,400
	50% DS	4,000	77	*	
	Conditional Exemption	10,000	20	0	
Light Sweet Crude (CL)	CME recommendation	††6,000	19	8	1,733
	25% DS	**10,400**	16	*	
	50% DS	20,800	*	0	
NY Harbor ULSD (HO)	CME recommendation	2,000	24	11	470
	25% DS	**2,900**	15	5	
	50% DS	5,800	5	0	
RBOB Gasoline (RB)	CME recommendation	2,000	23	14	463
	25% DS	**6,800**	*	0	
	50% DS	13,600	0	0	

Reproposed speculative position limit levels are shown in **bold**.
"25% DS" means 25 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract.
"50% DS" means 50 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract and is included to provide information regarding the distribution of reportable traders.
†† CME recommended a step-down spot month limit of 6,000/5,000/4,000 contracts in the last three days of trading.
* Denotes fewer than 4 persons.

5. Setting Levels of Single-Month and All-Months-Combined Limits

The Commission has determined to use the futures position limits formula, 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter, to repropose the non-spot month speculative position limits for referenced contracts, subject to the details and qualifications set forth in this Notice.[560] The Commission continues to believe that "the non-spot month position limits would restrict the market power of a speculator that could otherwise be used to cause unwarranted price movements." [561]

a. CME and MGEX Agricultural Contracts

The Commission is reproposing the non-spot month speculative position limit levels for the Corn (C), Oats (O), Rough Rice (RR), Soybeans (S), Soybean Meal (SM), Soybean Oil (SO), and Wheat (W) core referenced futures contracts based on the 10, 2.5 percent open interest formula.[562] Based on the Commission's experience since 2011 with non-spot month speculative position limit levels for the Hard Red Winter Wheat (KW) and Hard Red Spring Wheat (MWE) core referenced futures contracts, the Commission is reproposing the limit levels for those two commodities at the current level of 12,000 contracts rather than reducing them to the lower levels that would result from applying the 10, 2.5 percent formula.[563]

times limit encourages a process of de-liquefying the benchmark physically delivered futures market and directly affects the determination of the final settlement price for the NYMEX NG contract- the very same price that a position representing five times the physical limit will settle against.").

[560] As noted in the December 2013 Position Limits Proposal, the Commission has used the 10, 2.5 percent formula in administering the level of the legacy all-months position limits since 1999. December 2013 Position Limits Proposal, 78 FR at 75729–30.

Several commenters did not support establishing non-spot month limits. *See, e.g.,* CL–ISDA/SIFMA–59611 at 27 ("There is no justification *whatsoever* for non-spot-month limits."); CL–EEI–EPSA–59602 at 10 ("limits outside the spot month are not necessary"); CL–AMG–59709 at 10 (the Commission should "decline to adopt non-spot-month position limits"); CL–CME–59718 at 39 (the Proposal's non-spot-month position limit formula should be withdrawn"); CL–CAM–60097 at 2 ("Non-spot month limits are neither necessary nor appropriate."); CL–BG Group–60383 at 2 ("Any final rule should be limited to a federally mandated spot-month limit (not any/all month limits)."). Some of these same commenters supported position accountability in the non-spot months rather than limits. *See, e.g.,* CL–EEI–EPSA–59602 at 10, CL–FIA–59595 at 3, CL–MFA–60385 at 5, CL–ISDA/SIFMA–59611 at 29, CL–Calpine–59663 at 3–4, CL–Working Group-60396 at 10, CL–EDF–60398 at 4, CL–ICE–59966 at 8, CL–BG Group-60383 at 2, CL–CMC–59634 at 11. Some commenters also urged the Commission to wait until it has reliable data before establishing non-spot month limits. *See, e.g.,* CL–EEI–EPSA–59602 at 11; CL–FIA–59595 at 3, 14; CL–MFA–60385 at 5; CL–ISDA/SIFMA–59611 at 29; CL–Olam–59658 at 1, 3. *See also* discussion of part 20 data adjustments under § 150.2, below. *Contra* CL–O SEC–59972 ("corners and other supply fluctuations can occur during non-spot months").

A commenter who did not support adopting non-spot month limits suggested a fall-back position of adopting "any months limits" but not "all months limits," and suggested an alternative 10, 5 percent formula in specified circumstances. CL-Working Group–59693 at 62. *See also* CL–CME–59718 at 44 (supporting a 10, 5 percent formula). One commenter supported abolishing single month limits "in favor of an "all months" or gross position that would effectively allow the player to adapt their position to the realities of an agricultural crop that doesn't flow in equal monthly chunks." CL-Thornton–59702 at 1. Another commenter stated that "[p]osition limits should be a function of the liquidity of the market," CL–MFA–59606 at 21, and asserted that applying the 10, 2.5 percent formula will result in "a self-reinforcing cycle of lower open interest and lower position limits in successive years." CL–MFA–59696 at 22. Another commenter supported "tying the overall non-spot month position limits to an acceptable aggregate (market-wide) level of speculation, and tying individual trader limits to that aggregate level." CL-Public Citizen–59648 at 4. Another commenter expressed the belief that the 10, 2.5 percent formula would result in non-spot month limits that "are much too high to adequately regulate excessive speculation that might lead to price fluctuations." CL–Tri-State–59682 at 1. To "address the cumulative, disruptive effect of traders who hold large, but not dominant positions," one commenter suggested basing non-spot month position limits on "an acceptable total level of speculation that approximates the historic ratio of hedging to investor/speculative trading." CL–A4A–59714 at 4. *See* CL-Better Markets–60401 at 4 ("Historically, speculators in commodity futures have constituted between 15%–30% of market activity, and within this range speculators productively facilitated effective hedging without meaningfully disrupting or independently shaping the market's behavior.").

[561] December 2013 Position Limits Proposal, 78 FR at 75730.

[562] One commenter expressed concern "that proposed all-months-combined speculative position limits based on open interest levels is not necessarily the appropriate methodology and could lead to contract performance problems." This commenter urged "that all-months-combined limits be structured to 'telescope' smoothly down to legacy spot-month limits in order to ensure continued convergence." CL–NGFA–60312 at 4.

[563] One commenter supported a higher limit for KW than proposed to promote growth and to enable liquidity for Kansas City hedgers who often use the Chicago market. CL-Citadel-59717 at 8. Another

Continued

TABLE III–B–13—CME AND MGEX AGRICULTURAL CONTRACTS—NON-SPOT MONTH LIMIT LEVELS

Contract	Current limit level	Previously proposed limit level	Reproposed speculative limit level
C	33,000	53,500	62,400
O	2,000	1,600	5,000
RR	1,800	2,200	5,000
S	15,000	26,900	31,900
SM	6,500	9,000	16,900
SO	8,000	11,900	16,700
W [564]	12,000	16,200	32,800
KW	12,000	6,500	12,000
MWE	12,000	3,300	12,000

Maintaining the status quo for the non-spot month limit levels for the KW and MWE core referenced futures contracts means there will be partial wheat parity.[565] The Commission has determined not to raise the reproposed limit levels for KW and MWE to the limit level for W, as 32,800 contracts appears to be extraordinarily large in comparison to open interest in the KW and MWE markets, and the limit levels for KW and MWE are already larger than a limit level based on the 10, 2.5 percent formula. Even when relying on a single criterion, such as percentage of open interest, the Commission has historically recognized that there can ''result . . . a range of acceptable position limit levels.'' [566]

TABLE III–B–14—CME AND MGEX AGRICULTURAL CONTRACTS—NON-SPOT MONTHS

Core-referenced futures contract	Open interest				Initial limit level	Unique persons above limit level		Reportable persons in market—all months
	Year	Futures	Swaps	Total		All months	Single month	
Corn (C)	1	1,829,359	359,715	2,189,074	**62,400**	*	*	2,606
	2	1,779,977	641,014	2,420,991				
Oats (O)	1	10,097	646	10,743	**5,000**	0	0	173
	2	11,223	480	11,703				
Rough Rice (RR)	1	10,585	362	10,948	**5,000**	0	0	281
	2	12,769	4	12,773				
Soybeans (S)	1	973,037	109,858	1,082,895	**31,900**	6	4	2,503
	2	962,636	235,679	1,198,315				
Soybean Meal (SM)	1	422,611	71,887	494,498	**16,900**	5	4	978
	2	463,549	134,399	597,948				
Soybean Oil (SO)	1	421,114	55,265	476,379	**16,700**	5	4	1,034
	2	464,373	125,106	589,478				
Wheat (W)	1	1,072,107	162,999	1,235,105	**32,800**	*	*	1,867
	2	1,010,342	222,420	1,232,762				
Wheat (MWE)	1	67,653	1,944	69,596	† 5,000	10	7	342
	2	66,608	3,079	69,687	**12,000**	0	0	
Wheat (KW)	1	169,059	9,436	178,495	† 8,100	9	8	718
	2	216,236	29,563	245,799	**12,000**	*	*	

Year 1 = July 1, 2014 to June 30, 2015
Year 2 = July 1, 2015 to June 30, 2016
Reproposed speculative position limit levels are shown in **bold**.
† Application of the 10, 2.5 percent formula would result in a level lower than the level adopted by the Commission in 2011.
* Denotes fewer than 4 persons.

b. Softs

The Commission is reproposing non-spot month speculative position limit levels for the CC, KC, CT, OJ, SB, SF and LC [567] core referenced futures contracts based on the 10, 2.5 percent open interest formula.

commenter supported setting ''a non-spot month and combined position limit of no less than 12,000 for all three wheat contracts.'' CL–MGEX–60301 at 1. *Contra* CL–O SEC–59972 at 7–8 (commending ''the somewhat more restrictive limitations . . . on wheat trading'').

[564] The W core referenced futures contract refers to soft red winter wheat, the KW core reference futures contract refers to hard red winter wheat, and the MWE core reference futures contract refers to hard red spring wheat; *i.e.*, the contracts are for different products.

[565] Several commenters supported adopting equivalent non-spot month position limits for the three existing wheat referenced contracts traders. *See, e.g.*, CL–FIA–59595 at 4, 15; CL–CMC–60391 at 8; CL–CMC–60950 at 11; CL–CME–59718 at 44; CL–AFBF–59730 at 4; CL–MGEX–59932 at 2; CL–MGEX–60301 at 1; CL–MGEX–59610 at 2–3; CL–MGEX–60936 at 2–3; CL–NCFC–59942 at 6; CL–NGFA–59956 at 3.

[566] Revision of Speculative Position Limits, 57 FR 12770, 12766 (Apr. 13, 1992). *See also* Revision of Speculative Position Limits and Associated Rules, 63 FR 38525, 38527 (July 17, 1998). *Cf.* December 2013 Position Limits Proposal, 78 FR at 75729 (there may be range of spot month limits that maximize policy objectives).

[567] One commenter expressed concern that too high non-spot month limit levels could lead to a repeat of convergence problems experienced by certain contracts and that ''the imposition of all months combined limits in continuously produced non-storable commodities such as livestock . . . will reduce the liquidity needed by hedgers in deferred months who often manage their risk using strips comprised of multiple contract months.'' CL–AFBF–59730 at 3–4. One commenter requested that the Commission withdraw its proposal regarding non-spot month limits, citing, among other things, the Commission's previous approval of exchange rules lifting all-months-combined limits for live cattle contracts ''to ensure necessary deferred month liquidity.'' CL–CME–59718 at 4. Another commenter expressed concern that non-spot month limits would have a negative impact on live cattle market liquidity. CL–CMC–59634 at 12–13. *See also* CL–CME–59718 at 41.

TABLE III–B–15—SOFTS AND OTHER AGRICULTURAL CONTRACTS—NON-SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level [568]	Reproposed speculative limit level
CC	7,100	10,200
KC	7,100	8,800
CT	8,800	9,400
OJ	2,900	5,000
SB	23,500	38,400
SF	1,200	7,000
LC	12,900	12,200

Set forth below is a summary of the impact analysis for softs and live cattle.

TABLE III–B–16—SOFTS AND OTHER AGRICULTURAL CONTRACTS—NON-SPOT MONTHS

Core-referenced futures contract	Open interest				Initial limit level	Unique persons above limit level		Reportable persons in market—all months
	Year	Futures	Swaps	Total		All months	Single month	
Cocoa (CC)	1	240,984	11,257	252,240	**10,200**	12	7	682
	2	273,134	56,853	329,987				
Coffee C (KC)	1	211,051	24,164	235,215	**8,800**	6	*	1,175
	2	223,885	51,846	275,731				
Cotton No. 2 (CT)	1	238,580	35,102	273,682	**9,400**	13	8	1,000
	2	239,321	60,477	299,798				
FCOJ–A (OJ)	1	16,883	121	17,004	**5,000**			
	*	*	242					
	2	16,336	5	16,341				
Sugar No. 11 (SB)	1	1,016,271	211,994	1,228,265	**38,400**	14	9	874
	2	1,077,452	382,816	1,460,268				
Sugar No. 16 (SF)	1	8,385	0	8,385	**7,000**	*	0	22
	2	9,608	0	9,608				
Live Cattle (LC)	1	387,896	23,626	411,522	**12,200**	9	*	1,436
	2	350,147	52,330	402,478				

Year 1 = July 1, 2014 to June 30, 2015. Year 2 = July 1, 2015 to June 30, 2016. Reproposed speculative position limit levels are shown in **bold**.
* Denotes fewer than 4 persons.

c. Metals

The Commission is reproposing non-spot month speculative position limit levels for the GC, SI, PL, PA, and HG core referenced futures contracts based on the 10, 2.5 percent open interest formula.[569]

[568] December 2013 Position Limits Proposal, 78 FR at 75839–40 (App. D to part 150—Initial Position Limit Levels).

[569] One commenter was concerned that applying the 10, 2.5 percent formula to open interest for gold would result in a lower non-spot month limit level than the spot month limit level, and urged the Commission to ''apply a consistent methodology to both spot and non-spot months.'' CL–WGC–59558 at 5.

TABLE III–B–17—CME METALS CONTRACTS—NON-SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level	Reproposed speculative limit level
GC	21,500	19,500
SI	6,400	7,600
PL	5000	5,000
PA	5000	5,000
HG	5,600	7,800

Set forth below is a summary of the impact analysis for metals.[570]

TABLE III–B–18—CME METALS CONTRACTS—NON-SPOT MONTHS

Core-referenced futures contract	Open interest				Initial limit level	Unique persons above limit level		Reportable persons in market—all months
	Year	Futures	Swaps	Total		All months	Single month	
Gold (GC)	1	618,738	47,727	666,465	**19,500**	19	17	1,557
	2	667,495	36,029	703,525				
Silver (SI)	1	218,028	9,867	227,895	**7,600**	15	18	1,023
	2	203,645	3,510	207,155				
Platinum (PL)	1	70,151	21,566	91,717	**5,000**	26	26	842
	2	70,713	2,285	72,997				
Palladium (PA)	1	37,488	1,929	39,417	**5,000**	*	*	580
	2	28,276	823	29,099				
Copper (HG)	1	170,784	22,859	193,643	**7,800**	19	12	1,457
	2	186,525	47,365	233,890				

Year 1 = July 1, 2014 to June 30, 2015
Year 2 = July 1, 2015 to June 30, 2016
Reproposed speculative position limit levels are shown in **bold**.
* Denotes fewer than 4 persons.

d. Energy

The Commission is reproposing non-spot month speculative position limit levels for the NG, CL, HO, and RB core referenced futures contracts based on the 10, 2.5 percent open interest formula.[571]

[570] One commenter expressed concern that imposing non-spot position limits on copper would negatively affect liquidity as evidenced by the number of unique persons affected. CL–CMC–59634 at 13, n. 26. Another commenter cited the number of unique traders with all-months overages as shown in the open interest data for the GC, SI and PL contracts in the December 2013 Position Limits Proposal as an indication that ''the impact of the Commission's non-spot-month position limits is random and arbitrarily inflexible with no relationship to preventing excessive speculation or manipulation.'' CL–CME–59718 at 41.

[571] One commenter suggested deriving non-spot month limit levels for the CL, HO, and RB referenced contracts from the usage ratios for U.S. crude oil and oil products rather than open interest and expressed concern that ''unnecessarily low limits will hamper legitimate hedging activity.'' CL–Citadel–59717 at 7–8. Another commenter suggested setting limit levels based on customary position size. CL–APGA–59722 at 6. This commenter also supported setting the single month limit at two-thirds of the all months combined limit in order to relieve market congestion as traders exit or roll out of the next to expire month into the spot month. CL–APGA–59722 at 7.

TABLE III–B–19—CME ENERGY CONTRACTS—NON-SPOT MONTH LIMIT LEVELS

Contract	Previously proposed limit level	Reproposed speculative limit level
NG	149,600	200,900
CL	109,200	148,800
HO	16,100	21,300
RB	11,800	15,300

Set forth below is a summary of the impact analysis for energy contracts.

TABLE III–B–20—CME ENERGY CONTRACTS—NON-SPOT MONTHS

Core-referenced futures contract	Open interest				Initial limit level	Unique persons above limit level		Reportable persons in market—all months
	Year	Futures	Swaps	Total		All months	Single month	
Natural Gas (NG)	1	4,919,841	2,866,128	7,785,969	**200,900**	*	0	1,846
	2	4,628,471	3,331,141	7,959,612				
Light Sweet Crude (CL)	1	4,071,681	1,587,450	5,659,130	**148,800**	0	0	2,673
	2	4,130,131	1,744,137	5,874,268				
NY Harbor ULSD (HO)	1	638,040	138,360	776,400	**21,300**	6	*	760
	2	587,796	65,721	653,518				
RBOB Gasoline (RB)	1	448,598	81,822	530,420	**15,300**	8	7	837
	2	505,849	30,477	536,327				

Year 1 = July 1, 2014 to June 30, 2015.
Year 2 = July 1, 2015 to June 30, 2016.
Reproposed speculative position limit levels are shown in **bold**.
* Denotes fewer than 4 persons.

6. Subsequent Levels of Limits

The Commission notes that many of the comments referenced above, regarding setting initial position limits, are also discussed below, regarding re-setting levels of limits.

a. General Procedure for Re-Setting Levels of Limits

Commission Proposal: The Commission proposed in § 150.2(e)(2) that it would fix subsequent levels of speculative position limits no less frequently than every two calendar years, in accordance with the procedures in § 150.2(e)(3) for spot-month limits and § 150.2(e)(3) for non-spot-month limits, discussed below.[572] The Commission proposed it would publish such subsequent levels on its Web site.

Comments Received: Regarding § 150.2(e)(2), commenters requested the Commission review the level of limits more frequently than every two years to address changes that may occur within the commodities markets.[573]

Commission Reproposal: The Commission has determined to repropose this provision as previously proposed in the December 2013 Position Limits Proposal, and reiterates that it will fix subsequent levels no less frequently than every two calendar years. The Commission is not proposing to establish a procedural requirement to reset limit levels more frequently than every two years, because as the frequency of reset increases, the burdens on market participants to update compliance systems and strategies, and on exchanges to submit deliverable supply estimates and reset exchange limit levels, also increase. The Commission believes that a two year timetable should reduce burdens on market participants while still maintaining limits based on recent market data. Should higher limit levels be desired, exchanges or market participants may petition the Commission to change limit levels within the two year period.

b. Re-setting Levels of Spot-Month Limits

Commission Proposal: The Commission proposed in § 150.2(e)(3) to reset each spot month limit at a level no greater than one-quarter of the estimated spot-month deliverable supply, based on the estimate of deliverable supply provided by the exchange listing the core referenced futures contract. The Commission proposed that it could, in its discretion, rely on its own estimate of deliverable supply. The Commission further proposed that, alternatively, it could set spot-month limits based on the recommended level of the exchange listing the core referenced futures contract, if lower than 25 percent of estimated deliverable supply.[574]

Comments Received: Commenters generally recommended the Commission enhance predictability and reduce uncertainty for market participants, by either restricting how much adjustment would be made to the position limit level, or having the discretion to not alter position limit

[572] December 2013 Position Limits Proposal, 78 FR at 75728.

[573] CL–Public Citizen–59648 at 5; CL–AFR–59711 at 2; CL–IECA–59713 at 3; CL–Better Markets–60325 at 2–3; CL–Better Markets–60401 at 19–20; CL–CMOC–59720 at 3; CL–Cota–59706 at 2; CL–RF–60372 at 3.

[574] December 2013 Position Limits Proposal, 78 FR at 75728.

levels, for example, if there have not been problems with convergence.[575]

Commenters were divided regarding the proposed methodology for computing spot month position limit levels (which is calculated by determining a figure that is no more than 25 percent of estimated deliverable supply).[576] Several commenters stated that the proposed formula for setting spot month limits based on 25 percent of deliverable supply results in spot month position limits that would be too high and may result in contract performance issues.[577] Other commenters thought the formula results in spot-month position limits that would be too low and hinder market liquidity.[578] Yet another requested that the Commission do further research to determine whether deliverable supply or open interest was a better means of setting spot month position limits, and apply the same metric (deliverable supply or open interest) to spot month limits and to non-spot month limits.[579] Several commenters recommended that the Commission consider an alternative means of limiting excessive speculation, that is, by setting position limits at a level low enough to restore a hedger majority in open interest in each core referenced futures contract.[580]

In estimating deliverable supply, some commenters recommended that the Commission include supply that is subject to long-term supply contracts, arguing that such supply can be readily made available for futures delivery.[581] One commenter recommended that the Commission permit the inclusion in the deliverable supply calculation of supplies that can be readily transported to the futures delivery location.[582] Another commenter recommended that the deliverable supply estimate should include related commodities that a DCM allows to be used to liquidate a futures position through an EFP transaction.[583] One commenter recommended that the deliverable supply estimate for natural gas should include supplies that are available at other major locations in addition to the specific futures delivery location of Erath, Louisiana, because commercials at these locations use the futures contract for hedging and price basing and basing spot month limits on a more limited delivery area would be too restrictive.[584] In estimating deliverable supply, one commenter recommended that the Commission not include supplies that do not meet delivery specifications.[585] The same commenter said that DCMs should provide documentation if including long term supply agreements in deliverable supply estimates to enable the Commission to verify the information. The commenter expressed concern about financial holding companies' ability to own, warehouse and trade physical commodities and urged the Commission to assess how such firms might affect deliverable supply.[586]

Commission Reproposal: The Commission is reproposing to reset each spot-month limit, in its discretion, either: Based on 25 percent of deliverable supply as estimated by an exchange listing the core referenced futures contract; to the existing spot-month position limit level (that is, not changing such level); or to the recommended level of the exchange listing the core referenced futures contract, but not greater than 25 percent of estimated deliverable supply. In the alternative, if the Commission elects to rely on its own estimate of deliverable supply, it will first publish that estimate for comment in the **Federal Register**.

Thus, the Commission accepts the commenter's recommendation that the Commission have discretion to retain current spot-month position limit levels. In this regard, the Commission provides, in reproposed § 150.2(e)(3)(ii)(B), that an exchange need not submit an estimate of deliverable supply, if the exchange provides notice to the Commission, not less than two calendar months before the due date for its submission of an estimate, that it is recommending the Commission not change the spot-month limit, and the Commission accepts such recommendation.

The Commission notes that it has long used deliverable supply as the basis for spot month position limits due to concerns regarding corners, squeezes, and other settlement-period manipulative activity. By restricting derivative positions to a proportion of the deliverable supply of the commodity, spot month position limits reduce the possibility that a market participant can use derivatives, including referenced contracts, to affect the price of the cash commodity (and vice versa). Limiting a speculative position based on a percentage of deliverable supply also restricts a speculative trader's ability to establish a leveraged position in cash-settled derivative contracts, diminishing that trader's incentive to manipulate the cash settlement price. Commenters did not provide evidence that would suggest that the open interest formula would respond more effectively to these concerns, and the Commission does not believe that using open interest would be preferable for calculating spot-month position limit levels.

In addition, setting the limit levels at no greater than 25 percent of deliverable supply has historically been effective on both the federal and exchange level to combat corners and squeezes. In the preamble to the final rules for vacated Part 151, the Commission noted that the 25 percent of deliverable supply formula appears to ''work effectively as a prophylactic tool to reduce the threat of corners and squeezes and promote convergence without compromising market liquidity.'' Commenters did not provide evidence to support claims that this historical formula is no longer effective.

In response to concerns that 25 percent of deliverable supply may result in a limit level that is too high, the Commission notes that exchanges can and often do—and are permitted under reproposed § 150.5(a) to—set limits at a level lower than 25 percent of estimated deliverable supply, which allows the exchanges to alter exchange-set limits easily based on changing market conditions.

In response to commenters' suggestion to restore a hedger majority, the Commission notes such an alternative may fail the requirements of CEA section 4a(a)(3)(B)(iv) to ensure sufficient liquidity for bona fide hedgers. Hedgers may not be transacting on opposite sides of the market simultaneously and, thus, need speculators to provide liquidity. Simply changing the proportion of hedgers in the market does not mean that the markets would operate more efficiently for bona fide hedgers. In addition, in order to adopt the commenter's suggestion, the Commission would need to reintroduce the withdrawn '03 series forms which required traders to identify which positions were speculative and which were hedging, since any entity,

[575] CL–FIA–60303 at 8, Agricultural Advisory Committee Meeting Transcript at 126–134 (Dec. 9, 2014).

[576] *E.g.,* CL–WGC–59558 at 5; CL–MFA–60385 at 4–6; CL–ISDA/SIFMA–59611 at 3, 31, 55–56, and 63–64; CL–MGEX–59610 at 2; CL–NGFA–59681 at 4–5.

[577] *See, e.g.,* CL–WGC–59558 at 5; CL–Public Citizen–60313 at 1; CL–Tri-State–59682 at 1–2; CL–AFR–59711 at 2; CL–WEED–59628 at 1; CL–Industrial Energy Consumers of America–59671 at 3; CL–CMOC–59720 at 3; CL–IATP–60394 at 2; CL–NGFA–59681 at 4–5.

[578] CL–ISDA/SIFMA–59611 at 55; CL–Armajaro–59729 at 1; CL–CAM–60097 at 3–4.

[579] CL–WGC–59558 at 5.

[580] *E.g.,* CL–IATP–60323 at 5; CL–IATP–60394 at 2; CL–RF–60372 at 3.

[581] CL–FIA–59595 at 3, 9–10; CL–NGSA–59941 at 15.

[582] CL–MFA–59606 at 18; CL–MFA–60385 at 6.

[583] CL–MSCGI–59708 at 2, 11.

[584] CL–CAM–60097 at 3–4.

[585] CL–IATP–60323 at 6.

[586] CL–IATP–60323 at 7.

even a commercial end-user, can establish speculative positions.

In response to commenters' suggestions regarding methods for estimating deliverable supply, the Commission notes that deliverable supply estimates are calculated and submitted by DCMs. Guidance for calculating deliverable supply can be found in Appendix C to part 38. Amendments to part 38 are beyond the scope of this rulemaking. However, such guidance already provides that deliverable supply calculations are estimates based on what ''reasonably can be expected to be readily available'' (including estimates of long-term supply that can be shown to be regularly made available for futures delivery).

c. Re-Setting Levels of Non-Spot-Month Limits

Commission Proposal—General Procedure: For setting subsequent levels of non-spot month limits no less frequently than every two calendar years, the Commission proposed in § 150.3(e)(4) to use the open interest formula: 10 percent of the first 25,000 contracts and 2.5 percent of the open interest thereafter (10, 2.5 percent formula).[587]

Comments Received and Commission Response: ''In order to enhance the predictability and reduce uncertainty in business planning,'' one commenter recommended that the Commission ''adjust limits gradually and by no more than a minimum percentage in one biennial cycle.'' [588] The Commission declines this suggestion because, as explained below, the Commission is reproposing a minimum non-spot month limit level of 5,000 contracts; market participants would be certain that in no circumstance would the limit level fall below that figure. Also, because exchanges can set limits at levels below the federal limit level, a change in the federal limit may not have an effect on exchange limit levels.

Several commenters recommended that the Commission review the levels of position limits more frequently than once every two years to address changes that may occur within the commodities markets.[589] In response these concerns, the Commission notes that exchanges may set limits at a level lower than the federal limits in order to more readily adapt to changing market conditions. Should higher limit levels be desired, exchanges may petition the Commission or the Commission may determine to change limit levels within the two year period. Thus, the flexibility to change limit levels more frequently than every two years is already permitted by the reproposed rules and the Commission is not changing the timeline.

One commenter recommended that the Commission ''adopt final rules that give the Commission the flexibility to increase position limits immediately or with little delay so that the market can accurately respond to external forces without violating position limits'' or, in the alternative, ''include peak open interest levels beyond the most recent two years when it determines the level of open interest on which to base position limits.[590] In response, the Commission notes that using peak open interest figures, as opposed to an average, as reproposed, may not necessarily represent an accurate portrait of current market conditions. Using the most recent two years of data is designed to ensure that the non-spot-month limit levels are set relative to the current size of the market.

Several commenters expressed the view that the proposed limits based on the open interest formula would result in limit levels that are too high and would not accomplish the goal of reducing excessive speculation.[591] In response, the Commission believes the open interest formula provides a level that is low enough to reduce the potential for excessive speculation and market manipulation without unduly impairing liquidity for bona fide hedgers. Under the rules reproposed today, both the Commission and the exchanges would have flexibility to impose non-spot month limit levels at the greater of the open interest formula, the spot month limit level, or 5,000 contracts.

Several commenters expressed the view that the proposed limits based on the open interest formula would result in limit levels for dairy contracts that are too low and would restrict hedging use by limiting liquidity.[592] The Commission responds that it is deferring the imposition of position limits on the Class III Milk contract, as discussed below.[593] The Commission also observes that reproposed § 150.9 permits market participants to apply directly to the exchanges to obtain an exemption to exceed speculative position limits.

Several commenters recommended that the Commission consider an alternative means of limiting speculative traders, by setting position limits at a level low enough to restore a hedger majority in open interest in each core referenced futures contract.[594] As discussed above, the Commission is concerned that ''restoring'' a hedger majority may not ensure sufficient liquidity for bona fide hedgers. Hedgers may not be transacting on opposite sides of the market simultaneously and, thus, need speculators to provide liquidity. Simply changing the proportion of hedgers in the market does not mean that the markets would operate more efficiently for bona fide hedgers. In addition, in order to implement this suggestion, the Commission would need to reintroduce the long defunct '03 series forms which required traders to identify which positions were speculative and which were hedging, because any entity, even a commercial end-user, can establish speculative positions.

One commenter noted that the open interest formula permits a speculator to hold a larger percentage of open interest in a smaller commodity market and thus the formula's entire rationale seems ''arbitrary . . . and . . . capricious.'' [595] The Commission acknowledges that, because of the way the 10, 2.5 percent formula works, a speculator in a market with open interest of fewer than 25,000 contracts may have a larger share of the open interest than a speculator in a market with an open interest of greater

[587] December 2013 Position Limits Proposal, 78 FR at 75729.

[588] CL–FIA–60303 at 8. This commenter did not recommend any specific percentage limitation.

[589] *E.g.,* CL–Public Citizen–59648 at 5 (annually); CL–AFR–II at 2 (greater frequency); CL–Better Markets–60325 at 2–3 (''[b]iennial updates . . . are completely inadequate''); CL–Better Markets–59716 at 34 (biennial updates values ''the input of swap dealers and their trade groups over that of commercial hedgers''); CL–CMOC–59720 at 3 (annual consultation with hedgers and end users); CL–RF–60372 at 3 (''review position limits every six months'').

[590] CL–MFA–59606 at 21.

[591] *E.g.,* CL–Tri-State–59682 at 1–2; CL–A4A–59714 at 3; CL–Better Markets–59716 at 24; CL–APGA–59722 at 3, 6; CL–AFBF–59730 at 3; CL–NGFA–59681 at 5.

[592] *E.g.,* CL–U.S. Dairy–59597 at 4, 6; CL–Hood–59582; CL–McCully–59592 at 1; CL–Rice Dairy–59601 at 1; CL–Agri-Mark–59609 at 1–2; CL–Jacoby–59622 at 1; CL–Pedestal–59630 at 2; CL–Darigold–59651 at 1–2; CL–Traditum–59655 at 1; CL–Leprino–59707 at 2; CL–IDFA–59771 at 1–2; CL–Fonterra–59608 at 1–2; CL–NCFC–59613 at 6; CL–NMPF–59936 at 2; CL–DFA–59621 at 7–8; CL–Glanbia Foods–60316 at 1; CL–Leprino Foods–59707 at 2; CL–NMPF–59936 at 2.

[593] Some commenters urged the Commission to establish an individual month position limit in Class III Milk equal to the spot month limit but no less than 3,000 contracts net, and an all-months-limit as a multiple of four times the spot month limit, to foster needed liquidity in the non-spot months. *See, e.g.,* CL–NCFC–59942 at 6. Another commenter urged an all-months-limit in Class III Milk of ten times the spot month limit for a similar reason. CL–U.S. Dairy–59597 at 4. These comments are now moot.

[594] *E.g.,* CL–IATP–60323 at 5; CL–IATP–60394 at 2; CL–RF–60372 at 3; CL–A4A–59686 at 4; CL–Better Markets–59716 at 5; CL–Better Markets–60325 at 2.

[595] CL–USCF–59644 at 3–4.

than 25,000 contracts. The Commission responds that it is by design that the 10, 2.5 percent open interest formula provides that a speculator may hold a larger percentage of total open interest in a smaller market, potentially providing liquidity for bona fide hedgers in such a smaller market. As open interest increases, the 2.5% marginal increase results in limit levels that become a progressively smaller percentage of total open interest, essentially placing a greater emphasis on deterring market manipulation and protecting the price discovery process in a larger market.

Another commenter suggested that the Commission use a 10, 5 percent open interest formula rather than a 10, 2.5 percent formula as proposed, arguing that the 10, 5 percent formula has worked well for certain agricultural futures markets and should be applied more broadly. Alternatively, this commenter said that Commission should use the 10, 5 percent formula for at least spread positions.[596] The Commission notes the 10, 2.5 percent formula has produced limit levels that should sufficiently maximize the CEA section 4a(a)(3)(B) criteria, and the Commission does not believe increasing the marginal percentage is necessary. A larger limit such as would be produced from a 10, 5 percent formula may not adequately prevent excessive speculation. In the preamble to the proposed rules, the Commission noted that the 10, 2.5 percent formula was first proposed in 1992, and the commenter has not provided sufficient justification for moving away from this established standard.

One commenter recommended that the Commission consider commodity-related ratios in establishing limits, such as the ratio between crude oil and its products, diesel (30 percent) and gasoline (50 percent), rather than on separate open interest formulas applied to each.[597] In response, the Commission notes setting limit levels based on the open interest of a related commodity may result in limit levels that are too large to be effective in the smaller commodity markets. For example, based on the levels proposed in this release in Appendix D, implementing a limit for NYMEX RBOB Gasoline equal to 50 percent of the crude oil limit, as suggested by the commenter, would result in a limit almost 10 times the size otherwise indicated by the open interest formula, and would equal almost 28 percent of total average open interest in the RBOB referenced contract. Further, hedgers with positions in multiple contracts could establish positions in various ratios without violating a position limit, provided they comply with the bona fide hedging position definition and any applicable requirements. The Commission also notes that the process in reproposed § 150.10 exempting certain spread positions may allow speculators some flexibility in inter- and intra-commodity spreads for the purpose of providing liquidity to bona fide hedgers.

One commenter suggested the Commission consider setting position limits on ''customary position size'' which had been used for setting non-spot month limits by the Commission in the past and which the commenter argues is a more effective means of curtailing large speculative positions.[598] In response, the Commission believes the 10, 2.5 percent formula has been effective in preventing excessive speculation without unduly limiting liquidity for bona fide hedgers. The Commission notes when the ''customary position size'' methodology was used to set non-spot-month limit levels, such levels were below the levels established using 10, 2.5 percent formula.

Commission Reproposal Regarding General Procedure for Re-Setting Levels of Non-Spot Month Limits: The Commission has determined to repropose the 10, 2.5 percent formula, generally as proposed in the December 2013 Position Limits Proposal, for the reasons discussed above. However, the Commission has determined, in response to requests by commenters requesting wheat parity, as discussed above, to provide that it may determine not to change the level of a non-spot month limit. This would permit, for example, the Commission to continue to retain a level of 12,000 contracts for the non-spot month limits in the KW and MWE contracts, even if average open interest did not exceed 405,000 contracts (which is the level that, when applying the 10, 2.5 percent formula, would result in a limit of 12,000 contracts).

Commission Proposal for Time Periods, Data Sources, Publication and Minimum Levels for Re-Setting Levels of Non-Spot Month Limits: Under proposed in § 150.2(e)(4)(i) and (ii), the Commission would estimate average open interest in referenced contracts using data reported for each of the last two calendar years pursuant to parts 16, 20, and/or 45.[599] The Commission also proposed under § 150.2(e)(4)(iii) to publish on the Commission's Web page estimates of average open interest in referenced contracts on a monthly basis to make it easier for market participants to estimate changes in levels of position limits.[600] Finally, the Commission proposed under § 150.2(e)(4)(iv) to establish minimum non-spot month levels of 1,000 contracts for agricultural commodity contracts and 5,000 contracts for exempt commodity contracts.

Comments Received and Commission Response: Regarding the time period for average open interest, as noted above, one commenter recommended that the Commission, as an alternative, ''include peak open interest levels beyond the most recent two years when it determines the level of open interest on which to base position limits.'' [601] In response, the Commission notes that using peak open interest figures, as opposed to an average, as reproposed, may not necessarily represent an accurate portrait of current market conditions.

Regarding data sources for average open interest, several commenters noted that the open interest data used by the Commission in determining the non-spot month limits was not complete since it did not include all OTC swaps data and that the Commission should correct this deficiency before it sets the limits using the open interest formula.[602] In response, the Commission notes it used futures-equivalent open interest for swaps reported under part 20, in determining the initial non-spot month limits, as discussed above, and believes this data also is acceptable for re-setting limit levels, as reproposed.

The Commission received no comments regarding publication of average open interest.

Regarding minimum levels for non-spot month limits, some commenters urged the Commission to afford itself the flexibility to set non-spot month limits at least as high as the spot-month position limit, rather than base the non-spot month limit strictly on the open interest formula in cases where the latter would result in a relatively small limit that would hinder liquidity.[603] The Commission accepts these

[596] CL–Working Group–59693 at 62.

[597] CL–Citadel–59717 at 7–8.

[598] CL–APGA–59722 at 6.

[599] December 2013 Position Limits Proposal, 78 FR at 75734.

[600] *Id.*

[601] CL–MFA–59606 at 21.

[602] *E.g.,* CL–DBCS–59569 at 6; CL–FIA–59595 at 14; CL–EEI–60386 at 11; CL–MFA–59606 at 5, 20, 22–23; CL–ISDA/SIFMA–59611 at 29, including footnote 108; CL–CMC–59634 at 13; CL–Olam–59658 at 3; CL–COPE–59662 at 22; CL–Calpine–59663 at 4; CL–Chamber–59684 at 5; CL–NFP–59690 at 20; CL–Just Energy–59692 at 4; CL–Working Group–59693 at 62; CL–Working Group–60396 at 8–10; CL–Citadel–59717 at 4–5.

[603] CL–ICE–59966 at 6; CL–U.S. Dairy–59597 at 4.

commenters' recommendation. Upon consideration of proposing minimum initial non-spot month limits, as discussed above, the Commission is removing the distinction between agricultural and exempt commodities. This change would establish a minimum non-spot month limit level of 5,000 contracts in either agricultural or exempt commodities.

Commission Reproposal: The Commission has determined to repropose these provisions generally as proposed in the December 2013 Position Limits Proposal, but with the changes described above to provide flexibility for a higher minimum level of non-spot month limits.

7. Deferral of Limits on Cash-Settled Core Referenced Futures Contracts

Commission Proposal:

The Commission proposed, but is not reproposing, positon limits on three cash-settled core referenced futures contracts: CME Class III Milk; CME Feeder Cattle; and CME Lean Hogs.[604]

Comments Received: Commenters raised concerns with these cash-settled contracts and how they fit within the federal position limits regime. While many of these concerns were raised in the context of the dairy industry, they apply to all three cash-settled core referenced futures contracts. Concerns raised include: (1) How to apply spot month limits in a contract that is cash-settled;[605] (2) the ''five-day rule'' for bona fide hedging;[606] and (3) the length of the spot month period.[607] Commenters contended that the Commission's rationale in the December 2013 Position Limits Proposal focused on concerns with physical-delivery contracts, which the commenters believe do not apply to cash-settled core referenced futures contracts because there is no physical delivery process and because the contracts settle to government-regulated price series (through the USDA).[608] Commenters were concerned that the Commission's ''one-size-fits-all'' approach discriminates against participants in dairy and livestock because the spot-month limit is effectively smaller compared to the separate spot-month limits for physical-delivery and cash-settled contracts in other commodities.[609] Several commenters suggested limit levels that do not follow the proposed formulae for determining limit levels for both spot and non-spot-month limits due to the unique aspects of cash-settled core referenced futures contracts, including the relatively large cash market and trading strategies not found in other core referenced futures markets.[610]

Commission Determination: The Commission, as part of the phased approach to implementing position limits on all physical commodity derivative contracts, is deferring action so that it may, at a later date: (1) Clarify the application of limits to cash-settled core referenced futures contracts; and (2) consider further which method to use to determine a level for a spot-month limit for a cash-settled core referenced futures contract. The Commission notes that the December 2013 Position Limits Proposal discussed spot-month limits primarily in the context of protecting the price discovery process by preventing corners and squeezes.[611] There was limited discussion of cash-settled core referenced futures contracts.[612] The Commission did not propose alternate means of calculating limit levels for cash-settled core referenced futures contracts in the December 2013 Position Limits Proposal.

C. § 150.3—Exemptions

1. Current § 150.3

Statutory authority: CEA section 4a(c)(1) exempts positions that are shown to be bona fide hedging positions, as defined by the Commission, from any Commission rule establishing speculative position limits under CEA section 4a(a).[613] In addition, CEA section 4a(a)(1) authorizes the Commission to exempt transactions normally know to the trade as ''spreads.''[614] Further, CEA section 4a(a)(7) authorizes the Commission to exempt any person, contract, or transaction from any position limit requirement the Commission establishes.[615]

Current exemptions: The three existing exemptions in current § 150.3(a), promulgated prior to the enactment of the Dodd-Frank Act, are part of the Commission's regulatory framework for speculative position limits.[616] First, current § 150.3(a)(1) exempts positions shown to be bona fide hedging positions from federal position limits.[617] Second, current § 150.3(a)(3) exempts spread positions between single months of a futures contract (and/or, on a futures-equivalent basis, options) outside of the spot month, provided a trader's spread position in any single month does not exceed the all-months limit.[618] Third, under current § 150.3(a)(4), positions carried for an eligible entity[619] in the separate account of an independent account controller (''IAC'')[620] that manages customer positions need not be aggregated with the other positions owned or controlled by that eligible entity (the ''IAC exemption'').[621]

[604] Each of these contracts is cash settled to a U.S. Department of Agriculture price series; Feeder Cattle and Lean Hogs settle to a CME-calculated index of daily USDA livestock prices, while Class III Milk settles to the monthly USDA Class III Milk price.

[605] CL–Rice Dairy–59960 at 1; CL–US Dairy–59597 at 3–4; CL–NMPF–59652 at 4; CL–DFA–59948 at 4–5.

[606] CL–NMPF–59652 at 5; CL–DFA–59948 at 8.

[607] CL–NGSA–59674 at 44; CL–ICE–59669 at 5–6.

[608] *See, e.g.,* CL–US Dairy–59597 at 3–4.

[609] CL–DFA–59948 at 6.

[610] CL–Rice Dairy–59601 at 1; CL–US Dairy–59597 at 3; CL–NMPF–59652 at 4; CL–DFA–59948 at 4–5.

[611] For example, the Commission stated that concerns regarding corners and squeezes are most acute in the markets for physical-delivery contracts in the spot month. December 2013 Position Limits Proposal, 78 FR at 75737.

[612] *See, e.g.,* December 2013 Position Limits Proposal 78 FR at 75688, including n. 82.

[613] 7 U.S.C. 6a(c)(1). Section 737 of the Dodd-Frank Act did not substantively change CEA section 4a(c)(1) (renumbering existing provision by inserting ''(1)'' after ''(c)'').

[614] 7 U.S.C. 6a(a)(1). Section 737 of the Dodd-Frank Act did not change the Commission's authority to exempt spreads under CEA section 4a(a)(1).

[615] 7 U.S.C. 6a(a)(7). Section 737 of the Dodd-Frank Act added CEA section 4a(a)(7). The Commission interprets CEA section 4a(a)(7) to provide the Commission with plenary authority to grant exemptive relief from position limits, consistent with the purposes of the CEA. Specifically, under Section 4a(a)(7), the Commission ''by rule, regulation, or order, may exempt, conditionally or unconditionally, any person, or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish . . . with respect to position limits.''

[616] For completeness, the Commission notes it previously provided an exemption in § 150.3(a)(2) for spreads of futures positions which offset option positions. However, the Commission removed and reserved that provision once it was rendered obsolete by the Commission determination to impose speculative limits on a trader's net position in futures and options combined, rather than separately. 58 FR 17973 at 17979 (April 7, 1993).

[617] 17 CFR 150.3(a)(1). The term bona fide hedging position is currently defined at 17 CFR 1.3(z) (2010). As discussed above, the Commission is reproposing a new definition of bona fide hedging position in § 150.1.

[618] The Commission clarifies that a spread position in this context means a short position in a single month of a futures contract and a long position in another contract month of that same futures contract, outside of the spot month, in the same crop year. The short and/or long positions may also be in options on that same futures contract, on a futures equivalent basis. Such spread positions, when combined with any other net positions in the single month, must not exceed the all-months limit set forth in current § 150.2, and must be in the same crop year. 17 CFR 150.3(a)(3).

[619] ''Eligible entity'' is defined in current 17 CFR 150.1(d).

[620] ''Independent account controller'' is defined in current 17 CFR 150.1(e).

[621] 17 CFR 150.3(a)(4). *See also* discussion of the IAC exemption in the 2016 Final Aggregation Rule.

2. Proposed § 150.3

In the December 2013 Position Limits Proposal, the Commission proposed a number of organizational and substantive amendments to § 150.3, generally resulting in an increase in the number of exemptions to speculative position limits. First, the Commission proposed to amend the three exemptions from federal speculative limits contained in current § 150.3. These previously proposed amendments would update cross references, relocate the IAC exemption and consolidate it with the Commission's separate proposal to amend the aggregation requirements of § 150.4,[622] and delete the calendar month spread provision which is unnecessary under changes to § 150.2 that would set the level of each single month position limit to that of the all-months position limit. Second, the Commission proposed to add exemptions from the federal speculative position limits for financial distress situations, certain spot-month positions in cash-settled referenced contracts, and grandfathered pre-Dodd-Frank and transition period swaps. Third, the Commission proposed to revise recordkeeping and reporting requirements for traders claiming any exemption from the federal speculative position limits.

a. Proposed Amendments to Existing Exemptions

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to update cross-references within § 150.3 to reflect other changes in part 150. Specifically, the Commission proposed: To update references to the bona fide hedging definition to § 150.1 from § 1.3(z); to require that those filing for exemptive relief must meet the reporting requirements in part 19; and to add a cross-reference to aggregation provisions in proposed § 150.4.

The Commission also proposed to move the existing IAC exemption to § 150.4, thereby deleting the current exemption in § 150.3(a)(4). The Commission also proposed to delete the spread exemption in current § 150.3, because it noted that the proposed non-spot month limits rendered such an exemption unnecessary.[623]

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to conform § 150.3(a) to accommodate processes proposed in other sections of part 150. Specifically, the Commission proposed under § 150.3(a)(1)(i) exemptions for those bona fide hedging positions that have been recognized by a DCM or SEF in accordance with proposed §§ 150.9 and 150.11. The Commission also proposed under § 150.3(a)(1)(iv) exemptions for those spread positions that have been recognized by a DCM or SEF in accordance with proposed § 150.10. Recognition of other positions exempted under proposed § 150.3(e) was re-numbered as subsection (v) from subsection (iv) of § 150.3(a)(1) of the 2013 Position Limits Proposal.

Comments Received: The Commission received no comments on the proposed conforming changes to § 150.3.[624] The Commission addresses comments on the IAC exemption in its final rule amending the aggregation policy under § 150.4, published separately.

Commission Reproposal: The Commission is reproposing these amendments as previously proposed in the December 2013 Position Limits Proposal.

b. Positions Which May Exceed Limits—§ 150.3(a)

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission listed positions which may exceed limits in proposed § 150.3(a). Such positions included: (i) Bona fide hedging positions as defined in § 150.1; (ii) financial distress positions exempted under § 150.3(b); (iii) conditional spot month limit positions exempted under § 150.3(c); and (iv) other positions exempted under § 150.3(e). Proposed § 150.3(a) also provided that all such positions may exceed limits only if recordkeeping requirements in § 150.3(g) are met and any applicable reporting requirements in part 19 are met.

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to revise § 150.3(a) to include, in addition to bona fide hedging positions as defined in § 150.1, positions that are recognized by a DCM or SEF in accordance with § 150.9 or § 150.11 as well as spread positions recognized by a DCM or SEF in accordance with § 150.10.

Comments Received: The Commission received many comments on the definition of bona fide hedging in § 150.1, as well as on the processes proposed in §§ 150.9–11.[625] The Commission addresses those comments in the discussion of the definition of bona fide hedging position in § 150.1, above, and in the discussion of the processes proposed in §§ 150.9–11, below. The Commission did not receive comments specific to the conforming revisions to § 150.3(a).

Commission Reproposal: The Commission is reproposing § 150.3(a) as previously proposed in the December 2013 Position Limits Proposal, with conforming changes consistent with the reproposed definition of a bona fide hedging position in § 150.1, which includes positions that are recognized by a DCM or SEF in accordance with reproposed § 150.9 or § 150.11, or by the Commission, and conforming changes consistent with the process for spread positions recognized by a DCM or SEF in accordance with reproposed § 150.10, or by the Commission.

c. Proposed Additional Exemptions From Position Limits

i. Financial Distress Exemption—§ 150.3(b)

Proposed Rule: The Commission proposed to add in § 150.3(b) an exemption from position limits for market participants in financial distress circumstances, upon the Commission's approval of a specific request.[626] For example, the Commission recognized that, in periods of financial distress, it may be beneficial for a financially sound market participant to take on the positions (and corresponding risk) of a less stable market participant. The Commission explained that it has historically provided an exemption from position limits in these types of situations in order to avoid sudden liquidations that could potentially reduce liquidity, disrupt price discovery, and/or increase systemic risk. The Commission therefore proposed to codify this historical practice.

Comments Received: One commenter requested the non-exclusive circumstances for the financial distress exemption be clarified by adding ''bud not limited to'' after the word ''include'' to permit other situations not listed.[627]

Commission Reproposal: In response to the commenter, the Commission clarifies that the circumstances under which a financial distress exemption may be claimed include, but are not limited to, the specific scenarios in the definition. However, the Commission believes that the proposed definition

[622] *See* November 2013 Aggregation Proposal. *See also* 2016 Final Aggregation Rule.

[623] Under the 2016 Supplemental Position Limits Proposal, DCMs and SEFs that are trading facilities would have authority to grant spread exemptions to both exchange and federal position limits. *See infra* discussion of §§ 150.5 and 150.10.

[624] The Commission received many comments on the changes to the bona fide hedging definition in § 150.1 and the processes for exchange recognition of exemptions in §§ 150.9–11. *See* discussion of the bona fide hedging definition, above, and of the processes in §§ 150.9–11, below.

[625] *Id.*

[626] December 2013 Position Limits Proposal, 78 FR at 75736.

[627] CL–CME–59718 at 71.

sufficiently articulates that the list of potential circumstances for claiming the financial distress exemption is non-exclusive, and, therefore, is reproposing the definition as previously proposed.

ii. Pre-Enactment and Transition Period Swaps Exemption—§ 150.3(d)

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to provide an exemption from federal position limits for (1) pre-enactment swaps, defined as swaps entered into prior to July 21, 2010 (the date of the enactment of the Dodd-Frank Act of 2010), so long as the terms of which have not expired as of that date, and (2) transition period swaps, defined as swaps entered into during the period commencing July 22, 2010 and ending 60 days after the publication of the final position limit rules in the **Federal Register**, the terms of which have not expired as of that date. The Commission also proposed to allow both pre-enactment and transition period swaps to be netted with commodity derivative contracts acquired more than 60 days after publication of the final rules in the **Federal Register** for purposes of complying with non-spot-month position limits.[628]

Comments Received: One commenter suggested that ''grandfathering'' relief should be extended to pre-existing positions, and should also permit the pre-existing positions to be increased after the effective date of the limit. The commenter also suggested that the Commission should permit the risk associated with a pre-existing position to be offset through roll of a position from a prompt month into a deferred contract month.[629]

Commission Reproposal: The Commission declines to accept the commenter's recommendation regarding increasing positions, because allowing pre-existing positions to be increased after the effective date of the limits effectively would create a loophole for exceeding position limits. Further, the Commission declines the commenter's recommendation to permit a roll of a pre-existing position, because that would permit a market participant to extend indefinitely the holding of a speculative economic exposure in commodity derivative contracts exempt from position limits, frustrating the intent of speculative position limits. The Commission notes, however, that reproposed § 150.3(d), like the previous proposal, allows for netting of pre- and post-effective date positions, allowing a market participant to offset the risk of the position provided the offsetting position is not held into a spot month. The Commission is reproposing § 150.3(d) as proposed in the December 2013 Position Limits Proposal.

iii. Previously Granted Exemptions—§ 150.3(f)

Proposed Rule: The Commission proposed in the December 2013 Position Limits Proposal that exemptions previously granted by the Commission under § 1.47 for swap risk management would not apply to new swap positions entered into after the effective date of the final rule. The Commission noted that the proposed rules revoke the previously granted exemptions for risk management positions for such new swaps. Therefore, risk management positions that offset such new swaps would be subject to federal position limits, unless another exemption applied. The Commission explained that these risk management positions are inconsistent with the revised definition of bona fide hedging contained in the December 2013 Position Limits Proposal and the purposes of the Dodd-Frank Act amendments to the CEA.[630]

Comments Received: A number of commenters urged the Commission not to deny risk-management exemptions for financial intermediaries who utilize referenced contracts to offset the risks arising from the provision of diversified commodity-based returns to the intermediaries' clients.[631]

In contrast, other commenters noted that the proposed rules ''properly refrain'' from providing a general exemption to financial firms seeking to hedge their financial risks from the sale of commodity-related instruments such as index swaps, ETFs, and ETNs because such instruments are ''inherently speculative'' and may overwhelm the price discovery function of the derivative market.[632]

Commission Reproposal: As discussed above in the clarifications to the bona fide hedging position definition, the Commission now proposes to expand the relief in § 150.3(f) by: (1) Clarifying that such previously granted exemptions may apply to pre-existing financial instruments that are within the scope of existing § 1.47 exemptions, rather than only to pre-existing swaps; and (2) recognizing exchange-granted non-enumerated exemptions in non-legacy commodity derivatives outside of the spot month (consistent with the Commission's recognition of risk management exemptions outside of the spot month), and provided such exemptions are granted prior to the compliance date of the final rule, and apply only to pre-existing financial instruments as of the effective date of the final rule. These two changes are intended to reduce the potential for market disruption by forced liquidations, since a market intermediary would continue to be able to offset risks of pre-effective-date financial instruments, pursuant to previously-granted federal or exchange risk management exemptions.

iv. Non-Enumerated Hedging Positions—§ 150.3(e)

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission noted that it previously permitted a person to file an application seeking approval for a non-enumerated position to be recognized as a bona fide hedging position under § 1.47. The Commission proposed to delete § 1.47 for several reasons described in the December 2013 Position Limits Proposal.[633]

Proposed § 150.3 provided that a person that engages in risk-reducing practices commonly used in the market, that the person believes may not be included in the list of enumerated bona fide hedging positions, may apply to the Commission for an exemption from position limits. As previously proposed, market participants would be guided in § 150.3(e) first to consult proposed Appendix C to part 150 to see whether their practices fell within a non-exhaustive list of examples of bona fide hedging positions as defined under proposed § 150.1.

A person engaged in risk-reducing practices that are not enumerated in the revised definition of bona fide hedging position in previously proposed § 150.1 may use two different avenues to apply to the Commission for relief from federal position limits: The person may request an interpretative letter from Commission staff pursuant to § 140.99 [634] concerning the applicability

[628] December 2013 Position Limits Proposal, 78 FR at 75738.

[629] CL–AMG–59709 at 2, 18–19.

[630] December 2013 Position Limits Proposal, 78 FR at 75740.

[631] CL–FIA–59595 at 5, 34–35; CL–AMG–59709 at 2, 12–15; CL–CME–59718 at 67–69.

[632] CL–Sen. Levin–59637 at 8; CL–Better Markets–60325 at 2.

[633] December 2013 Position Limits Proposal, 78 FR at 75738–9.

[634] 17 CFR 140.99 defines three types of staff letters—exemptive letters, no-action letters, and interpretative letters—that differ in scope and effect. An interpretative letter is written advice or guidance by the staff of a division of the Commission or its Office of the General Counsel. It binds only the staff of the division that issued it (or the Office of the General Counsel, as the case may

Continued

of the bona fide hedging position exemption, or the person may seek exemptive relief from the Commission under CEA section 4a(a)(7).[635]

In the 2016 Supplemental Position Limits Proposal, the Commission proposed §§ 150.9, 150.10, and 150.11 which provided alternative processes that would permit eligible DCMs and SEFs to provide relief for non-enumerated bona fide hedging positions, certain spread positions, and anticipatory bona fide hedging positions, respectively.[636] However, the Commission did not propose to alter or delete § 150.3 because the Commission determined to provide multiple avenues for persons seeking exemptive relief.

Comments Received: One commenter requested that the Commission provide a spread exemption from federal position limits for certain soft commodities, reasoning that there was a ''lack of fungibility of certain soft commodities . . . [because] inventories of various categories vary widely in terms of marketability over time.'' The commenter also stated that such a spread exemption would allow for effective competition for the ownership of certified inventories that in turn helps to maintain a close relationship between the cash and futures markets.[637] Another commenter recommended the Commission recognize calendar spread netting, and not place any limits on the same, because speculators provide liquidity in deferred months to hedgers and offset, in part, that exposure with shorter dated contracts.[638]

Commission Reproposal: Both of these comments were submitted in response to the December 2013 Position Limits Proposal, well in advance of the 2016 Supplemental Position Limits Proposal. Spread exemptions such as those described by the commenters are addressed in § 150.10, discussed below. The Commission is reproposing § 150.3(e) as previously proposed in the December 2013 Position Limits Proposal.

d. Proposed Conditional Spot Month Limit Exemption—§ 150.3(c)

Conditional spot month limit exemptions to exchange-set spot-month position limits for natural gas contracts were adopted in 2009, after the ICE submitted such an exemption as part of its certification of compliance with core principles required of exempt commercial markets (''ECMs'') on which significant price discovery contracts (''SPDCs'') were traded.[639]

As ICE developed its rules in order to comply with the ECM SPDC requirements,[640] ICE expressed concerns regarding the impact of position limits on the open interest in its LD1 contract. ICE demonstrated that as the open interest declines in the physical-delivery New York Mercantile Exchange Inc. (''NYMEX'') Henry Hub Natural Gas Futures (''NYMEX NG'') contract approaching expiration, open interest increases rapidly in the cash-settled ICE NG LD1 contract, and suggested that the ICE NG LD1 contract served an important function for hedgers and speculators who wished to recreate or hedge the NYMEX NG contract price without being required to make or take delivery. ICE stated that it believed there are ''significant and material distinctions between the design and use of'' the NYMEX NG contract and the ICE NG LD1 contract, and those distinctions were most pronounced at expiration. Further, ICE stated that, due to the size of some positions in the cash-settled ICE NG LD1 contract, the impact to the market of an equivalent limit could impair the ability for market participants to adjust their positions in an orderly fashion to come into compliance. For these reasons, ICE requested that the Commission consider an alternative to the Commission's acceptable practice that spot month position limits for the NG LD1 contract should be equivalent to the spot month position limits in the NYMEX NG contract.[641]

After discussion with both the Commission's Division of Market Oversight and NYMEX, ICE submitted and certified rule amendments implementing position limits and position accountability rules for the ICE NG LD1 contract. Specifically, ICE imposed a spot-month position limit and non-spot-month position accountability levels equal to those of the economically equivalent NYMEX NG contract. ICE also adopted a rule for a larger conditional position limit for traders who: (1) Agreed not to maintain a position in the NYMEX NG futures contract during the last three trading days, and (2) agreed to show ICE their complete book of Henry Hub related positions.[642]

In June 2009, the Commission also received self-certified rule amendments from CME Group, Inc. (''CME'') regarding position limits and position accountability levels for the cash-settled NYMEX Henry Hub Financial Last Day Futures (HH) contract and related cash-settled contracts.[643] The rules, as amended, established spot month position limits for the NYMEX HH contract as well as certain related cash-settled contracts so as to be consistent with the requirements for the SPDC contract on ICE. In the rule certification documents, CME stated that it was amending its position limits rules for the HH contract in anticipation of ICE's new rules. In February 2010, the conditional spot month limit exemptions on NYMEX and ICE went into effect.

Proposed Rules: In the December 2013 Position Limits Proposal, the

be), and third-parties may rely upon it as the interpretation of that staff. *See* description of CFTC Staff Letters, *available at http://www.cftc.gov/lawregulation/cftcstaffletters/index.htm.*

[635] *See supra* discussion of CEA section 4a(a)(7).

[636] *See infra* discussion of these alternative processes in § 150.9, § 150.10, and § 150.11.

[637] CL–CMC–59718 at 15.

[638] CL–Citadel–59717 at 8–9.

[639] CFTC Reauthorization Act of 2008 (''Farm Bill'', incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 112 Stat. 1624 (June 18, 2008)) expanded the Commission's authority with respect to ECMs by creating a new regulatory category: ECMs on which significant price discovery contracts (''SPDCs'') were traded. The Farm Bill authorized the Commission to designate an ECM contract as a SPDC if the Commission determined, under criteria established in the Act, that the contract performed a significant price discovery function. When the Commission made such a determination, the ECM on which the SPDC was traded would be required to assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Commission's regulations and the Act. This process was invalidated and deleted by changes to the Act made under the Dodd-Frank Act of 2010.

[640] On March 16, 2009, the Commission adopted final rules implementing the provisions of the Farm Bill. 74 FR 12179 (March 23, 2009). These regulations became effective on April 22, 2009. Among other things, the rules established procedures by which the Commission would make and announce its determination as to whether a particular contract served a significant price discovery function. On July 24, 2009, the Commission issued an order finding that ICE's Henry Financial LD1 Fixed Price contract (''NG LD1 contract'') performed a significant price discovery function and, thus, that ICE was a registered entity with respect to the NG LD1 contract, subject to all provisions of the Act applicable to registered entities, including compliance with certain core principles. 74 FR 37988 (July 30, 2009).

As required after the designation of the NG LD1 contract as a SPDC, ICE submitted a demonstration of their compliance with the required core principles. One of the core principles with which ICE was required to comply with under the Farm Bill ECM SPDC rules concerned position limits and position accountability rules for the contract(s) designated as SPDC(s). *See* Section 13201(C)(ii)(IV) of the Farm Bill (implemented in Section 2(h)(7) of the Act).

[641] *See* 17 CFR part 36, App. B, Core Principle IV(c)(3) (2010). 74 FR 12177 (April 22, 2009).

[642] ICE also imposed related aggregation, bona fide hedging, and other exemption rules for the ICE NG LD1 contract.

[643] New York Mercantile Exchange, Inc. Submission #09.103 (June 2, 2009): Notification of Amendments to NYMEX Rules 9A.27 and 9A.27A to Establish Hard Expiration Position Limits for Certain Natural Gas Financially Settled Contracts. Previously, NYMEX did not have spot-month limits on its HH contract and related cash-settled contracts.

Commission proposed a conditional spot month limit exemption for all commodities subject to federal limits under proposed § 150.2. That proposed rule was identical to the rule proposed in the Part 151 Proposal, with the exception that the December 2013 Position Limits Proposal did not include any restriction on trading in the cash market.[644] In proposing the conditional spot month limit exemption in proposed § 150.3(c), the Commission stated its preliminary belief that the current exemption in natural gas markets has served ''to further the purposes Congress articulated for position limits'' and that the exemption ''would not encourage price discovery to migrate to the cash-settled contracts in a way that would make the physical-delivery contract more susceptible to sudden price movements near expiration.'' [645] In addition, the Commission noted that it has observed repeatedly that open interest levels in physical-delivery contracts ''naturally decline leading up to and during the spot month, as the contract approaches expiration'' because ''both hedgers and speculators exit the physical-delivery contract in order to, for example, roll their positions to the next contract month or avoid delivery obligations.'' [646] The Commission also stated its preliminary belief that ''it is unlikely that the factors keeping traders in the spot month physical-delivery contract will change due solely to the introduction of a higher cash-settled limit,'' as traders participating in the physical-delivery contract in the spot month are ''understood to have a commercial reason or need to stay in the spot month.'' [647]

Comments Received: The Commission received many comments regarding the conditional spot month limit exemption. These comments revealed little to no consensus among market participants, exchanges, and industry groups regarding spot-month position limits in cash-settled contracts.

Several commenters supported the higher spot-month limit (or no limit at all) for cash-settled contracts, but opposed the restriction on holding a position in the physical-delivery referenced contract to obtain the higher limit for various reasons, including: The view that there is no discernible reason for the restriction in the first place; the belief that it provides a negative impact on liquidity in the physical delivery contract; and the view that it prevents commercials from taking advantage of the higher limit given their need to have some exposure in a physical delivery referenced contract during the spot month.[648]

One commenter said that the conditional spot month position limit exemption for gold is not supported by sufficient research, could decouple the cash-settled contract from the physical-delivery contract, and could lead to lower liquidity in the physical-delivery contract and higher price volatility.[649] Several commenters opposed a spot-month position limit for cash-settled contracts that is higher than the limit for physical-delivery contracts for various reasons including: The higher limit does not address the problem of excessive speculation; the higher limit would reduce liquidity in the physical-delivery contract; and the conditional limit is not restrictive enough and should include a restriction on holdings of the physical commodity as had been proposed in vacated part 151.[650]

Several commenters expressed the view that a market participant holding a trade option position, which presumably would be considered a physical delivery referenced contract, should not be precluded from using the conditional spot-month limit exemption because trade options are functionally equivalent to a forward contract and the conditional exemption does not restrict holding forwards.[651]

One commenter supported the conditional spot month limit exemption provided that the Commission modifies its proposal to allow independently-operated subsidiaries to hold positions in physical-delivery contracts if the subsidiary engages in separate and independent trading activities, shares no employees, and is not jointly directed in its trading activity with other subsidiaries by the parent company.[652]

Some commenters supported the continuation of the practice of DCMs separately establishing and maintaining their own conditional spot month limits and not aggregating cash-settled limits across exchanges and the OTC market, arguing that the resultant aggregated limit will be unnecessarily restrictive and result in lower liquidity and increased volatility.[653]

Some commenters expressed the view that the filing of daily Form 504 reports to satisfy the conditional spot month limit exemption was burdensome, and recommended less frequent reporting such as monthly reports [654] or no reporting at all.[655]

Two exchanges which currently permit a conditional spot month limit exemption, CME and ICE, have each submitted several comments regarding the exemption, some in direct response to the other exchange's comments. This back-and-forth nature of the disagreement surrounding the conditional spot month limit exemption has been significant and, on many aspects of the previously proposed exemption, the comments have been in direct opposition to each other. CME submitted a comment letter in response to the 2016 Supplemental Position Limits Proposal that reiterated its belief that the conditional limit would drain liquidity from the physical-delivery contract; [656] ICE responded that nothing in the natural gas market has suggested that the physical-delivery contract has been harmed.[657] ICE noted that CME's current conditional limit benefits CME's own cash-settled natural gas contracts; [658] CME responded that it opposes any conditional limit framework even though such opposition could work ''to the detriment of CME Group's commercial interests in certain of its cash-settled markets.'' [659] CME stated its belief that the CEA necessitates ''one-to-one limit treatment and similar exemptions'' for both physical-delivery and cash-settled contracts within a particular commodity; [660] ICE suggested that removing or reducing the conditional limit would ''disrupt present market practice.'' [661]

ICE also submitted a series of charts, using CFTC Commitment of Traders

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[644] *See* December 2013 Position Limits Proposal, 78 FR at 75736–38.

[645] *Id.* at 75737.

[646] *Id.* at 75770.

[647] *Id.* at 75770, n. 782.

[648] *E.g.,* CL–FIA–59595 at 3 and 11; CL–EEI–EPSA–59602 at 9–10; CL–MFA–59606 at 5 and 19–20; CL–AIMA–59618 at 2; CL–ISDA/SIFMA–59611 at 31; CL–BG Group–59656 at 7; CL–BG Group–59937 at 5–6; CL–COPE–59662 at 23; CL–NGSA–59673 at 38–39; CL–NGSA–59941 at 3–4; CL–IECAssn–59957 at 9.

[649] CL–WGC–59558 at 4.

[650] *E.g.,* CL–Sen. Levin–59637 at 7; CL–AFR–59711 at 2; CL–A4A–59714 at 3; CL–Working Group–59693 at 59–60; CL–IECA–59713 at 3–4; CL–Better Markets–60401 at 17–18; CL–CME–59971 at 3; CL–CME–60307 at 4–5; CL–CME–60406 at 2; CL–CMOC–59720 at 3–6; CL–APGA–59722 at 8; CL–OSEC–59972 at 7; CL–RF–60372 at 3; CL–IATP–59701 at 5; CL–IATP–59704 at 6; CL–IATP–60394 at 2; CL–NGFA–59681 at 6.

[651] *E.g.,* CL–FIA–59595 at 20; CL–COPE–59662 at 23; CL–EEI–EPSA–60926 at 7, CL–EEI–Sup–60386 at 3–4; CL–Working Group–59693 at 59–60.

[652] CL–SEMP–59926 at 4–6; CL–SEMP–60384 at 5–6.

[653] *E.g.,* CL–IECAssn–59713 at 30–31; CL–ICE–59966 at 4–5; CL–ICE–59962 at 4–7.

[654] CL–EEI–EPSA–59602 at 10; CL–ICE–59669 at 7.

[655] CL–COPE–59662 at 24.

[656] CL–CME–60926 at 4.

[657] CL–ICE–61009 at 1.

[658] *Id.*

[659] CL–CME–61008 at 2.

[660] *Id.* at 3.

[661] CL–ICE–61009 at 2.

Report data, illustrating the opposite: That spot-month open interest and volume in the physical-delivery contract (the NYMEX NG) have actually increased since the introduction of the conditional spot month limit.[662]

CME stated its opposition to the conditional limits ''as a matter of statutory law,'' opining that CEA section 4(b) does not allow the imposition of the conditional limit.[663] CME believes that the conditional limit contained in the December 2013 Position Limits Proposal ''contravenes Congress's intent behind the statutory 'comparability' requirement'' in multiple ways, and that neither ICE nor the Commission has ''addressed these aspects of [CEA section 4(b)].'' [664]

ICE replied that the Commission ''has no basis to modify the current conditional limit level'' because the markets ''have functioned efficiently and effectively'' and the Commission should not ''change the status quo.'' [665] ICE continued that the conditional limit of five times the physical-delivery contract's spot-month limit ''appears to be arbitrary and likely insufficient'' and opined that the Commission has not indicated how it arrived at that figure or how such a level ''strikes the right balance between supporting liquidity and diminishing undue burdens.'' [666] ICE concluded that the conditional exemption ''must be maintained at no less than the current levels.'' [667]

Commission Reproposal: After taking into consideration all the comments it received regarding the conditional spot-month limit exemption, the Commission is reproposing the conditional spot-month limit exemption in natural gas markets only. The Commission believes the volume of comments regarding the conditional spot-month limit exemption indicates the importance of careful and thoughtful analysis prior to finalizing policy with respect to conditional spot-month limit exemptions in other cash-settled referenced contracts. In particular, the considerations may vary, and should be considered in relation to the particular commodity at issue. As such, the Commission believes it is prudent to proceed cautiously in expanding the conditional spot-month limit exemption beyond the natural gas markets where it is currently employed. The Commission encourages exchanges and/or market participants who believe that the Commission should extend the conditional spot-month limit exemption to additional commodities to petition the Commission to issue a rule pursuant to § 13.2 of the Commission's regulations.[668]

With respect to natural gas cash-settled referenced contracts, the reproposed rules allow market participants to exceed the position limit provided that such positions do not exceed 10,000 contracts and the person holding or controlling such positions does not hold or control positions in the spot-month natural gas physical-delivery referenced contract (NYMEX NG). Persons relying upon this exemption must file Form 504 during the spot month.[669]

The Commission observes that the conditional exemption level of 10,000 contracts is equal to five times the federal natural gas spot-month position limit level of 2,000 contracts. The conditional exemption level is also equal to the sum of the current conditional exemption levels for each of the NYMEX HH contract and the ICE NG LD1 contract. The Commission believes the level of 10,000 contracts provides relief for market participants who currently may hold or control 5,000 contracts in each of these two cash-settled natural gas futures contracts and an unlimited number of cash-settled swaps, while still furthering the purposes of the Dodd-Frank Act's amendments to CEA section 4a.

The Commission is proposing the fixed figure of 10,000 contracts, rather than the variable figure of five times the spot-month position limit level, in order to avoid confusion in the event NYMEX were to set its spot-month limit in the physical-delivery NYMEX NG contract at a level below 2,000 contracts.

The Commission provides, for informational purposes, summary statistical information that it considered in declining to extend the conditional spot-month limit exemption beyond the natural gas referenced contract. The four tables below present the number of unique persons that held positions in commodity derivative contracts greater than or equal to the specified levels, as reported to the Commission under the large trader reporting systems for futures and swaps, for the period July 1, 2014 to June 30, 2016. The table also presents counts of unique reportable persons, whether reportable under part 17 (futures and future option contracts) or under part 20 (swap contracts). The method the Commission used to analyze this large trader data is discussed above, under § 150.2.

The four tables group commodities only for convenience of presentation. In each table, the term ''25% DS'' means 25 percent of the deliverable supply as estimated by the exchange listing the core referenced futures contract and verified as reasonable by the Commission. Similarly, ''15% DS'' means 15 percent of estimated deliverable supply. An asterisk (''*'') means that fewer than four unique persons were reported. ''CME proposal'' means the level recommended by the CME Group for the spot-month limit. MGEX submitted a recommended spot-month limit level that is slightly less than 25 percent of estimated deliverable supply but did not affect the reported number of unique persons; no other exchange recommended a spot-month level of less than 25 percent of estimated deliverable supply.

For the first group of commodities, there was no unique person in the cash-settled referenced contracts whose position would have exceeded 25 percent of the exchange's estimated deliverable supply. Moreover, no unique person held a position in the cash-settled referenced contracts that would have exceeded the reproposed spot-month limits discussed under § 150.2, above, that are lower than 25 percent of the exchange's estimated deliverable supply.

[662] *Id.* at 3–6.

[663] CL–CME–61008 at 2–3. CEA section 4(b)(1)(B)(ii)(1) imposes requirements on a foreign board of trade (''FBOT'') as a condition of providing U.S. persons direct access to the electronic trading and order-matching systems of the FBOT with respect to a contract that settles against any price of one or more contracts listed for trading on a registered entity. Such FBOT must adopt position limits for contract(s) that are ''comparable'' to the position limits adopted by the registered entity for the contract(s) against which the FBOT contract settles. 7 U.S.C. 6(b)(1)(B)(ii)(1), codified in 17 CFR 48.8(c)(1)(ii)(A).

[664] CL–CME–61008 at 3.

[665] CL–ICE–61022 at 2.

[666] *Id.*

[667] *Id.*

[668] 17 CFR 13.2.

[669] *See infra* discussion of part 19 and Form 504, below.

TABLE III–B–21—CME GROUP AND MGEX AGRICULTURAL CONTRACTS

Core-referenced futures contract	Basis of spot-month level	Position limit level	Number of unique persons >= level		Number of reportable persons in market	
			Spot month cash settled	Spot month physical delivery	Spot month only	All months
Corn	CME proposal	600	0	36	1,050	2,606
(CBOT current limit 600)	25% DS	900	0	20		
Oats	CME proposal	600	0	0	33	173
(CBOT current limit 600)	25% DS	900	0	0		
Soybeans	CME proposal	600	0	22	929	2,503
(CBOT current limit 600)	25% DS	1,200	0	14		
Soybean Meal	CME proposal	720	0	14	381	978
(CBOT current limit 720)	25% DS	2,000	0	(*)		
Soybean Oil	CME proposal	540	0	21	397	1,034
(CBOT current limit 540)	25% DS	3,400	0	0		
Wheat (CBOT)	CME proposal	600	0	11	444	1,867
(CBOT current limit 600)	25% DS	1,000	0	6		
Wheat (MGEX)	Parity w/CME proposal	600	0	(*)	102	342
(MGEX current limit 600)	Approx. 25% DS	1,000	0	(*)		
Wheat (KCBT)	CME proposal	600	0	4	250	718
(KCBT current limit 600)	25% CBOT DS	1,000	0	(*)		
	25% DS	3,000	0	(*)		
Rough Rice	CME proposal	600	0	0	91	281
(CBOT current limit 600)	25% DS	2,300	0	0		

For the second group of commodities, there was no unique person in the cash-settled referenced contracts whose position would have exceeded 25 percent of the exchange's estimated deliverable supply or, in the case of Live Cattle, the current exchange limit level of 450 contracts. Moreover, other than in the Sugar No. 11 contract, no unique person held a position in the cash-settled referenced contracts that would have exceeded 15 percent of the exchange's estimated deliverable supply. For informational purposes, the table also shows for Live Cattle that no unique person held a position in the cash-settled referenced contracts that would have exceeded 60 percent of the exchange's current spot-month limit of 450 contracts.[670]

TABLE III–B–22—OTHER AGRICULTURAL CONTRACTS AND ICE FUTURES U.S. SOFTS

Core-referenced futures contract	Basis of spot-month level	Position limit level	Number of unique persons >= level		Number of unique persons in market	
			Spot month cash settled	Spot month physical delivery	Spot month only	All months
Cotton No. 2	15% DS	960	0	(*)	122	1,000
(ICE current limit 300)	25% DS	1,600	0	0		
Cocoa	15% DS	3,300	0	0	164	682
(ICE current limit 1,000)	25% DS	5,500	0	0		
Coffee	15% DS	1,440	0	(*)	336	1,175
(ICE current limit 500)	25% DS	2,400	0	(*)		
Orange Juice	15% DS	1,680	0	0	38	242
(ICE current limit 300)	25% DS	2,800	0	0		
Live Cattle	60% Current Limit	225	0	33	616	1,436
(CME current limit 450)	Current limit *	450	0	0		
Sugar No. 11	15% DS	13,980	(*)	10	443	874
(ICE current limit 5,000)	25% DS	23,300	0	(*)		
Sugar No. 16	15% DS	4,200	0	0	12	22
(ICE current limit 1,000)	25% DS	7,000	0	0		

For the third group of energy commodities, there were a number of unique persons in the cash-settled referenced contracts whose position would have exceeded 25 percent of the exchange's estimated deliverable supply. For energy commodities other than natural gas, there were fewer than 20 unique persons that had cash-settled positions in excess of the reproposed spot-month limit levels, each based on 25 percent of deliverable supply, as discussed above under § 150.2. However, for natural gas referenced contracts, 131 unique persons had cash-settled positions in excess of the reproposed spot-month limit level of 2,000 contracts. As can be observed in the table below, only 20 unique persons had cash-settled referenced contract positions that would have exceeded the

[670] The Commission notes that 60 percent of the 450 contract spot-month limit is analogous to the counts presented for 15 percent of estimated deliverable supply. That is, 60 percent of 25 percent equals 15 percent.

reproposed natural gas conditional spot-month limit level of 10,000 contracts. Thus, a conditional spot-month limit exemption in natural gas referenced contracts potentially would provide relief to a substantial number of market participants, each of whom did not have a position that was extraordinarily large in relation to other traders' positions in cash-settled referenced contracts.

TABLE III–B–23—ENERGY CONTRACTS

Core-referenced futures contract	Basis of spot-month level	Position limit level	Number of unique persons >= level		Number of unique persons in market	
			Spot month cash settled	Spot month physical delivery	Spot month only	All months
Crude Oil, Light Sweet (WTI).	CME proposal *	6,000	19	8	1,773	2,673
(NYMEX current limit	25% DS	10,400	16	(*)		
3,000 contracts)	50% DS	20,800	(*)	0		
Gasoline Blendstock (RBOB).	CME proposal	2,000	23	14	463	837
(NYMEX current limit	25% DS	6,800	(*)	0		
1,000 contracts)	50% DS	13,600	0	0		
Natural Gas	25% DS	2,000	131	16	1,400	1,846
(NYMEX current limit	50% DS	4,000	77	(*)		
1,000 contracts)	Current single exchange conditional spot-month limit exemption.	5,000	65	(*)		
	Conditional spot-month limit exemption.	*10,000*	20	0		
ULSD (HO)	CME proposal	2,000	24	11	470	760
(NYMEX current limit	25% DS	2,900	15	5		
1,000 contracts)	50% DS	5,800	5	0		

* For WTI, CME Group recommended a step-down spot-month limit of 6,000/5,000/4,000 contracts in the last three days of trading.

For the fourth group of metal commodities, there were a few unique persons in the cash-settled referenced contracts whose position would have exceeded the reproposed levels of the spot-month limits, based on the CME Group's recommended levels, as discussed above under § 150.2. However, there were fewer than 20 unique persons that had cash-settled positions in excess of the reproposed spot-month limit levels for metal commodities; this is in marked contrast to the 131 unique persons who had cash-settled positions in excess of the reproposed spot-month limit for natural gas contracts. The Commission, in consideration of the distribution of unique persons holding positions in cash-settled metal commodity contracts across the 24 calendar months of its analysis, particularly in platinum,[671] is of the view that the spot-month limit level, as discussed above under § 150.2, and without a conditional spot-month limit exemption, is within the range of acceptable limit levels that, to the maximum extent practicable, may achieve the statutory policy objectives in CEA section 4a(a)(3)(B).

TABLE III–B–24—METAL CONTRACTS (COMEX DIVISION OF NYMEX)

Core-referenced futures contract	Basis of spot-month level	Position limit level	Number of unique persons >= level		Number of unique persons in market	
			Spot month cash settled	Spot month physical delivery	Spot month only	All months
Copper	CME proposal	1,000	0	(*)	493	1,457
(current limit 1,000)	25% DS	1,100	0	(*)		
Gold	CME proposal	6,000	(*)	(*)	518	1,557
(current limit 3,000)	25% DS	11,200	0	0		
Palladium	CME proposal	100	6	14	164	580
(current limit 100)	25% DS	900	0	0		
Platinum	CME proposal	500	13	(*)	235	842
(current limit 500)	25% DS	900	10	(*)		
	50% DS	1,800	(*)	0		
Silver	CME proposal	3,000	0	0	311	1,023
(current limit 1,500)	25% DS	5,600	0	0		

[671] As can be observed in the open interest table discussed under § 150.2, above, the Commission notes that open interest in cash-settled platinum contracts was markedly lower in the second 12-month review period (year 2), than in the first 12-month review period (year 1).

e. Proposed Recordkeeping and Special Call Requirements—§ 150.3(g) and § 150.3(h)

Proposed Rules: As proposed in the December 2013 Position Limits Proposal, § 150.3(g) specifies recordkeeping requirements for persons who claim any exemption set forth in § 150.3. Persons claiming exemptions under previously proposed § 150.3 must maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions. Furthermore, such persons must make such books and records available to the Commission upon request under previously proposed § 150.3(h), which would preserve the ''special call'' rule set forth in current § 150.3(b). This ''special call'' rule would have required that any person claiming an exemption under § 150.3 must, upon request, provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash market positions which support the claim of exemption; and the relevant business relationships supporting a claim of exemption.

The Commission noted that the previously proposed rules concerning detailed recordkeeping and special calls are designed to help ensure that any person who claims any exemption set forth in § 150.3 can demonstrate a legitimate purpose for doing so.[672]

Comments Received: The Commission did not receive any comments on the recordkeeping provisions in § 150.3(g) as proposed in the December 2013 Position Limits Proposal. With respect to previously proposed § 150.3(h), one commenter opposed the ''special call'' provision because, in the commenter's opinion, it is ''too passive.'' The commenter advocated, instead, a revision requiring persons claiming an exemption to maintain books and records on an ongoing basis and provide information to the Commission on a periodic and automatic basis, because even if the Commission lacked staff and resources to review the submitted material in real-time, Commission staff would have detailed historical data for use in compliance audits. This commenter stated that since required records are likely to be kept in an electronic format, the more frequent reporting requirement would not be considered burdensome.[673]

Commission Reproposal: The Commission believes the previously proposed recordkeeping and ''special call'' provisions in § 150.3(g) and § 150.3(h), respectively, are sufficient to limit abuse of exemptions without causing undue burdens on market participants. The Commission is reproposing these sections generally as proposed in the December 2013 Position Limits Proposal. The Commission is clarifying, in reproposed § 150.3(g)(2), that the bona fides of the pass-through swap counterparty may be determined at the time of the transaction or, alternatively, at such later time that the counterparty can show the swap position to be a bona fide hedging position. As previously proposed, such bona fides could only be determined at the time of the transaction, as opposed to at a later time.

D. § 150.5—Exchange-Set Speculative Position Limits and Parts 37 and 38

1. Background

As discussed above, the Commission currently sets and enforces position limits pursuant to its broad authority under CEA section 4a,[674] and does so only with respect to certain enumerated agricultural products.[675] As the Commission explained above and in the December 2013 Position Limits Proposal,[676] section 735 of the Dodd-Frank Act amended section 5(d)(1) of the CEA to explicitly provide that the Commission may mandate the manner in which DCMs must comply with the core principles.[677] However, Congress limited the exercise of reasonable discretion by DCMs only where the Commission has acted by regulation.[678]

The Dodd-Frank Act also amended DCM core principle 5. As amended, DCM core principle 5 requires that, for any contract that is subject to a position limitation established by the Commission pursuant to CEA section 4a(a), the DCM ''shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.''[679] Moreover, the Dodd-Frank Act added CEA section 5h to provide a regulatory framework for Commission oversight of SEFs.[680] Under SEF core principle 6, which parallels DCM core principle 5, Congress required that SEFs that are trading facilities adopt for each swap, as is necessary and appropriate, position limits or position accountability.[681] Furthermore, Congress required that, for any contract that is subject to a Federal position limit under CEA section 4a(a), the SEF shall set its position limits at a level no higher than the position limitation established by the Commission.[682]

2. Summary

As explained in the December 2013 Position Limits Proposal,[683] to implement the authority provided by section 735 of the Dodd-Frank Act amendments to CEA sections 5(d)(1) and 5h(f)(1), the Commission evaluated its pre-Dodd-Frank Act regulations and approach to oversight of DCMs, which had consisted largely of published guidance and acceptable practices, with the aim of updating them to conform to the new Dodd-Frank Act regulatory framework. Based on that review, and pursuant to the authority given to the Commission in amended sections 5(d)(1) and 5h(f)(1) of the CEA, which permit the Commission to determine, by rule or regulation, the manner in which boards of trade and SEFs, respectively, must comply with the core principles,[684] the Commission in its December 2013 Position Limit Proposal, proposed several updates to § 150.5 to promote compliance with DCM core principle 5 and SEF core principle 6 governing position limitations or accountability.[685]

First, the Commission proposed amendments to the provisions of § 150.5 to include SEFs and swaps. Second, the Commission proposed to codify rules and revise acceptable practices for

[672] December 2013 Position Limits Proposal, 78 FR at 75741.

[673] CL–O SEC–59972 at 5.

[674] CEA section 4a, as amended by the Dodd-Frank Act, provides the Commission with broad authority to set position limits, including an extension of its position limits authority to swaps positions. 7 U.S.C. 6a. *See supra* discussion of CEA section 4a.

[675] The position limits on these agricultural contracts are referred to as ''legacy'' limits, and the listed commodities are referred to as the ''enumerated'' agricultural commodities. This list of enumerated agricultural contracts includes Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (and Mini-wheat), Soybean Oil, Soybean Meal, Hard Red Spring Wheat, Hard Winter Wheat, and Cotton No. 2. *See* 17 CFR 150.2.

[676] *See* December 2013 Position Limits Proposal, 78 FR at 75748.

[677] Specifically, the Dodd-Frank Act amended DCM core principle 1 to include the condition that ''[u]nless otherwise determined by the Commission by rule or regulation,'' boards of trade shall have reasonable discretion in establishing the manner in which they comply with the core principles. *See* CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B).

[678] *See* December 2013 Position Limits Proposal, 78 FR at 75748.

[679] *See* CEA section 5(d)(5)(B) (amended 2010), 7 U.S.C. 7(d)(5)(B).

[680] *See* CEA section 5h, 7 U.S.C. 7b–3.

[681] CEA section 5h(f)(6), 7 U.S.C. 7b–3(f)(6); *see also* December 2013 Position Limits Proposal, 78 FR at 75748.

[682] *Id.*

[683] December 2013 Position Limits Proposal, 78 FR at 75754.

[684] *See* CEA sections 5(d)(1)(B) and 5h(f)(1)(B); 7 U.S.C. 7(d)(1)(B) and 7b–3(f)(1)(B).

[685] December 2013 Position Limits Proposal, 78 FR at 75754.

compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(a) for contracts subject to the federal position limits set forth in § 150.2. Third, the Commission proposed to codify rules and revise guidance and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(b) for contracts not subject to the federal position limits set forth in § 150.2. Fourth, the Commission proposed to amend § 150.5 to implement uniform requirements for DCMs and SEFs that are trading facilities relating to hedging exemptions across all types of contracts, including those that are subject to federal limits. Fifth, the Commission proposed to require DCMs and SEFs that are trading facilities to have aggregation policies that mirror the federal aggregation provisions.[686]

In addition to the changes to the provisions of § 150.5 proposed in the December 2013 Position Limits Proposal, the Commission also noted that it had, in response to the Dodd-Frank Act, previously published several earlier rulemakings that pertained to position limits, including in a notice of proposed rulemaking to amend part 38 to establish regulatory obligations that each DCM must meet in order to comply with section 5 of the CEA, as amended by the Dodd-Frank Act.[687] In addition, as noted above, the Commission had published a proposal to replace part 150 with a proposed part 151, which was later finalized before being vacated.[688] In the December 2013 Position Limits Proposal, the Commission pointed out that as it was originally proposed, § 38.301 would require each DCM to comply with the requirements of part 151 as a condition of its compliance with DCM core principle 5.[689] When the Commission finalized Dodd-Frank updates to part 38 in 2012, it adopted a revised version of § 38.301 with an additional clause that requires DCMs to continue to meet the requirements of part 150 of the Commission's regulations—the current position limit regulations—until such time that compliance would be required under part 151.[690] At that time, the Commission explained that this clarification would ensure that DCMs were in compliance with the Commission's regulations under part 150 during the interim period until the compliance date for the new position limits regulations of part 151 would take effect.[691] The Commission further explained that its new regulation, § 38.301, was based on the Dodd-Frank amendments to the DCM core principles regime, which collectively would provide that DCM discretion in setting position limits or position accountability levels was limited by Commission regulations setting position limits.[692]

Similarly, as the Commission noted in the December 2013 Position Limits Proposal,[693] when in 2010 the Commission proposed to adopt a regulatory scheme applicable to SEFs, it proposed to require that SEFs establish position limits in accordance with the requirements set forth in part 151 of the Commission's regulations under proposed § 37.601.[694] The Commission pointed out that it had revised § 37.601 in the SEF final rulemaking, to state that until such time that compliance was required under part 151, a SEF may refer to the guidance and/or acceptable practices in Appendix B of part 37 to demonstrate to the Commission compliance with the requirements of SEF core principle 6.[695]

In the December 2013 Position Limits Proposal, the Commission noted that in light of the District Court vacatur of part 151, the Commission proposed to amend § 37.601 to delete the reference to vacated part 151. The amendment would have instead required that SEFs that are trading facilities meet the requirements of part 150, which would be comparable to the DCM requirement, since, as proposed in the December 2013 Position Limits Proposal, § 150.5 would apply to commodity derivative contracts, whether listed on a DCM or on a SEF that is a trading facility. At the same time, the Commission would have amended Appendix B to part 37, which provides guidance on complying with core principles, both initially and on an ongoing basis, to maintain SEF registration.[696] Since the December 2013 Position Limits Proposal required that SEFs that are trading facilities meet the requirements of part 150, the proposed amendments to the guidance regarding SEF core principle 6 reiterated that requirement. The Commission noted that for SEFs that are not trading facilities, to whom core principle 6 would not be applicable under the statutory language, part 150 should have been considered as guidance.[697]

More recently, the Commission issued the 2016 Supplemental Position Limits Proposal to revise and amend certain parts of the December 2013 Position Limits Proposal based on comments received on the December 2013 Position Limits Proposal,[698] viewpoints expressed during a Roundtable on Position Limits,[699] several Commission advisory committee meetings that each provided a focused forum for participants to discuss some aspects of the December 2013 Position Limits Proposal,[700] and information obtained in the course of ongoing Commission

[686] *Id.* Aggregation exemptions can be used, in effect, as a way for a trader to acquire a larger speculative position. As noted in the December 2013 Position Limits Proposal, the Commission believes that it is important that the aggregation rules set out, to the extent feasible, ''bright line'' standards that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. December 2013 Position Limits Proposal, 78 FR at 75754, n. 660.

[687] *See* December 2013 Position Limits Proposal, 78 FR at 75753; *see also* Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (Dec. 22, 2010) (''2010 Part 38 Proposed Rule'').

[688] *See supra* discussion under Part I.B (discussing the Commission's adoption of part 151,subsequently vacated).

[689] 2010 Part 38 Proposed Rule at 80585.

[690] Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36611, 36639 (Jun. 19, 2012) (''Final Part 38 Rule''). The Commission mandated in final § 38.301 that, in order to comply with DCM core principle 5, a DCM must ''meet the requirements of parts 150 and 151 of this chapter, as applicable.'' *See also* 17 CFR 38.301.

[691] Final Part 38 Rule at 36639.

[692] *Id.* (discussing the Dodd-Frank amendments to the DCM core principles); *see also* CEA sections 5(d)(1) and 5(d)(5), as amended by the Dodd-Frank Act.

[693] December 2013 Position Limits Proposal, 78 FR at 75753.

[694] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214 (Jan. 7, 2011) (''SEF final rulemaking''). Current § 37.601 provides requirements for SEFs that are trading facilities to comply with SEF core principle 6 (Position Limits or Accountability), while the guidance to SEF core principle 6 (Position Limits or Accountability) in Appendix B to part 37, cites to part 151.

[695] Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (June 4, 2013). Current § 37.601 provides requirements for SEFs that are trading facilities to comply with SEF core principle 6 (Position Limits or Accountability).

[696] Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance with Core Principles.

[697] December 2013 Position Limits Proposal, 78 FR at 75753.

[698] Comments on the December 2013 Position Limits Proposal are accessible on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1436*.

[699] A transcript of the June 19, 2014 Roundtable on Position Limits is available on the Commission's Web site at *http://www.cftc.gov/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission_061914-trans.pdf*.

[700] Information regarding the December 9, 2014 and September 22, 2015 meetings of the Agricultural Advisory Committee, sponsored by Chairman Massad, is accessible on the Commission's Web site at *http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_meetings*. Information regarding February 26, 2015 and the July 29, 2015 meetings of the Energy & Environmental Markets Advisory Committee (''EEMAC''), sponsored by Commission Giancarlo, is accessible on the Commission's Web site at *http://www.cftc.gov/About/CFTCCommittees/EnergyEnvironmentalMarketsAdvisory/emac_meetings*.

review of SEF registration applications.[701]

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to delay for exchanges that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps at this time by: (i) Adding Appendix E to part 150 to provide guidance regarding § 150.5; and (ii) revising guidance on DCM Core Principle 5 and SEF Core Principle 6 that corresponds to that proposed guidance regarding § 150.5.[702] In addition, the Commission in the 2016 Supplemental Position Limits Proposal proposed new alternative processes for DCMs and SEFs to recognize certain positions in commodity derivative contracts as non-enumerated bona fide hedges or enumerated anticipatory bona fide hedges, as well as to exempt from federal position limits certain spread positions, in each case subject to Commission review.[703] Moreover, the Commission proposed that DCMs and SEFs could recognize and exempt from exchange position limits certain non-enumerated bona fide hedging positions, enumerated anticipatory bona fide hedges, and certain spread positions.[704] To effectuate the latter proposals, the Commission proposed amendments to § 150.3 and new § 150.9, 150.10, and 150.11, as well as corresponding amendments to § 150.5(a)(2) and 150.5(b)(5).[705]

3. Discussion

As discussed in greater detail below, the Commission has determined to repropose § 150.5 largely as proposed in the December 2013 Position Limit Proposal and as revised in the 2016 Supplemental Position Limits Proposal. In addition, the Commission has determined to repropose the previously proposed amendments to § 37.601 and § 38.301.[706]

Some changes were made to § 150.5 in response to concerns raised by commenters; other changes to the reproposed regulation are to conform to changes made in other sections. For example, in reproposing § 150.5(b)(1) and (2), the Commission has determined to make certain changes to the acceptable practices for establishing the levels of individual non-spot or all-months combined position limits for futures and future option contracts that are not subject to federal limits. The changes to reproposed § 150.5(b)(1) and (2) correspond to changes to reproposed § 150.2(e)(4)(iv) discussed above, for establishing the levels of individual non-spot or all-months combined positions limits for futures and future option contracts that are subject to federal limits. Moreover, several non-substantive changes were made in response to commenter requests to provide greater clarity.[707]

The essential features of the changes to reproposed § 150.5 are discussed below.

a. Treatment of Swaps on SEFs and DCMs

i. December 2013 Position Limits Proposal. As explained above, CEA section 4a(a)(5), as amended by the Dodd-Frank Act, requires federal position limits for swaps that are ''economically equivalent'' to futures and options that are subject to mandatory position limits under CEA section 4a(a)(2).[708] The CEA also requires in SEF Core Principle 6 that a SEF that is a trading facility: (i) Set its exchange-set limit on swaps at a level no higher than that of the federal position limit; and (ii) monitor positions established on or through the SEF for compliance with the federal position limit and any exchange-set limit.[709] Similarly, for all contracts subject to a federal position limit, including swaps, DCMs, under DCM Core Principle 5, must set a position limit no higher than the federal limit.[710]

The December 2013 Position Limits Proposal specified that federal position limits would apply to referenced contracts,[711] whether futures or swaps, regardless of where the futures or swaps positions are established.[712] Consistent with DCM Core Principle 5 and SEF Core Principle 6, the Commission at § 150.5(a)(1) previously proposed that for any commodity derivative contract that is subject to a speculative position limit under § 150.2, a DCM or SEF that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.'' [713]

ii. Comments Received to December 2013 Position Limits Proposal

Several comment letters on previously proposed § 150.5 recommended that the Commission not require SEFs to establish position limits.[714] Two noted that because SEF participants may use more than one derivatives clearing organization (''DCO''), a SEF may not know when a position has been offset.[715] Further, during the ongoing SEF registration process,[716] a number of

[701] Added by the Dodd-Frank Act, section 5h(a) of the CEA, 7 U.S.C. 7b–3, requires SEFs to register with the Commission. *See generally* ''Core Principles and Other Requirements for Swap Execution Facilities,'' 78 FR 33476 (Aug. 5, 2013). Information regarding the SEF application process is available on the Commission's Web site at *http://www.cftc.gov/IndustryOversight/TradingOrganizations/SEF2/sefhowto.*

[702] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38459–62. *See also* DCM Core Principle 5, Position Limitations or Accountability (contained in CEA section 5(d)(5), 7 U.S.C. 7(d)(5)) and SEF Core Principle 6, Position Limits or Accountability (contained in CEA section 5h(f)(6), 7 U.S.C. 7b–3(f)(6)).

[703] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38467–76 (providing for recognition of certain positions in commodity derivative contracts as non-enumerated bona fide hedges), at 38480–81 (providing for recognition of certain positions in commodity derivatives contracts as enumerated anticipatory bona fide hedges); and at 38476–80 (providing for exemptions from federal position limits for certain spread positions).

[704] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38482.

[705] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38504–13. The 2016 Supplemental Position Limits Proposal did not address the changes to §§ 37.601 or 38.301 proposed in the December 2013 Position Limits Proposal.

[706] The Commission did not receive any comments regarding the proposed changes to § 37.601 and § 38.301.

[707] *See* the removal of the provisions regarding excluded commodities from § 150.5(b) and their placement in a new section (c), which addresses only excluded commodities. In addition to the reorganization of the excluded commodity provisions, changes were made to those provisions to track changes made in other sections or paragraphs and to address concerns raised by commenters and confusion that became apparent in the comment letters.

[708] *See* December 2013 Position Limits Proposal, 78 FR at 75681–5 (the Commission interpret the statute to mandate that the Commission impose limits on futures, options, and swaps, in agricultural and exempt commodities).

[709] CEA section 5h(f)(6)(B), 7 U.S.C. 7b–3(f)(6) (SEF Core Principle 6B). The Commission codified SEF Core Principle 6, added by the Dodd-Frank Act, in § 37.600 of its regulations, 17 CFR 37.600. *See generally* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33533–34 (June 4, 2013).

[710] CEA section 5(d)(5), 7 U.S.C. 7(d)(5) (DCM Core Principle 5). The Commission codified DCM Core Principle 5, as amended by the Dodd-Frank Act, in § 38.300 of its regulations, 17 CFR 38.300. *See* Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36639 (June 19, 2012).

[711] Under the December 2013 Position Limits Proposal, ''referenced contracts'' are defined as futures, options, economically equivalent swaps, and certain foreign board of trade contracts, in physical commodities, and are subject to the proposed federal position limits. *See* December 2013 Position Limits Proposal, 78 FR at 75825.

[712] *See* December 2013 Position Limits Proposal, 78 FR at 75826 (previously proposed § 150.2).

[713] *See* December 2013 Position Limits Proposal, 78 FR at 75754–8.

[714] CL–CMC–59634 at 14–15, CL–FIA–60392 at 10. One comment letter stated that SEFs should be exempt from the requirement to set positions limits because SEFs are in the early stages of development and could be harmed by limits that restrict liquidity. CL–ISDA/SIFMA–59611 at 35.

[715] CL–CMC–59634 at 14–15, CL–FIA–60392 at 10.

[716] Under CEA section 5h(a)(1), no person may operate a facility for trading swaps unless the

Continued

persons applying to become registered as SEFs told the Commission that they lack access to information that would enable them to knowledgeably establish position limits or monitor positions.[717] As the Commission observed in the 2016 Supplemental Position Limits Proposal, this information gap would also be a concern for DCMs in respect of swaps.[718]

iii. 2016 Supplemental Position Limits Proposal

As explained above, in the 2016 Supplemental Position Limits Proposal, the Commission proposed to temporarily delay for DCMs and SEFs that are trading facilities, which lack access to sufficient swap position information, the requirement to establish and monitor position limits on swaps by: (i) Adding Appendix E to part 150 to provide guidance regarding § 150.5; and (ii) revising guidance on DCM Core Principle 5 and SEF Core Principle 6 that corresponds to that guidance regarding § 150.5.[719] At that time, the Commission acknowledged that, if an exchange does not have access to sufficient data regarding individual market participants' open swap positions, then it cannot effectively monitor swap position limits, and expressed its belief that most exchanges do not have access to sufficient swap position information to effectively monitor swap position limits.[720]

In this regard, the Commission expressed its belief that an exchange would have or could have access to sufficient swap position information to effectively monitor swap position limits if, for example: (1) It had access to daily information about its market participants' open swap positions; or (2) it knows that its market participants regularly engage in large volumes of speculative trading activity, including through knowledge gained in surveillance of heavy trading activity, that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions [721] or total open swap positions.[722]

The Commission noted that it is possible that an exchange could obtain an indication of whether a swap position established on or through a particular exchange is increasing a market participant's swap position beyond a federal or exchange-set limit, if that exchange has data about some or all of a market participant's open swap position from the prior day and combines it with the transaction data from the current day, to obtain an indication of the market participant's current open swap position.[723] The indication would alert the exchange to contact the market participant to inquire about that participant's total open swap position.

The Commission expressed its belief that although this indication would not include the market participant's activity transacted away from that particular exchange, such monitoring would comply with CEA section 5h(f)(6)(B)(ii). However, the Commission observed that exchanges generally do not currently have access to a data source that identifies a market participant's reported open swap positions from the prior trading day. With only the transaction data from a particular exchange, it would be impracticable, if not impossible, for that exchange to monitor and enforce position limits for swaps.[724]

The Commission also acknowledged in the 2016 Supplemental Position Limits Proposal that it has neither

facility is registered as a SEF or DCM. 7 U.S.C. 7b–3(a)(1). A SEF must comply with core principles, including Core Principle 6 regarding position limits, as a condition of registration. CEA section 5h(f)(1), 7 U.S.C. 7b–3(f)(1).

[717] For example, in a submission to the Commission under part 40 of the Commission's regulations, BGC Derivative Markets, L.P. states that ''[t]he information to administer limits or accountability levels cannot be readily ascertained. Position limits or accountability levels apply market-wide to a trader's overall position in a given swap. To monitor this position, a SEF must have access to information about a trader's overall position. However, a SEF only has information about swap transactions that take place on its own Facility and has no way of knowing whether a particular trade on its facility adds to or reduces a trader's position. And because swaps may trade on a number of facilities or, in many cases, over-the-counter, a SEF does not know the size of the trader's overall swap position and thus cannot ascertain whether the trader's position relative to any position limit. Such information would be required to be supplied to a SEF from a variety of independent sources, including SDRs, DCOs, and market participants themselves. Unless coordinated by the Commission operating a centralized reporting system, such a data collection requirement would be duplicative as each separate SEF required reporting by each information source.'' BGC Derivative Markets, L.P., Rule Submission 2015–09 (Oct. 6, 2015).

[718] 2016 Supplemental Position Limits Proposal, 81 FR at 38460.

[719] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38459–62.

[720] *Id.* at 38460. The Commission acknowledged that one SEF that may have access to sufficient swap position information by virtue of systems integration with affiliates that are CFTC registrants and shared personnel. This SEF requires that all of its listed swaps be cleared on an affiliated DCO, which reports to an affiliated SDR. 2016 Supplemental Position Limits Proposal, 81 FR at 38459; *see also* 38460, n. 32.

[721] *Id.* at 38460–61. For instance, heavy trading activity might cause an exchange to ask whether a market participant is building a large speculative position or whether the heavy trading activity is merely the result of a market participant making a market across several exchanges.

[722] *Id.* at 38461. *See* 17 CFR 45.3, 45.4, and 45.10. *See generally* CEA sections 4r (reporting and recordkeeping for uncleared swaps) and 21 (swap data repositories), 7 U.S.C. 6r and 24a, respectively. The Commission also observed that, unlike futures contracts, which are proprietary to a particular DCM and typically clear at a single DCO affiliated with the DCM, swaps in a particular commodity are not proprietary to any particular trading facility or platform. Market participants may execute swaps involving a particular commodity on or subject to the rules of multiple exchanges or, in some circumstances, OTC. Further, under the Commission regulations, data with respect to a particular swap transaction may be reported to any swap data repository (''SDR'').

[723] 2016 Supplemental Position Limits Proposal, 81 FR at 38461. The Commission observed, moreover, by way of example, that part 20 swaps data is a source that identifies a market participant's reported open swap positions from the prior trading day. So an exchange with access to part 20 swaps date could use it to add to any swap positions established on or through that exchange during the current trading day to get an indication of a potential position limit violation. Nonetheless, that market participant may have conducted other swap transactions in the same commodity, away from a particular exchange, that reduced its swap position. *Id.*

[724] *Id.* The Commission also noted that an exchange could theoretically obtain swap position data directly from market participants, for example, by requiring a market participant to report its swap positions, as a condition of trading on the exchange. The Commission observed, however, that it is unlikely that a single exchange would unilaterally impose a swaps reporting regime on market participants. *Id.* at 38461, n. 36. The Commission abandoned the approach of requiring market participants to report futures positions directly to the Commission many years ago. *Id.; see also* Reporting Requirements for Contract Markets, Futures Commission Merchants, Members of Exchanges and Large Traders, 46 FR 59960 (Dec. 8, 1981). Instead, the Commission and DCMs rely on a large trader reporting system where futures positions are reported by futures commission merchants, clearing members and foreign brokers. *See generally* part 19 of the Commission's regulations, 17 CFR part 19. *See also,* for example, the discussion of an exchange's large trader reporting system in the Division of Market Oversight Rule Enforcement Review of the Chicago Mercantile Exchange and the Chicago Board of Trade, July 26, 2013, at 24–7, available at *http://www.cftc.gov/idc/groups/public/@iodcms/documents/file/rercmecbot072613.pdf.*

Further, as noted above, exchanges do not have authority to demand swap position data from derivative clearing organizations or swap data repositories; nor do exchanges have general authority to demand market participants' swap position data from clearing members of DCOs or swap dealers (as the Commission does under part 20). 2016 Supplemental Position Limits Proposal, 81 FR at 38461, n. 36.

required any DCO [725] or SDR [726] to provide such swap data to exchanges,[727] nor provided any exchange with access to swaps data collected under part 20 of the Commission's regulations.[728]

The Commission stated that in light of the foregoing, it was proposing a delay in implementation of exchange-set limits for swaps only, and only for exchanges without sufficient swap position information.[729] After consideration of the circumstances described above, and in an effort to accomplish the policy objectives of the Dodd-Frank Act regulatory regime, including to facilitate trade processing of any swap and to promote the trading of swaps on SEFs,[730] the 2016 Supplemental Position Limits Proposal amended the guidance in the appendices to parts 37 and 38 of the Commission's regulations regarding SEF core principle 6 and DCM core principle 5, respectively. According to the 2016 Supplemental Position Limits Proposal, the revised guidance clarified that an exchange need not demonstrate compliance with SEF core principle 6 or DCM core principle 5 as applicable to swaps until it has access to sufficient swap position information, after which the guidance would no longer be applicable.[731] For clarity, the 2016 Supplemental Position Limits Proposal included the same guidance in a new Appendix E to proposed part 150 in the context of the Commission's proposed regulations regarding exchange-set position limits.

Although the Commission proposed to temporarily relieve exchanges that do not now have access to sufficient swap position information from having to set position limits on swaps, it also noted that nothing in the 2016 Supplemental Position Limits Proposal would prevent an exchange from nevertheless establishing position limits on swaps, while stating that it does seem unlikely that an exchange would implement position limits before acquiring sufficient swap position information because of the ensuing difficulty of enforcing such a limit. The Commission expressed its belief that providing delay for those exchanges that need it both preserved flexibility for subsequent Commission rulemaking and allowed for phased implementation of limitations on swaps by exchanges, as practicable.[732]

Additionally, the Commission observed that courts have authorized relieving regulated entities of their statutory obligations where compliance is impossible or impracticable,[733] and noted its view that it would be impracticable, if not impossible, for an exchange to monitor and enforce position limits for swaps with only the transaction data from that particular exchange.[734] The Commission expressed its belief that, accordingly, it was reasonable to delay implementation of this discrete aspect of position limits, only with respect to swaps position limits, and only for exchanges that lacked access to sufficient swap position information. This approach, the Commission believed, would further the policy objectives of the Dodd-Frank Act regulatory regime, including the facilitation of trade processing of swaps

[725] Core principle M for DCOs addresses information sharing for risk management purposes, but does not address information sharing with exchanges for other purposes. CEA section 5b(c)(2)(M), 7 U.S.C. 7a–1(c)(2)(M), and § 39.22, 17 CFR 39.22. The Commission has access to DCO information relating to trade and clearing details under § 39.19, 17 CFR 39.19, as is necessary to conduct its oversight of a DCO. However, the Commission has not used its general rulemaking authority under CEA section 8a(5), 7 U.S.C. 12a(5), to require DCOs to provide registered entities access to swap information, although the Commission could impose such a requirement by rule. CEA section 5b(c)(2)(A)(i), 7 U.S.C. 7a–1(c)(2)(A)(i).

[726] An SDR has a duty to provide direct electronic access to the Commission, or a designee of the Commission who may be a registered entity (such as an exchange). CEA section 21(c)(4), 7 U.S.C. 24a(c)(4). *See* 76 FR 54538 at 54551, n. 141 (Sept. 1, 2011). However, the Commission has not designated any exchange as a designee of the Commission for that purpose. Further, the Commission has not used its general rulemaking authority under CEA section 8a(5), 7 U.S.C. 12a(5), to require SDRs to provide registered entities (such as exchanges) access to swap information, although the Commission could impose such a requirement by rule. CEA section 21(a)(3)(A)(ii), 7 U.S.C. 24a(a)(3)(A)(ii). For purposes of comparison, the Securities and Exchange Commission (''SEC'') noted with regard to security-based swaps when it finalized its rules implementing its similar provision (which it described as a ''statutory requirement that security-based SDRs conditionally provide data to certain regulators and other authorities''), ''that one or more self-regulatory organizations potentially may seek such access under this provision.'' Access to Data Obtained by Security-Based Swap Data Repositories, 81 FR 60585, 50588 (Sept. 2, 2016). The SEC estimated that ''up to 30 domestic entities potentially might enter into such MOUs or other arrangements, reflecting the nine entities specifically identified by statute or the final rules, and up to 21 additional domestic governmental entities or self-regulatory organizations that may seek access to such data.'' *Id.* at 60593.

[727] As the Commission noted in the 2016 Supplemental Position Limits Proposal, even if such information were to be made available to exchanges, the swaps positions would need to be converted to futures-equivalent positions for purposes of monitoring position limits on a futures-equivalent basis. 2016 Supplemental Position Limits Proposal, 81 FR at 38461. *See also* December 2013 Positions Limits Proposal, 78 FR at 78 FR75825 (describing the proposed definition of futures-equivalent); 2016 Supplemental Position Limits Proposal at 38461 (describing amendments to that proposed definition).

[728] 2016 Supplemental Position Limits Proposal, 81 FR at 38461. The part 20 swaps data is reported in futures equivalents, but does not include data specifying where reportable positions in swaps were established.

The Commission stated in the December 2013 Position Limits Proposal that it preliminarily had decided not to use the swaps data then reported under part 20 for purposes of setting the initial levels of the proposed single and all-months-combined positions limits due to concerns about the reliability of such data. December 2013 Position Limits Proposal, 78 FR at 75533. The Commission also stated that it might use part 20 swaps data should it determine such data to be reliable, in order to establish higher initial levels in a final rule. *Id.* at 75734.

However, as the Commission noted in the 2016 Supplemental Position Limits Proposal, the quality of part 20 swaps data does appear to have improved somewhat since the December 2013 Position Limits Proposal, although some reports continue to have significant errors. The Commission stated that it is possible that it will be able to rely on swap open positions data, given adjustments for obvious errors (*e.g.,* data reported based on a unit of measure, such as an ounce, rather than a futures equivalent number of contracts), to establish higher initial levels of non-spot month limits in a final rule. 2016 Supplemental Position Limits Proposal, 81 FR at 38461.

Moreover, the quality of the data regarding reportable positions in swaps may have improved enough for the Commission to be able to rely on it when monitoring market participants' compliance with the proposed federal position limits.

[729] *Id.*

[730] *See, e.g.,* CEA sections 5h(b)(1)(B) and 5h(e), 7 U.S.C. 7b–3(b)(1)(B) and 7b–3(e), respectively.

[731] 2016 Supplemental Position Limits Proposal, 81 FR at 38461. The Commission stated that once the guidance was no longer applicable, a DCM or a SEF would be required to file rules with the Commission to implement the relevant position limits and demonstrate compliance with Core Principle 5 or 6, as appropriate. The Commission also noted that, for the same reasons regarding swap position data discussed above in respect of CEA section 5h(f)(6)(B), the guidance proposed in the 2016 Supplemental Position Limits Proposal would temporarily relieve SEFs of their statutory obligation under CEA section 5h(f)(6)(A). *Id.*

[732] As the Commission noted above, although the 2016 Supplemental Position Limits Proposal proposed position limits relief to SEFs and to DCMs in regards to swaps, it did not propose any alteration to the definition of referenced contract (including economically equivalent swaps) that was proposed in December 2013. *See also* December 2013 Position Limits Proposal, 78 FR at 75825.

[733] 2016 Supplemental Position Limits Proposal, 81 FR at 38462. *See also id.* at n. 44 (*See, e.g., Ass'n of Irritated Residents* v. *EPA,* 494 F.3d 1027, 1031 (D.C. Cir. 2007) (allowing regulated entities to enter into consent agreements with EPA—without notice and comment—that deferred prosecution of statutory violation until such time as compliance would be practicable); *Catron* v. *County Bd. Of Commissioners* v. *New Mexico Fish & Wildlife Serv.,* 75 F.3d 1429, 1435 (10th Cir.1966) (stating that 'Compliance with [the National Environmental Protection Act] is excused when there is a statutory conflict with the agency's authorizing legislation that prohibits or renders compliance impossible.' '')). The Commission noted, moreover, that ''it is axiomatic that courts will avoid reading statutes to reach absurd or unreasonable consequences'' (citing, as an example, *Griffin* v. *Oceanic Contractors, Inc.,* 458 U.S. 564 (1982)), and pointed out that to require an exchange to monitor position limits on swaps, when it currently has extremely limited visibility into a market participant's swap position, was, arguably, absurd and certainly appeared unreasonable. 2016 Supplemental Position Limits Proposal, 81 FR at 38462, n. 44.

[734] *Id.* at 38462.

and the promotion of trading swaps on SEFs. Finally, the Commission noted that while this approach would delay the requirement for certain exchanges to establish and monitor exchange-set limits on swaps, under the December 2013 Position Limits Proposal, federal position limits would apply to swaps that are economically equivalent to futures contracts subject to federal position limits.[735]

iv. Comments Received to 2016 Supplemental Position Limits Proposal

Several commenters addressed the Commission's proposed guidance on exchange-set limits on swaps.[736]

Regarding insufficient swap data, four commenters agreed that SEFs and DCMs lack access to sufficient swap position data to set exchange limits on swaps, and as such, the commenters support the Commission's decision to delay the position limit monitoring requirements for SEFs that are trading facilities and DCMs.[737] In addition, one commenter recommended that the Commission provide notice for public comments prior to implementing any determination that a DCM or SEF has access to sufficient swap position data to set exchange limits on swaps.[738] Further, two commenters recommended that the Commission identify a plan, to address the insufficient data issues, that goes beyond ''simply exempting affected exchanges.'' [739]

On the other hand, one commenter asserted that there should be no delay in implementing position limits for swaps because, according to the commenter, the Commission has access to sufficient swap data it needs to implement position limits.[740]

v. Commission Determination

The Commission has determined to repropose the treatment of swaps and SEFs as previously proposed in the 2016 Supplemental Position Limits Proposal for the reasons given above.[741]

Regarding the comments recommending that the Commission identify a plan to address the insufficient data issues that goes beyond ''simply exempting affected exchanges,'' the Commission may consider granting DCMs and SEFs, as self-regulatory organizations, access to part 20 data or SDR data at a later time.

In addition, regarding the comment that the Commission already has access to sufficient swap data in order to implement position limits, the Commission points out that it proposes to adopt a phased approach to updating its position limits regime.[742] In conjunction with this phased approach, the Commission believes that at this time it should limit its implementation of position limits for swaps to those that are referenced contracts.

b. § 150.5(a)—Requirements and Acceptable Practices for Commodity Derivative Contracts That Are Subject to Federal Position Limits

i. December 2013 Position Limits Proposal

Several requirements were added to § 150.5(a) in the December 2013 Position Limits Proposal to which a DCM or SEF that is a trading facility must adhere when setting position limits for contracts that are subject to the federal position limits listed in § 150.2.[743] Previously proposed § 150.5(a)(1) specified that a DCM or SEF that lists a contract on a commodity that is subject to federal position limits must adopt position limits for that contract at a level that is no higher than the federal position limit.[744] Exchanges with cash-settled contracts price-linked to contracts subject to federal limits would also be required to adopt those limit levels.

Previously proposed § 150.5(a)(3) would have required a DCM or SEF that is a trading facility to exempt from speculative position limits established under § 150.2 a swap position acquired in good faith in any pre-enactment and transition period swaps, in either case as defined in § 150.1.[745] However, previously proposed § 150.5(a)(3) would allow a person to net such a pre-existing swap with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit. Under previously proposed § 150.5(a)(4)(i), a DCM or SEF that is a trading facility must require compliance with spot month speculative position limits for pre-existing positions in commodity derivatives contracts other than pre-enactment or transition period swaps, while previously proposed § 150.5(a)(4)(ii) provides that a non-spot-month speculative position limit established under § 150.2 would not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit.[746] As proposed in the December 2013 Position Limits Proposal, however, such a pre-existing commodity derivative contract position must be attributed to the person if the person's position is increased after the effective date of such limit.[747]

Under the December 2013 Position Limits Proposal, the Commission had proposed to require DCMs and SEFs that are trading facilities to have aggregation polices that mirror the federal aggregation provisions.[748] Therefore,

[735] *Id.*

[736] *E.g.,* CL–FIA–60937 at 1,6; CL–WMBA–60945 at 1–2; CL–AFR–60953 at 2; CL–RER2–60962 at 1; CL–Better Markets–60928 at 6.

[737] CL–FIA–60937 at 2, 5–6; CL–WMBA–60945 at 1–2; CL–AFR–60953 at 2; CL–RER2–60962 at 1.

[738] CL–FIA–60937 at 2, 5–6.

[739] CL–AFR–60953 at 2; CL–RER2–60962 at 1.

[740] CL–Better Markets–60928 at 6.

[741] For purposes of clarity, the Commission is reproposing the guidance to provide for a temporarily delay for DCMs and SEFs that are trading facilities that lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps by reproposing as proposed in the 2016 Supplemental Position Limits Proposal: (i) Appendix E to Part 150 to provide guidance regarding reproposed § 150.5; and (ii) guidance on DCM Core Principle 5 and SEF Core Principle 6 that corresponds to that reproposed guidance regarding § 150.5.

[742] As the Commission noted in the December 2013 Position Limits Proposal, ''a phased approach will (i) reduce the potential administrative burden by not immediately imposing position limits on all commodity derivative contracts in physical commodities at once, and (ii) facilitate adoption of monitoring policies, procedures and systems by persons not currently subject to positions limits (such as traders in swaps that are not significant price discovery contracts).'' 78 FR 75680.

[743] As discussed above, 17 CFR 150.2 provides limits for specified agricultural contracts in the spot month, individual non-spot months, and all-months-combined.

[744] As previously proposed, § 150.5(a)(1) is in keeping with the mandate in core principle 5 as amended by the Dodd-Frank Act. *See* CEA section 5(d)(1)(B), 7 U.S.C. 7(d)(1)(B). SEF core principle 6 parallels DCM core principle 5. *Compare* CEA section 5h(f)(5), 7 U.S.C. 7b–3(f)(5) with CEA section 5(d)(5), 7 U.S.C. 7(d)(5).

[745] The Commission previously proposed to exercise its authority under CEA section 4a(a)(7) to exempt pre-Dodd-Frank and transition period swaps from speculative position limits (unless the trader elected to include such a position to net with post-effective date commodity derivative contracts). Such a pre-existing swap position would be exempt from initial spot month speculative position limits. December 2013 Position Limits Proposal, 78 FR at 75756, n. 674.

[746] *See* previously proposed 150.5(a)(4)(ii). *See also* CEA section 22(a)(5)(B), added by section 739 of the Dodd-Frank Act.

[747] *See* previously proposed 150.5(a)(4)(ii). Notwithstanding any pre-existing exemption adopted by a DCM or SEF that applied to speculative position limits in non-spot months, under the December 2013 Position Limits Proposal, a person holding pre-existing commodity derivative contracts (except for pre-existing swaps as described above) would be required to comply with spot month speculative position limits. However, nothing in previously proposed § 150.5(a)(4) would override the exclusion of pre-Dodd-Frank and transition period swaps from speculative position limits. December 2013 Position Limits Proposal, 78 FR at 75756, n. 675.

[748] December 2013 Position Limits Proposal, 78 FR at 75754, 75756. As noted above, aggregation exemptions can be used, in effect, as a way for a trader to acquire a larger speculative position, and the Commission believes that it is important that the aggregation rules set out, to the extent feasible, ''bright line'' standards that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. The December 2013 Position Limits Proposal also noted that ''. . . position aggregation exemptions, if not

previously proposed § 150.5(a)(5) required DCMs and SEFs that are trading facilities to have aggregation rules that conformed to the uniform standards listed in § 150.4.[749] As noted in the December 2013 Position Limits Proposal, aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits.[750]

A DCM or SEF that is a trading facility would have continued to be free to enforce position limits that are more stringent that the federal limits. The Commission clarified in the December 2013 Position Limits Proposal that federal spot month position limits do not to apply to physical-delivery contracts after delivery obligations are established.[751] Exchanges generally prohibit transfer or offset of positions once long and short position holders have been assigned delivery obligations. Previously proposed § 150.5(a)(6) clarified acceptable practices for a DCM or SEF that is a trading facility to enforce spot month limits against the combination of, for example, long positions that have not been stopped, stopped positions, and deliveries taken in the current spot month.[752]

ii. Comments Received to December 2013 Position Limits Proposal Regarding Proposed § 150.5(a)

One commenter recommended that exchanges be required to withdraw their position accountability and position limit regimes in deference to any federal limits and to conform their position limits to the federal limits so that a single regime will apply across exchanges.[753]

Two commenters recommended that the Commission clarify that basis contracts would be excluded from exchange-set limits in order to provide consistency since such contracts are excluded from the Commission's definition of referenced contract and thus are not subject to Federal limits.[754]

One commenter recommended that DCMs and SEFs that are trading facilities be given more discretion, particularly with respect to non-referenced contracts, over aggregation requirements.[755]

iii. 2016 Supplemental Position Limits Proposal

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to amend § 150.5(a)(2) as it was proposed in the December 2013 Position Limits Proposal.[756] The amendments would permit exchanges to recognize non-enumerated bona fide hedging positions under § 150.9, to grant spread exemptions from federal limits under § 150.10, and to recognize certain enumerated anticipatory bona fide hedging positions under § 150.11, each as contained in the 2016 Supplemental Position Limits Proposal. In conjunction with those amendments, the Commission proposed corresponding changes to § 150.3 and § 150.5(a)(2).

For example, § 150.5(a)(2)(i), as proposed in the December 2013 Position Limits Proposal, required that any exchange rules providing for hedge exemptions for commodity derivatives contracts subject to federal position limits conform to the definition of bona fide hedging position as defined in the amendments to § 150.1 contained in the December 2013 Position Limits Proposal. But because the 2016 Supplemental Position Limits Proposal incorporated the bona fide hedging position definition and provided for spread exemptions in 150.3(a)(1)(i), the 2016 Supplemental Position Limits Proposal proposed instead to cite to § 150.3 in § 150.5(a)(2).[757] Similarly, the application process provided for in § 150.5(a)(2) was amended to conform to the requirement in proposed § 150.10 and § 150.11 that exchange rules providing for exemptions for commodity derivatives contracts subject to federal position limits require that traders reapply on at least an annual basis. In addition, the changes to § 150.5(a)(2) clarified that exchanges may deny an application, or limit, condition, or revoke any exemption granted at any time.

Similarly, the 2016 Supplemental Position Limits Proposal amended previously proposed § 150.5(b) to require that exchange rules provide for recognition of a non-enumerated bona fide hedge ''in a manner consistent with the process described in § 150.9(a).'' Addressing the granting of spread exemptions for contracts not subject to federal position limits, the 2016 Supplemental Position Limits Proposal integrates in the standards of CEA section 4a(a)(3), providing that exchanges should take into account those standards when considering whether to grant spread exemptions. Finally, the 2016 Supplemental Position Limits Proposal clarified that for excluded commodities, the exchange can grant certain exemptions provided under paragraphs § 150.5(b)(5)(i) and (b)(5)(ii) in addition to the risk management exemption previously proposed in the December 2013 Position Limits Proposal.[758]

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uniform with the Commission's requirements, may serve to permit a person to obtain a larger position on a particular DCM or SEF than would be permitted under the federal limits. For example, if an exchange were to grant an aggregation position to a corporate person with aggregate positions above federal limits, that exchange may permit such person to be treated as two or more persons. The person would avoid violating exchange limits, but may be in violation of the federal limits. The Commission believes that a DCM or SEF, consistent with its responsibilities under applicable core principles, may serve an important role in ensuring compliance with federal positions limits and thereby protect the price discovery function of its market and guard against excessive speculation or manipulation. In the absence of uniform . . . position aggregation exemptions, DCMs or SEFs may not serve that role. December 2013 Position Limits Proposal, 78 FR at 75754. *See also* 2016 Final Aggregation Rule (regarding amendments to 150.4, which were approved by the Commission in a separate release concurrently with this reproposed rulemaking).

[749] Under the December 2013 Position Limits Proposal, 17 CFR 150.5(g) would be replaced with previously proposed § 150.5(a)(5) which referenced 17 CFR 150.4 as the regulation governing aggregation for contracts subject to federal position limits.

[750] December 2013 Position Limits Proposal, 78 FR at 75755.

[751] December 2013 Position Limits Proposal, 78 FR at 75756. The Commission stated that, therefore, federal spot month position limits do not apply to positions in physical-delivery contracts on which notices of intention to deliver have been issued, stopped long positions, delivery obligations established by the clearing organization, or deliveries taken. *Id.* at 75756, n. 678.

[752] *Id.* at 75756. The December 2013 Position Limits Proposal noted, for example, that an exchange might restrict a speculative long position holder that otherwise would obtain a large long position, take delivery, and seek to re-establish a large long position in an attempt to corner a significant portion of the deliverable supply or to squeeze shorts. Previously proposed § 150.5(b)(9) set forth the same acceptable practices for contracts not subject to federal limits. *Id.* at 75756, n. 679.

[753] CL–DBCS–59569 at 4.

[754] CL–FIA–59595 at 41; CL–Nodal-59695 at 3.

[755] CL–AMG–59709 at 2, 10–11.

[756] As noted above, the changes to § 150.3 as proposed in the December 2013 Position Limits Proposal would have provided for recognition of enumerated bona fide hedge positions, but would not have exempted any spread positions from federal limits. For any commodity derivative contracts subject to federal position limits, § 150.5(a)(2) as proposed in the December 2013 Position Limits Proposal would have established requirements under which exchanges could recognize exemptions from exchange-set position limits, including hedge exemptions and spread exemptions. *See also* 2016 Supplemental Position Limits Proposal, 81 FR at 38482.

[757] As proposed in the 2016 Supplemental Position Limits Proposal, § 150.5(a)(2)(i) provides that a DCM or SEF that is a trading facility ''may grant exemptions from any speculative position limits it sets under paragraph (a)(1) of this section, provided that such exemptions conform to the requirements specified in § 150.3.''

[758] *See* § 150.5(b)(5)(D) (stating that for excluded commodities, a DCM or SEF may grant, pursuant to

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iv. Comments Received on the 2016 Supplemental Position Limits Proposal Regarding § 150.5(a)

While comments were submitted on the 2016 Supplemental Position Limits Proposal that addressed the proposed changes to the definitions under § 150.1, as well as to the proposed exchange processes for recognition of non-enumerated bona fide hedges and anticipatory hedges, and for granting spreads exemptions under proposed §§ 150.9, 150.11, and 150.10, respectively, all of which indirectly affect § 150.5(a), very few comments specifically addressed § 150.5(a). Comments received on the 2016 Supplemental Position Limits Proposal regarding the other sections are addressed in the discussions of those sections.[759]

One commenter urged the Commission to allow exchanges to maintain their current authority to set speculative limits for both spot month and all-months combined limits below federal limits to ensure that convergence continues to occur.[760]

While the Commission's retention of what is often referred to as the five-day rule [761] was included only in the revised definition of bona fide hedging position under § 150.1,[762] several commenters addressed the five-day rule in the context of § 150.5 as proposed in the 2016 Supplemental Position Limits Proposal.[763] According to the commenters, the decision of whether to apply the five-day rule to a particular contract should be delegated to the exchanges because the exchanges are in the best position to evaluate facts and circumstances, and different markets have different dynamics and needs.[764] In addition, one commenter requested that the Commission specifically authorize exchanges to grant bona fide hedging position and spread exemptions during the last five days of trading or less.[765] Two commenters suggested, as an alternative approach if the five-day rule remains, that the Commission instead rely on tools available to exchanges to address concerns, such as exchanges requiring gradual reduction of the position (''step down'' requirements) or revoking exemptions to protect the price discovery process in core referenced futures contracts approaching expiration.[766] Another commenter argued that in spite of any five-day rule that is adopted, exchanges should be allowed to recognize non-enumerated bona fide hedging exemptions during the last five trading days for enumerated strategies that are otherwise subject to the five-day rule and the discretion to grant exemptions for hedging strategies that would otherwise be subject to the five-day rule.[767]

One issue raised by several commenters [768] that did not directly address § 150.5 concerns the application procedures in §§ 150.9(a)(4), 150.10(a)(4), and 150.11(a)(3), which require market participants to apply for recognition or an exemption in advance of exceeding the limit.[769] For example, one commenter requested the insertion of a provision permitting exchanges to recognize exemptions retroactively due to ''unforeseen hedging needs''; this commenter also stated that certain exchanges currently utilize a similar rule and it is ''critical in reflecting commercial hedging needs that cannot always be predicted in advance.'' [770] Another commenter requested that the Commission allow exchanges to recognize a bona fide hedge exemption for up to a five-day retroactive period in circumstances where market participants need to exceed limits to address a sudden and unforeseen hedging need.[771] That commenter stated that CME and ICE currently provide mechanisms for such recognition, which are used infrequently but are nonetheless important. According to that commenter, ''[t]o ensure that such allowances will not diminish the overall integrity of the process, two effective safeguards under the current exchange-administered processes could continue to be required. First, the exchange rules could continue to require market participants making use of the retroactive application to demonstrate that the applied-for hedge was required to address a sudden and unforeseen hedging need. . . . Second, if the emergency hedge recognition is not granted, the exchange rules could continue to require the applicant to immediately unwind its position and also deem the applicant to have been in violation for any period in which its position exceeded the applicable limits.[772] While these comments address other sections, the Commission will respond to these comments in explaining its reproposal of § 150.5.

v. Commission Determination Regarding § 150.5(a)

The Commission has determined to repropose § 150.5(a) as proposed in the 2016 Supplemental Position Limits Proposal for the reasons provided above with some changes, as detailed below.[773]

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rules submitted to the Commission, ''the exemptions under paragraphs (b)(5)(i) and (b)(5)(ii)(A) through (C)''). While the December 2013 Position Limits Proposal numbered the provisions applicable to excluded commodities as § 150.5(b)(5)(ii)(E), the 2016 Supplemental Position Limits Proposal renumbered the provision as § 150.5(b)(5)(ii)(D).

[759] One example of an issue raised by several commenters concerns the application procedures in §§ 150.9(a)(4), 150.10(a)(4), and 150.11(a)(3), which requires market participants to apply for recognition or an exemption in advance of exceeding the limit. *See, e.g.,* CL–FIA–60937 at 4, 13; CL–CME–60926 at 12; CL–ICE–60929 at 11, 20–21; CL–NCGA–NGSA–60919 at 10–11; CL–EEI–EPSA–60925 at 4; CL–ISDA–60931 at 13; and CL–CMC–60950 at 3. For example, ICE requested the insertion of a provision for exchanges to recognize exemptions retroactively due to ''unforeseen hedging needs,'' and also stated that certain exchanges currently utilize a similar rule and it is ''critical in reflecting commercial hedging needs that cannot always be predicted in advance.'' CL–ICE–60929 at 11.

[760] CL–NGFA–60941 at 2.

[761] The Commission's current definition of ''bona fide hedging transactions and positions,'' under § 1.3(z), applies the ''five-day rule'' in § 1.3(z)(2) subsections (i)(B), (ii)(C), (iii), and (iv). Under those sections of the ''five-day rule,'' no such positions and transactions were maintained in the five last days of trading. *See* § 1.3(z).

[762] As noted in the December 2013 Position Limits Proposal (which did not change in the 2016 Supplemental Position Limits Proposal), the Commission previously proposed to delete § 1.3(z) and replace it with a new definition in § 150.1 of ''bona fide hedging position.'' And, as noted above, the December 2013 Position Limits Proposal retained the five-day rule. The previously proposed definition was built on the Commission's history and was grounded for physical commodities in the new requirements of CEA section 4a(c)(2) as amended by the Dodd-Frank Act. December 2013 Position Limits Proposal, 78 FR at 75706.

[763] *E.g.,* CL–NCGA–ASA–60917 at 1–2; CL–CME–60926 at 14–15; CL–ICE–60929 at 7–8; CL–ISDA–60931 at 11; CL–CCI–60935 at 3; CL–MGEX–60936 at 4; CL–Working Group–60947 at 5, 7–9; CL–IECAssn–60949 at 7–9; CL–CMC–60950 at 9–14; CL–NCC–ACSA–60972 at 2. No comments on the December 2013 Position Limits Proposal specifically addressed the ''five-day rule'' in the context of § 150.5.

[764] *See, e.g,* CL–ISDA–60931 at 10; CL–CCI–60935 at 3; CL–MGEX–60936 at 11; CL–Working Group–60947 at 7–9.

[765] CL–CMC–60950 at 11–12.

[766] CL–Working Group–60947 at 8; CL–IECAssn–60949 at 7–9.

[767] CL–CME–60926 at 6, 8.

[768] CL–FIA–60937 at 4, 13; CL–CME–60926 at 12; CL–ICE–60929 at 11, 20–21; CL–NCGA–NGSA–60919 at 10–11; CL–EEI–EPSA–60925 at 4; CL–ISDA–60931 at 13; and CL–CMC–60950 at 3.

[769] *See* 150.9(a)(4) (requiring each person intending to exceed position limits to, among other things, ''receive notice of recognition from the designated contract market or swap execution facility of a position as a non-enumerated bona fide hedge in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act.'')

[770] CL–ICE–60929 at 11.

[771] CL–NCGA–NGSA–60919 at 10–11.

[772] *Id.* at 11 (footnote omitted).

[773] For example, the Commission is reproposing the following sections as previously proposed without change for the reasons provided above: § 150.5(a)(1); § 150.5(a)(3) (Pre-enactment and transition period swap positions), § 150.5(a)(4) (Pre-existing positions), and § 150.5(a)(6) (Additional acceptable practices); no substantive comments were received regarding those sections.

Although the Commission is reproposing § 150.5(a)(1), in response to the comment that the exchanges should conform their position limits to the federal limits so that a single position limit and accountability regime apply across exchanges,[774] the Commission believes that exchanges may find it prudent in the course of monitoring position limits to impose lower (that is, more restrictive) limit levels. The flexibility for exchanges to set more restrictive limits is granted in CEA section 4a(e), which provides that if an exchange establishes limits on a contract, those limits shall be set at a level no higher than the level of any limits set by the Commission. This expressly permits an exchange to set lower limit levels than federal limit levels. The reproposed rules track this statutory provision.

For purposes of clarification in response to comments on the treatment of basis contracts, the reproposed rules provide a singular definition of ''referenced contract'' which, as stated by the commenters, excludes ''basis contracts.'' For commodities subject to federal limits under reproposed § 150.2, the definition of referenced contract remains the same for federal and exchange-set limits and may not be amended by exchanges. An exchange could, but is not required to, impose limits on any basis contract independently of the federal limit for the commodity in question, but a position in a basis contract with an independent, exchange-set limit would not count for the purposes of the federal limit.[775]

After consideration of comments regarding § 150.5(a)(2)(i) (Grant of exemption),[776] as proposed in the 2016 Supplemental Position Limits Proposal, the Commission is reproposing it with modifications. Reproposed § 150.5(a)(2)(i) provides that any exchange may grant exemptions from any speculative position limits it sets under paragraph § 150.5(a)(1), provided that such exemptions conform to the requirements specified in § 150.3, and provided further that any exemptions to exchange-set limits not conforming to § 150.3 are capped at the level of the applicable federal limit in § 150.2.

The Commission notes that under the 2013 Position Limits Proposal, exchanges could adopt position accountability at a level lower than the federal limit (along with a position limit at the same level as the federal limit); in such cases, the exchange would not need to grant exemptions for positions no greater than the level of the federal limit. Under the Reproposal, exchanges could choose, instead, to adopt a limit lower than the federal limit; in such a case, the Commission would permit the exchange to grant an exemption to the exchange's lower limit, where such exemption does not conform to § 150.3, provided that such exemption to an exchange-set limit is capped at the level of the federal limit. Such a capped exemption would basically have the same effect as if the exchange set its speculative position limit at the level of the federal limit, as required under DCM core principle 5(B) and SEF core principle 6(B)(1).[777]

In regards to the five-day rule, the Commission notes that the reproposed rule does not apply the prudential condition of the five-day rule to non-enumerated hedging positions. The Commission considered the recommendations that the Commission: Allow exchanges to recognize a bona fide hedge exemption for up to a five-day retroactive period in circumstances where market participants need to exceed limits to address a sudden and unforeseen hedging need; specifically authorize exchanges to grant bona fide hedge and spread exemptions during the last five days of trading or less, and/or delegate to the exchanges for their consideration the decision of whether to apply the five-day rule to a particular contract after their evaluation of the particular facts and circumstances. As reproposed, and as discussed in connection with the definition of bona fide hedging position,[778] the five-day rule would only apply to certain positions (pass-through swap offsets, anticipatory and cross-commodity hedges).[779] However, in regards to exchange processes under § 150.9, § 150.10, and § 150.11, the Commission would allow exchanges to waive the five-day rule on a case-by-case basis.

In addition, the Commission proposes to amend § 150.5(a)(2)(ii) (Application for exemption). The reproposed rule would permit exchanges to adopt rules that allow a trader to file an application for an enumerated bona fide hedging exemption within five business days after the trader assumed the position that exceeded a position limit.[780] The Commission expects that exchanges will carefully consider whether allowing such retroactive recognition of an enumerated bona fide hedging exemption would, as noted by one commenter, diminish the overall integrity of the process.[781] In addition, the Commission cautions exchanges to carefully consider whether to adopt in those rules the two safeguards recommended by that commenter: (i) Requiring market participants making use of the retroactive application to demonstrate that the applied-for hedge was required to address a sudden and unforeseen hedging need; and (ii) providing that if the emergency hedge recognition was not granted, exchange rules would continue to require the applicant to unwind its position in an orderly manner and also would deem the applicant to have been in violation for any period in which its position exceeded the applicable limits.[782]

Concerning the comment recommending greater discretion be given DCMs and SEFs that are trading facilities with respect to aggregation requirements, the Commission reiterates its belief in the benefits of requiring exchanges to conform to the federal standards on aggregation, including lower burden and less confusion for traders active on multiple exchanges,[783] efficiencies in administration for both exchanges and the Commission, and the prevention of a ''race-to-the-bottom'' wherein exchanges compete over lower standards. The Commission notes that the provision regarding aggregation in reproposed § 150.5(a)(5) incorporates by reference § 150.4 and thus would, on a continuing basis, reflect any changes made to the aggregation standard provided in the section.

[774] *But see* CL–NGFA–60941 at 2 (urging the Commission to allow exchanges to maintain their current authority to set speculative limits for both spot month and all-months combined limits below federal limits).

[775] The Commission notes that its singular definition of ''referenced contract'' that excludes ''basis contracts'' applies not only to § 150.5(a), but also to § 150.5(b). Separately, the Commission notes that in the future, it may determine to subject basis contracts to a separate class limit in order to discourage potential manipulation of the outright price legs of the basis contract.

[776] *See, e.g.,* CL–ICE–60929 at 2–4, 7–8; CL–Working Group–60947 at 14.

[777] 7 U.S.C. 7(d)(5) and 7 U.S.C. 7b–3(f)(6).

[778] *See* the discussion regarding the five-day rule in connection with the definition of bona fide hedging position in the discussion of § 150.9 (Process for recognition of positions as non-enumerated bona fide hedges).

[779] *See* § 150.1, definition of bona fide hedging position sections (2)(ii)(A), (3)(iii), (4), and (5) (Other enumerated hedging position). To provide greater clarity as to which bona fide hedge positions the five-day rule applies, the reproposed rules reorganize the definition.

[780] The Reproposal includes a similar modification to § 150.5(b)(5)(i).

[781] CL–NCGA–NGSA–60919 at 10–11.

[782] *Id.*

[783] The Commission's belief is supported by requests from multiple traders for industry-wide, standard aggregation requirements.

c. § 150.5(b)—Requirements and Acceptable Practices for Commodity Derivative Contracts That Are Not Subject to Federal Position Limits

i. December 2013 Position Limits Proposal

The Commission set forth in § 150.5(b), as proposed in the December 2013 Position Limits Proposal, requirements and acceptable practices that would generally update and reorganize the set of acceptable practices listed in current § 150.5 as they relate to contracts that are not subject to the federal position limits, including physical and excluded commodities.[784] As discussed above, the Commission also proposed to revise § 150.5 to implement uniform requirements for DCMs and SEFs that are trading facilities relating to hedging exemptions across all types of commodity derivative contracts, including those that are not subject to federal position limits. The Commission further proposed to require DCMs and SEFs that are trading facilities to have uniform aggregation polices that mirrored the federal aggregation provisions for all types of commodity derivative contracts, including for contracts that were not subject to federal position limits.[785]

The previously proposed revisions to DCM and SEF acceptable practices generally concerned how to: (1) Set spot-month position limits; (2) set individual non-spot month and all-months-combined position limits; (3) set position limits for cash-settled contracts that use a referenced contract as a price source; (4) adjust position limit levels after a contract has been listed for trading; and (5) adopt position accountability in lieu of speculative position limits.[786]

For spot months under the December 2013 Position Limits Proposal, for a derivative contract that was based on a commodity with a measurable deliverable supply, previously proposed § 150.5(b)(1)(i)(A) updated the acceptable practice in current § 150.5(b)(1) whereby spot month position limits should be set at a level no greater than one-quarter of the estimated deliverable supply of the underlying commodity.[787] Previously proposed § 150.5(b)(1)(i)(A) clarified that this acceptable practice for setting spot month position limits would apply to any commodity derivative contract, whether physical-delivery or cash-settled, that has a measurable deliverable supply.[788]

For a derivative contract that was based on a commodity without a measurable deliverable supply, the December 2013 Position Limits Proposal proposed for spot months, in § 150.5(b)(1)(i)(B), to codify as guidance that the spot month limit level should be no greater than necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price.[789]

Under previously proposed § 150.5(b)(1)(ii)(A), the December 2013 Position Limits Proposal preserved the existing acceptable practice in current § 150.5(b)(2) whereby individual non-spot or all-months-combined levels for agricultural commodity derivative contracts that are not subject to the federal limits should be no greater than 1,000 contracts at initial listing. As then proposed, the rule would also codify as guidance that the 1,000 contract limit should be taken into account when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity, or reduced if the notional quantity per contract is larger than a typical cash market transaction. Additionally, the December 2013 Position Limits Proposal proposed in § 150.5(b)(1)(ii)(A), to codify for individual non-spot or all-months-combined, that if the commodity derivative contract was substantially the same as a pre-existing DCM or SEF commodity derivative contract, then it would be an acceptable practice for the DCM or SEF that is a trading facility to adopt the same limit as applies to that pre-existing commodity derivative contract.[790]

In § 150.5(b)(1)(ii)(B), the December 2013 Position Limits Proposal preserved the existing acceptable practice for individual non-spot or all-months-combined in exempt and excluded commodity derivative contracts, set forth in current § 150.5(b)(3), for DCMs to set individual non-spot or all-months-combined limits at levels no greater than 5,000 contracts at initial listing.[791] Previously proposed § 150.5(b)(1)(ii)(B) would codify as guidance for exempt and excluded commodity derivative contracts that the 5,000 contract limit should be applicable when the notional quantity per contract was no larger than a typical cash market transaction in the underlying commodity, or should be reduced if the notional quantity per contract was larger than a typical cash market transaction. Additionally, previously proposed § 150.5(b)(1)(ii)(B) would codify a new acceptable practice for a DCM or SEF that is a trading facility to adopt the same limit as applied to the pre-existing contract if the new commodity contract was substantially the same as an existing contract.[792]

The December 2013 Position Limits Proposal provided in § 150.5(b)(1)(iii)

[784] For position limits purposes, § 150.1(k), as proposed in the December 2013 Position Limits Proposal, would define ''physical commodity'' to mean any agricultural commodity, as defined in 17 CFR 1.3, or any exempt commodity, as defined in section 1a(20) of the Act. Excluded commodity is defined in section 1a(19) of the Act.

[785] As Commission noted at that time, hedging exemptions and aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits. December 2013 Position Limits Proposal, 78 FR at 75756.

[786] *See* December 2013 Position Limits Proposal, 78 FR at 75757.

[787] As proposed in the December 2013 Position Limits Proposal, § 150.5(b)(1)(i)(A) was consistent with the Commission's longstanding policy regarding the appropriate level of spot-month limits for physical delivery contracts. These position limits would be set at a level no greater than 25 percent of estimated deliverable supply. The spot-month limits would be reviewed at least every 24 months thereafter. The 25 percent formula narrowly targeted the trading that may be most susceptible to, or likely to facilitate, price disruptions. The goal for the formula, as noted in the December 2013 Position Limits Proposal release, was to minimize the potential for corners and squeezes by facilitating the orderly liquidation of positions as the market approaches the end of trading and by restricting swap positions that may be used to influence the price of referenced contracts that are executed centrally. December 2013 Position Limits Proposal, 78 FR at 75756, n. 686.

[788] The Commission noted in the December 2013 Position Limits Proposal that, in general, the term ''deliverable supply'' means the quantity of the commodity meeting a derivative contract's delivery specifications that can reasonably be expected to be readily available to short traders and saleable to long traders at its market value in normal cash marketing channels at the derivative contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. Previously proposed § 150.1 would define commodity derivative contract to mean any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)). December 2013 Position Limits Proposal, 78 FR at 75756, n. 687.

[789] December 2013 Position Limits Proposal, 78 FR at 75757. The Commission noted that this descriptive standard is largely based on the language of DCM core principle 5 and SEF core principle 6. The Commission does not suggest that an excluded commodity derivative contract that is based on a commodity without a measurable supply should adhere to a numeric formula in setting spot month position limits. *Id.* at 75757, n. 688.

[790] The Commission noted that ''in this context, 'substantially the same' means a close economic substitute. For example, a position in Eurodollar futures can be a close economic substitute for a fixed-for-floating interest rate swap.'' December 2013 Position Limits Proposal, 78 FR at 75757.

[791] In contrast, 17 CFR 150.5(b)(3) lists this as an acceptable practice for contracts for ''energy products and non-tangible commodities.'' Excluded commodity is defined in CEA section 1a(19), and exempt commodity is defined CEA section 1a(20).

[792] December 2013 Position Limits Proposal, 78 FR at 75757.

that if a commodity derivative contract was cash-settled by referencing a daily settlement price of an existing contract listed on a DCM or SEF, then it would be an acceptable practice for a DCM or SEF to adopt the same position limits as the original referenced contract, assuming the contract sizes are the same. Based on its enforcement experience, the Commission expressed the belief that limiting a trader's position in cash-settled contracts in this way would diminish the incentive to exert market power to manipulate the cash-settlement price or index to advantage a trader's position in the cash-settled contract.[793]

In previously proposed § 150.5(b)(2)(i)(A), the Commission was updating the acceptable practices in current § 150.5(c) for adjusting limit levels for the spot month.[794] For a derivative contract that was based on a commodity with a measurable deliverable supply, previously proposed § 150.5(b)(2)(i)(A) maintained the acceptable practice in current § 150.5(c) to adjust spot month position limits to a level no greater than one-quarter of the estimated deliverable supply of the underlying commodity, but would apply this acceptable practice to any commodity derivative contract, whether physical-delivery or cash-settled, that has a measurable deliverable supply. For a derivative contract that was based on a commodity without a measurable deliverable supply, previously proposed § 150.5(b)(2)(i)(B) would codify as guidance that the spot month limit level should not be adjusted to levels greater than necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price. In addition, the December 2013 Position Limit Proposal would have codified in § 150.5(b)(2)(i)(A) a new acceptable practice that spot month limit levels be reviewed no less than once every two years.[795]

The December 2013 Position Limits Proposal explained that then proposed § 150.5(b)(2)(ii) maintained as an acceptable practice the basic formula set forth in current § 150.5(c)(2) for adjusting non-spot-month limits at levels of no more than 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% of the remaining open interest thereafter.[796] Previously proposed § 150.5(b)(2)(ii) would also maintain as an alternative acceptable practice the adjustment of non-spot-month limits to levels based on position sizes customarily held by speculative traders in the contract.[797] Previously proposed § 150.5(b)(3) generally updated and reorganized the existing acceptable practices in current § 150.5(e) for a DCM or SEF that is a trading facility to adopt position accountability rules in lieu of position limits, under certain circumstances, for contracts that are not subject to federal position limits. As noted in the December 2013 Position Limits Proposal, this section would reiterate the DCM's authority, with conforming changes for SEFs, to require traders to provide information regarding their position when requested by the exchange.[798] In addition, previously proposed § 150.5(b)(3) would codify a new acceptable practice for a DCM or SEF to require traders to consent to not increase their position in a contract if so ordered, as well as a new acceptable practice for a DCM or SEF to require traders to reduce their position in an orderly manner.[799]

The December 2013 Position Limits Proposal would maintain under § 150.5(b)(3)(i) the acceptable practice for a DCM or SEF to adopt position accountability rules outside the spot month, in lieu of position limits, for an agricultural or exempt commodity derivative contract that: (1) Had an average month-end open interest of 50,000 or more contracts and an average daily volume of 5,000 or more contracts during the most recent calendar year; (2) had a liquid cash market; and (3) was not subject to federal limits in § 150.2—provided, however, that such DCM or SEF that is a trading facility should adopt a spot month speculative position limit with a level no greater than one-quarter of the estimated spot month deliverable supply.[800]

The December 2013 Position Limits Proposal would maintain in § 150.5(b)(3)(ii)(A) the acceptable practice for a DCM or SEF to adopt position accountability rules in the spot month in lieu of position limits for an excluded commodity derivative contract that had a highly liquid cash market and no legal impediment to delivery.[801] For an excluded commodity derivative contract without a measurable deliverable supply, previously proposed § 150.5(b)(3)(ii)(A) would codify an acceptable practice for a DCM or SEF to adopt position accountability rules in the spot month in lieu of position limits because there was not a deliverable supply that was subject to manipulation. However, for an excluded commodity derivative contract that had a measurable deliverable supply, but that may not be highly liquid and/or was subject to some legal impediment to delivery, previously proposed § 150.5(b)(3)(ii)(A) set forth an acceptable practice for a DCM or SEF to adopt a spot-month position limit equal to no more than one-quarter of the estimated deliverable supply for that commodity, because the estimated deliverable supply may be susceptible to manipulation.[802] Furthermore, the December 2013 Position Limits Proposal in § 150.5(b)(3)(ii) would remove the ''minimum open interest and volume'' test for excluded commodity derivative contracts generally.[803] Finally, the December 2013 Position Limits Proposal would codify in § 150.5(b)(3)(ii)(B) an acceptable practice for a DCM or SEF to adopt position accountability levels for an excluded commodity derivative contract in lieu of position limits in the individual non-spot month or all-months-combined.

The December 2013 Position Limits Proposal added in § 150.5(b)(3)(iii) a new acceptable practice for an exchange to list a new contract with position accountability levels in lieu of position limits if that new contract was substantially the same as an existing contract that was currently listed for trading on an exchange that had already

[793] December 2013 Position Limits Proposal, 78 FR at 75757. As the Commission noted with respect to cash-settled contracts where the underlying product is a physical commodity with limited supplies, thus enabling a trader to exert market power (including agricultural and exempt commodities), the Commission has viewed the specification of speculative position limits to be an essential term and condition of such contracts in order to ensure that they are not readily susceptible to manipulation, which is the DCM core principle 3 requirement. *Id.* at 75757, n. 692.

[794] *Id.* at 75757.

[795] *Id.* at 75757–58.

[796] *Id.* at 75758.

[797] *Id.*

[798] *Id. Cf.* 17 CFR 150.5(e)(2)–(3).

[799] December 2013 Position Limits Proposal, 78 FR at 75758.

[800] The December 2013 Position Limits Proposal noted that 17 CFR 150.5(e)(3) applies this acceptable practice to a ''tangible commodity, including, but not limited to metals, energy products, or international soft agricultural products.'' *Id.* at 75758. It also cited to the comparison of the ''minimum open interest and volume test'' in proposed § 150.5(b)(3)(A) to that in current § 150.5(e)(3). *Id.*

[801] *Id.*

[802] *Id.*

[803] *Id.* The December 2013 Position Limits Proposal pointed out that the ''minimum open interest and volume'' test, as presented in 17 CFR 150.5(e)(1)–(2), need not be used to determine whether an excluded commodity derivative contract should be eligible for position accountability rules in lieu of position limits in the spot month. *Id.*

adopted position accountability levels in lieu of position limits.[804]

As previously proposed, § 150.5(b)(4) would maintain the acceptable practice that for contracts not subject to federal position limits, DCMs and SEFs should calculate trading volume and open interest in the manner established in current § 150.5(e)(4).[805] The Commission stated in the December 2013 Position Limits Proposal that then proposed § 150.5(b)(4) would build upon these standards by accounting for swaps in referenced contracts on a futures-equivalent basis.[806]

As noted above, under the December 2013 Position Limits proposal, the Commission proposed to require DCMs and SEFs to have uniform hedging exemptions and aggregation polices that mirror the federal aggregation provisions for all types of commodity derivative contracts, including for contracts that are not subject to federal position limits. The Commission explained that hedging exemptions and aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits.[807] Therefore, the December 2013 Position Limits Proposal in § 150.5(b)(5)(i) would require any hedge exemption rules adopted by a designated contract market or a swap execution facility that is a trading facility to conform to the definition of bona fide hedging position in previously proposed § 150.1.[808]

The December 2013 Position Limits Proposal also set forth in § 150.5(b)(5)(ii) acceptable practices for DCMs and SEFs to grant exemptions from position limits for positions, other than bona fide hedging positions, in contracts not subject to federal limits. The exemptions in § 150.5(b)(5)(ii) under the December 2013 Position Limits Proposal generally tracked the exemptions then proposed in § 150.3; acceptable practices were suggested based on the same logic that underpinned those exemptions.[809] The acceptable practices contemplated that a DCM or SEF might grant exemptions under certain circumstances for financial distress, intramarket and intermarket spread positions (discussed above), and qualifying cash-settled contract positions in the spot month.[810] Previously proposed § 150.5(b)(5)(ii)(E) also set forth an acceptable practice for a DCM or SEF to grant for contracts on excluded commodities, a limited risk management exemption pursuant to rules submitted to the Commission, and consistent with the guidance in new Appendix A to part 150.[811]

The December 2013 Position Limits Proposal provided in § 150.5(b)(6)–(7) acceptable practices relating to pre-enactment and transition period swap positions (as those terms were defined in previously proposed § 150.1),[812] as well as to commodity derivative contract positions acquired in good faith prior to the effective date of mandatory federal speculative position limits.[813]

Additionally, for any contract that is not subject to federal position limits, previously proposed § 150.5(b)(8) required the DCM or SEF that is a trading facility to conform to the uniform federal aggregation provisions.[814] As noted above, aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits. The requirement generally mirrored the requirement in § 150.5(a)(5) for contracts that are subject to federal position limits by requiring the DCM or SEF that is a trading facility to have aggregation rules that conform to previously proposed § 150.4.[815]

ii. Comments Received to December 2013 Position Limits Proposal Regarding § 150.5(b)

Three commenters on previously proposed regulation § 150.5 recommended that the Commission not require SEFs to establish position limits.[816] Two noted that because SEF participants may use more than one derivatives clearing organization (''DCO''), a SEF may not know when a position has been offset.[817] Further, during the ongoing SEF registration process,[818] a number of entities applying to become registered as SEFs told the Commission that they lacked access to information that would enable them to knowledgeably establish position limits or monitor positions.[819] The Commission observes that this

[804] *See supra* discussion of what is meant by ''substantially the same'' in this context. *See also* December 2013 Position Limits Proposal, 78 FR at 75757, n. 690.

[805] As noted in the December 2013 Position Limits Proposal, for SEFs, trading volume and open interest for swaptions should be calculated on a delta-adjusted basis. *See id.* at 75758, n. 697.

[806] *See id.* at 75698–99 (defining ''Futures-equivalent'' in § 150.1 to account for swaps in referenced contracts).

[807] *See* December 2013 Position Limits Proposal, 78 FR at 75756. *See also supra* regarding § 150.5(a)(5).

[808] The requirement proposed in § 150.5(b)(8) that DCMs and SEFs have uniform aggregation polices that mirror the federal aggregation provisions is addressed below.

[809] *See* December 2013 Position Limits Proposal, 78 FR at 75735–41, 75827–28. *See also supra* discussion of the § 150.3 exemptions.

[810] *See id.*

[811] As the Commission noted, previously proposed Appendix A to part 150 ''is intended to capture the essence of the Commission's 1987 interpretation of its definition of bona fide hedge transactions to permit exchanges to grant hedge exemptions for various risk management transactions. *See* Risk Management Exemptions From Speculative Position Limits Approved Under Commission Regulation 1.61, 52 FR 34633, Sep. 14, 1987.'' The Commission also specified that such exemptions be granted on a case-by-case basis, subject to a demonstrated need for the exemption, required that applicants for these exemptions be typically engaged in the buying, selling, or holding of cash market instruments, and required the exchanges to monitor the exemptions they granted to ensure that any positions held under the exemption did not result in any large positions that could disrupt the market. *Id. See also* December 2013 Position Limits Proposal, 78 FR at 75756, n. 683.

[812] *See supra* discussion of pre-enactment and transition period swap positions.

[813] December 2013 Position Limits Proposal, 78 FR at 75756, 75831.

[814] Proposed § 150.5(b)(7) would replace 17 CFR 150.5(g) as it relates to contracts that are not subject to federal position limits.

[815] *Id.* at 75756.

[816] CL–CMC–59634 at 14–15; CL–FIA–60392 at 10; and CL–ISDA/SIFMA–59611 at 35. One commenter stated that SEFs should be exempt from the requirement to set positions limits because SEFs are in the early stages of development and could be harmed by limits that restrict liquidity. CL–ISDA/SIFMA–59611 at 35.

[817] CL–CMC–59634 at 14–15; and CL–FIA–60392 at 10.

[818] Under CEA section 5h(a)(1), no person may operate a facility for trading swaps unless the facility is registered as a SEF or DCM. 7 U.S.C. 7b–3(a)(1). A SEF must comply with core principles, including Core Principle 6 regarding position limits, as a condition of registration. CEA section 5h(f)(1), 7 U.S.C. 7b–3(f)(1).

[819] For example, in a submission to the Commission under part 40 of the Commission's regulations, BGC Derivative Markets, L.P. states that ''[t]he information to administer limits or accountability levels cannot be readily ascertained. Position limits or accountability levels apply market-wide to a trader's overall position in a given swap. To monitor this position, a SEF must have access to information about a trader's overall position. However, a SEF only has information about swap transactions that take place on its own Facility and has no way of knowing whether a particular trade on its facility adds to or reduces a trader's position. And because swaps may trade on a number of facilities or, in many cases, over-the-counter, a SEF does not know the size of the trader's overall swap position and thus cannot ascertain whether the trader's position relative to any position limit. Such information would be required to be supplied to a SEF from a variety of independent sources, including SDRs, DCOs, and market participants themselves. Unless coordinated by the Commission operating a centralized reporting system, such a data collection requirement would be duplicative as each separate SEF required reporting by each information sources.'' BGC Derivative Markets, L.P., Rule Submission 2015–09 (Oct. 6, 2015).

information gap would also be a concern for DCMs in respect of swaps.

One commenter expressed the view that deliverable supply calculations used to establish spot month limits should be based on commodity specific actual physical transport/transmission, generation and production.[820]

One commenter urged the Commission to allow the listing exchange to set non-spot month limits at least as high as the spot-month position limit, rather than base the non-spot month limit strictly on the open interest formula.[821] Another commenter recommended that the Commission remove from § 150.5(b)(1)(ii)(B) the provision setting a 5,000 contract limit for non-spot-month or all-months-combined accountability levels for exempt commodities, because that level may not be appropriate for all markets; instead, the Commission should rely on the exchanges to set accountability levels for exempt commodity markets.[822]

One commenter recommended that DCMs be permitted to establish position accountability levels in lieu of position limits outside of the spot month.[823] The commenter recommended that the administration of position accountability should be coordinated with the Commission and other DCMs to the extent that a market participant holds positions on more than one DCM.[824]

iii. 2016 Supplemental Position Limits Proposal

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to revise § 150.5(b)(5) from what was proposed in the December 2013 Position Limits Proposal; proposed § 150.5(b) establishes requirements and acceptable practices that pertain to commodity derivative contracts not subject to federal position limits.[825] The proposed revisions to § 150.5(b)(5) would, under the 2016 Supplemental Position Limits Proposal, permit exchanges, in regards to commodity derivative contracts not subject to federal position limits, to recognize non-enumerated bona fide hedging positions, as well as spreads. Moreover, the exchanges would no longer be prohibited from recognizing spreads during the spot month.[826] Instead, as the Commission noted in the 2016 Supplemental Position Limits Proposal, what it was proposing would, in part, maintain the status quo: Exchanges that currently recognize spreads in the spot month under current § 150.5(a) would be able to continue to do so. Rather than a prohibition, the exchanges would be responsible for determining whether recognizing spreads, including spreads in the spot month, would further the policy objectives in section 4a(a)(3) of the Act.[827]

iv. Comments Received to 2016 Supplemental Position Limits Proposal Regarding § 150.5(b)

Exchange-Administered Exemptions Under § 150.5(b)

Several commenters requested clarification as to the application of exchange-administered exemption requests to non-referenced contracts generally under § 150.5(b).[828] In addition, several commenters raised concerns with the requirement in § 150.5(b)(5)(i) that the exchanges provide exemptions ''in a manner consistent with the process described in § 150.9(a).'' [829] Similarly, according to one commenter, the exchanges should not be bound to the same exemption process provided under proposed CFTC Regulation 150.9 when administering exemptions from exchange-set limits. Rather, the commenter recommended that the Commission: ''(i) not adopt proposed CFTC Regulation 150.5(b)(5)(i) in any final rule issued in this proceeding or (ii) clarify that the phrase 'in a manner consistent with the process described in [proposed CFTC Regulation] 150.5(b)(5)(i)' does not mean that the Exchanges must apply the virtually identical process for recognizing non-enumerated bona fide hedging positions under proposed CFTC Regulation 150.9(a) to their exemption process for exchange-set speculative position limits.'' [830]

Another commenter stated that the Commission should remove the requirements of § 150.5(b) that apply the exemption procedures of § 150.9 to exemptions granted for contracts in excluded commodities and physical commodities that are not subject to federal position limits. In support of this request, the commenter maintained that exchange exemption programs have been operating successfully without the need for such rules, and exchanges do not require additional guidance from the Commission on how to assess recognitions under the 2016 Supplemental Position Limits Proposal and that rule enforcement reviews are adequate.[831]

Treatment of Spread and Anticipatory Hedge Exemptions Under § 150.5(b)

Several commenters requested that the Commission clarify that spread and anticipatory hedge exemptions are unnecessary for excluded commodities and other products not subject to federal limits. For example, one commenter seeks clarity regarding the application of § 150.5(b) to spread exemption and anticipatory hedge exemption requests, stating that ''[p]roposed section 150.5(b) is silent with respect to anticipatory hedges contemplated under the process in proposed section 150.11, and makes no reference in proposed section 150.5(b)(5)(ii)(C) to the process in proposed section 150.10 when describing spread exemptions an exchange may recognize. The Commission must clarify whether it intends that market participants and exchanges may avail themselves of such processes in applying for and recognizing exemptions from exchange limits for non-referenced contracts.'' [832] On the other hand, in the associated footnote, the same commenter observes ''[h]owever, in its cost-benefit analysis, the Commission notes that proposed section 150.11 'works in concert with' 'proposed § 150.5(b)(5), with the effect that recognized anticipatory enumerated

[820] CL–EDF–60398 at 6–7.

[821] CL–ICE–59962 at 7.

[822] CL–Nodal–59695 at 3.

[823] CL–FIA–59595 at 5, 39 and 41; *see also* CL–FIA–60303 at 3–4.

[824] CL–FIA–60392 at 9.

[825] 2016 Supplemental Position Limits Proposal, 81 FR at 38482.

[826] *Id.* at 38482, 38506–7. *Compare* December 2013 Position Limits Proposal, 78 FR at 75830.

[827] 2016 Supplemental Position Limits Proposal, 81 FR at 38482, 38506–07.

[828] CMC, for example, requested that the Commission clarify that exchange-granted hedge exemption procedures would be ''applicable if, and to the extent that, the exchange granted exemption exceeds federally established speculative position limits and not otherwise.'' CL–CMC–60950 at 14. According to CME, on the other hand, proposed section 150.5(b) was unclear and ambiguous and so should be reproposed. For example, CME stated that the proposal was ''riddled with ambiguities and potential oversights,'' and, in connection with non-referenced contracts under section 150.5(b), CME also stated ''the scope of exchange discretion under proposed section 150.9(a) is unclear. Thus, exchanges could be bound by the five-day rule in recognizing as NEBFH positions certain enumerated hedge strategies for non-referenced contracts, despite the same five-day rule limitation not applying in similar scenarios today.'' CL–CME–60926 at 14–15.

[829] CL–CME–60926 at 14–15; CL–Working Group–60947 at 14; and CL–ICE–60929 at 8. For example, CME stated that requiring exchanges to recognize non-enumerated bona fide hedge positions for non-referenced contracts ''in a manner consistent with the process described in § 150.9(a)'' appears to ''break with historical practice in administering NEBFHs for non-referenced contracts,'' and ''would appear to impose new burdensome and unnecessary compliance obligations on market participants that do not exist today.'' CL–CME–60926 at 14–15.

[830] CL–Working Group–60947 at 14.

[831] CL–ICE–60929 at 8.

[832] CL–CME–60926 at 15.

bona fide hedging positions may exceed exchange-set position limits for contracts not subject to federal position limits.' '' [833]

Another commenter urges the Commission to clarify that spread and anticipatory hedge exemptions are unnecessary for excluded commodities and other products not subject to federal limits. In this regard, the commenter seeks the removal of requirements found in § 150.5(b).[834] A third commenter states that extending the requirements for exchange hedge exemption rules to contracts on excluded commodities is ''clearly an error'' that needs to be rectified, stating that there was no discussion of this expansion in the preamble to the Supplemental. According to the commenter, ''there is no basis in the Dodd-Frank amendments to the CEA for this extension of the Commission's authority over exchange position limits on excluded commodities. To the contrary, that authority is clearly limited to position limits on contracts on physical commodities.'' [835]

Reporting Requirements Under § 150.5(b)

According to one commenter, the 2016 Supplemental Position Limits Proposal does not provide any explanation regarding the Commission's need to receive from the exchanges the same exemption reports for non-referenced contracts that it would receive for referenced contracts. The commenter states that the 2016 Supplemental Position Limits Proposal characterizes exchange submissions of exemption recipient reports to the CFTC as ''support[ing] the Commission's surveillance program, by facilitating the tracking of non-enumerated bona fide hedging positions recognized by the exchange, and helping the Commission to ensure that an applicant's activities conform to the terms of recognition that the exchange has established.'' [836] While acknowledging that the Commission has a surveillance obligation with respect to federal limits, the commenter maintains that, ''the same obligation has never before existed with respect to exchange-set limits for non-referenced contracts, and does not exist today.'' [837] The commenter also states that the Commission has misinterpreted its mandate and therefore should drop this unnecessary reporting requirement and related procedures with respect to non-referenced contracts.''

Five-Day Rule Under § 150.5(b)

As noted above, several commenters [838] addressed the five-day rule, suggesting that the decision whether to apply the five-day rule to a particular contract should be delegated to the exchanges as the exchanges are in the best position to evaluate facts and circumstances, and different markets have different dynamics and needs.[839] And, specifically in connection with non-referenced contracts under § 150.5(b), one commenter states that, as it believes that the scope of exchange discretion under proposed section 150.9(a) is unclear, ''exchanges could be bound by the five-day rule in recognizing as non-enumerated bona fide hedging positions certain enumerated hedge strategies for non-referenced contracts, despite the same five-day rule limitation not applying in similar scenarios today.'' [840]

Comment Letter Received After the Close of the Comment Period for the 2016 Supplemental Position Limits Proposal Regarding Limit Levels Under § 150.5(b)

One commenter noted that when the CEA addresses ''linked contracts'' in CEA section 4(b)(1)(B)(ii)(I), in relation to FBOTS, it provides that the Commission may not permit an FBOT to provide direct access to participants located in the United States unless the Commission determines that the FBOT (or the foreign authority overseeing the FBOT) adopts position limits that are comparable to the position limits adopted by the registered entity for the contract(s) against which the FBOT contract settles.[841] According to the commenter, CEA section 4(b), which was added by the Dodd-Frank Act, ''contains an explicit Congressional endorsement of 'comparable' '' limits for cash-settled contracts in relation to the physically-delivered contracts to which they are linked.[842] The statutory definition of ''linked contract,'' the commenter stated, ''mirrors the definition of 'referenced contract' in the Commission's 2013 position limits proposal: Both definitions capture cash-settled contracts that are 'linked' to the price of a physically-delivered contract traded on a DCM (referred to as a 'core referenced futures contract' in the proposal).'' [843] That commenter stated that the only place in the CEA which addresses how to treat a cash-settled contract and its physically-delivered benchmark contract for position limit purposes is in CEA section 4(b), claiming that ''Congress unmistakably wanted the two trading instruments to be treated 'comparably.' '' [844]

In addition, according to the commenter, when the Commission, in response to the Dodd-Frank Act provisions regarding FBOTs in amended CEA section 4(b), adopted final § 48.8(c)(1)(ii)(A), ''it acknowledged that a linked contract and its physically-delivered benchmark contract 'create a single market' capable of being affected through trading in either of the linked or physically-delivered markets,'' and further noted that the Commission ''observed that the price discovery process would be protected by 'ensuring that [ ] linked contracts have position limits and accountability provisions that are comparable to the corresponding [DCM] contracts [to which they are linked].' '' [845]

iv. Commission Determination Regarding § 150.5(b)

The Commission has determined to repropose *§ 150.5(b) generally* as proposed in the the 2016 Supplemental Position Limits Proposal, for the reasons stated above, with specific exceptions discussed below.[846] An overall non-substantive change has been made in reproposing § 150.5 pertaining to excluded commodities. To provide

[833] *Id.*

[834] CL–CMC–60950 at 14.

[835] CL–ISDA–60931 at 11.

[836] CL–CME–60926 at 15, quoting the 2016 Supplemental Position Limits Proposal, 81 FR at 38475.

[837] *Id.*

[838] *E.g.,* CL–NCGA–ASA–60917 at 1–2; CL–CME–60926 at 14–15; CL–ICE–60929 at 7–8; CL–ISDA–60931 at 11; CL–CCI–60935 at 3; CL–MGEX–60936 at 4; CL–Working Group–60947 at 5, 7–9; CL–IECAssn–60949 at 7–9; CL–CMC–60950 at 9–14; CL–NCC–ACSA–60972 at 2.

[839] *See, e.g,* CL–ISDA–60931 at 10; CL–CCI–60935 at 3; CL–MGEX–60936 at 11; CL–Working Group–60947 at 7–9.

[840] CL–CME–60926 at 14–15.

[841] *See* CL–CME–61007 at 2–4; CL–CME–61008 at 2–3.

[842] *See* CL–CME–61007 at 2.

[843] *Id.* at 3. CME claims that the underlying Congressional intent is clear, stating that whether a cash-settled contract is called a ''linked contract'' or a ''referenced contract,'' ''the limit levels and hedge exemptions for that contract and the related physically-delivered contract must be 'comparable.'' *Id.*

[844] *Id.*

[845] *Id.* [footnotes omitted]. The Commission notes that CME incorrectly attributed preamble language as pertaining to § 48.8(c)(1)(ii)(A), which addresses statutory requirements, when it stated that the Commission ''acknowledged that a linked contract and its physically-delivered benchmark contract 'create a single market' capable of being affected through trading in either of the linked or physically-delivered markets'' as this discussion actually addressed the Commission's adoption of its second set of conditions for linked contracts, found in § 48.8(c)(2) (Other Conditions on Linked Contracts).

[846] The Commission is reproposing the following sections without further discussion, for the reasons provided above, since no substantive comments were received: § 150.5(b)(6)(Pre-enactment and transition period swap positions), § 150.5(b)(7) (Pre-existing positions), and § 150.5(b)(9) (Additional acceptable practices).

greater clarity regarding which provisions concern excluded commodities, the Commission proposes to move all provisions applying to excluded commodities from § 150.5(b) into § 150.5(c). As the Commission observed in the December 2013 Position Limits Proposal, ''CEA section 4a(a) only mandates position limits with respect to physical commodity derivatives (*i.e.,* agricultural commodities and exempt commodities).

Additionally, the Commission proposes to make some substantive revisions specific to excluded commodities in what was previously § 150.5 (b), addressed in the discussion of § 150.5(c).

Limit Levels for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

In response to the comment regarding the method for calculating deliverable supply, the Commission notes that guidance for calculating deliverable supply can be found in Appendix C to part 38. Amendments to part 38 are beyond the scope of this rulemaking. However, that guidance already provides that deliverable supply calculations are estimates based on what ''reasonably can be expected to be readily available'' on a monthly basis based on a number of types of data from the physical marketing channels, as suggested by the commenter, and these calculations are done for each month and each commodity separately. Furthermore, much of § 150.5(b) reiterates longstanding guidance and acceptable practices for DCMs, rather than proposing new concepts for administering limits on contracts that are not subject to federal limits under § 150.2.

The Commission agrees with the commenter urging the Commission to allow exchanges to set non-spot month limits at least as high as the spot-month position limit, in the event the open interest formula would result in a limit level lower than the spot month. Accordingly, consistent with the recommended revisions to the initial limit level listings for contracts subject to federal limits found in § 150.2(e)(4)(iv), the Commission proposes to revise § 150.5(b)(2)(ii) to allow exchanges to set non-spot month limit levels at the maximum of the spot month limit level, the level derived from the 10/2.5% formula, or 5,000 contracts. To conform with those revisions, the Commission also proposes to revise § 150.5(b)(1)(ii)(A)–(B) to remove the distinction between agricultural and exempt commodities.

Regarding the commenter who expressed concern regarding requirements for accountability levels for exempt commodities, the Commission notes that the provisions set forth guidance and acceptable practices for exchanges in setting position limit levels and accountability levels and, as guidance and acceptable practices, are not binding regulations. Under the Commission's guidance, an initial non-spot month limit level of no more than 5,000 is viewed as suitable.

Similarly, in response to the commenter who recommended that DCMs be permitted to establish position accountability levels in lieu of position limits outside the spot month and coordinate the administration of such levels with the Commission and other DCMs, the Commission agrees that position accountability may be permitted for certain physical commodity derivative contracts. Reproposed § 150.5(b)(3), therefore, provides guidance and acceptable practices concerning exchange adoption of position accountability outside the spot month for contracts having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 or more contracts during the most recent calendar year and a liquid cash market. The Commission again notes that guidance and acceptable practices do not establish mandatory means of compliance. As such, in regards to meeting the specified volume and open interest thresholds in § 150.5(b)(3), the Commission notes that the guidance in § 150.5(b)(3)(i) may not be the only circumstances under which sufficiently high liquidity may be shown to exist for the establishment of position accountability levels in lieu of position limits.

The December 2013 Position Limits Proposal provided in § 150.5(b)(1)(iii) that if a commodity derivative contract was cash-settled by referencing a daily settlement price of an existing contract listed on a DCM or SEF, then it would be an acceptable practice for a DCM or SEF to adopt the same position limits as the original referenced contract, assuming the contract sizes are the same.[847] However, the Commission is reproposing § 150.5(b)(1)(iii) with a modification: While the previously proposed guidance in § 150.5(b)(1)(iii) provided that the exchange should adopt the ''same'' spot-month, individual non-spot month, and all-months combined limit levels as the original price referenced contract, the Commission is reproposing § 150.5(c)(1)(iii) to provide that the limit levels should, instead, be ''comparable.''

As pointed out by one commenter,[848] the CEA establishes a comparability standard for linked FBOT contracts in CEA section 4(b)(1)(B)(ii)(I), when it provides that the Commission may not permit an FBOT to provide direct access to participants located in the United States unless the Commission determines that the FBOT (or the foreign authority overseeing the FBOT) adopts position limits that are ''comparable to'' the position limits adopted by the registered entity for the contract(s) against which the FBOT contract settles.[849] In addition, as noted by the commenter, the Commission, in adopting § 48.8(c)(2), recognized that the comparability standard and its associated requirements would protect the price discovery process by ensuring that the linked contracts and the U.S. contracts to which they are linked ''have position limits and accountability provisions that are comparable to the corresponding [DCM] contracts [to which they are linked].' '' [850] The Commission notes that this change will better align § 150.5(b)(1)(iii) with the statute and with the standard provided in § 48.8(c).[851] Moreover, use of

[847] The Commission expressed the belief that, based on its enforcement experience, limiting a trader's position in cash-settled contracts in this way would diminish the incentive to exert market power to manipulate the cash-settlement price or index to advantage a trader's position in the cash-settled contract. *See* December 2013 Position Limits Proposal, 78 FR at 75757. As the Commission noted with respect to cash-settled contracts where the underlying product is a physical commodity with limited supplies, thus enabling a trader to exert market power (including agricultural and exempt commodities), the Commission has viewed the specification of speculative position limits to be an essential term and condition of such contracts in order to ensure that they are not readily susceptible to manipulation, which is the DCM core principle 3 requirement. *Id.* at 75757, n. 692.

[848] *See, e.g.,* CL–CME–61007 at 2–4; CL–CME–61008 at 2–3.

[849] CL–CME–61007 at 2. ''Registered entities'' are defined in CEA section 1a(40) as DCMs, DCOs, SEFs, SDRs, notice-registered DCMs under CEA section 5f, and any electronic trading facility upon which a contract is executed or traded which the Commission has determined is a significant price discovery contract. According to CME, CEA Section 4(b) ''contains an explicit Congressional endorsement of 'comparable' '' limits for cash-settled contracts in relation to the physically-delivered contracts to which they are linked. *See* CL–CME–61007 at 2.

[850] CL–CME–61007 at 3. *See* 76 FR 80674, 80685, 80697 (Dec. 23, 2011). *See also* § 48.8(c)(1)(ii)(A).

[851] The comparability standard is also used in determinations as to which foreign DCOs are subject to comparable, comprehensive supervision and regulation by the appropriate government authority in the DCO's home country. See CEA section 5b)(h). *See also* the Commission's Notice of Comparability Determination for Certain Requirements Under the European Market Infrastructure Regulation, 81 FR 15260 (Mar. 22, 2016).

''comparable'' rather than ''same'' limit levels provides exchanges with a more flexible standard based on statutory language.[852] This change also provides a standard that is consistent with existing practice for domestic contracts that are linked to the price of a physical-delivery contract.[853]

The Commission proposes to revise § 150.5(b)(4)(B) regarding the calculation of open interest for use in setting exchange-set speculative position limits to provide that a DCM or SEF that is a trading facility would include swaps in their open interest calculation only if such entities are required to administer position limits on swap contracts of their facilities. This revision clarifies and harmonizes § 150.5(b)(4)(B) with the relief in Appendix E to part 150, as well as in appendices to parts 37 and 38, which delays for DCMs and SEFs that are trading facilities and lack access to sufficient swap position information the requirement to establish and monitor position limits on swaps at this time. This approach conforms § 150.5(b) with other proposed changes regarding the treatment of swaps.[854]

Exchange—Administered Exemptions for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

The Commission is reproposing § 150.5(b)(5)(i) with modifications to clarify that it is guidance rather than a regulatory requirement. In addition, as modified, it provides that under exchange rules allowing a trader to file an application for an enumerated bona fide hedging exemption, the application should be filed no later than five business days after the trader assumed the position that exceeded a position limit.[855] As noted above, the Commission expects that exchanges will carefully consider whether allowing retroactive recognition of an enumerated bona fide hedging exemption would, as noted by one commenter, diminish the overall integrity of the process, and should carefully consider whether to adopt in those rules the two safeguards noted: (i) To continue to require market participants making use of the retroactive application to demonstrate that the applied-for hedge was required to address a sudden and unforeseen hedging need; and (ii) providing that if the emergency hedge recognition was not granted, exchange rules would continue to require the applicant to promptly unwind its position and also would deem the applicant to have been in violation for any period in which its position exceeded the applicable limits.

Additionally, the Commission is reproposing § 150.5(b)(5)(i) with modifications to clarify, as requested by commenters,[856] that the exchanges have reasonable discretion as to whether they apply to their exemption process from exchange-set speculative position limits, a virtually identical process as provided for recognizing non-enumerated bona fide hedging positions under CFTC Regulation 150.9(a). As explained in the discussion regarding the changes to the bona fide hedging definition under § 150.1, the Commission is proposes a phased approach with respect to the definition of a bona fide hedging position applicable to physical commodities.[857] The Commission recognizes that exchanges, under § 150.9, may need to adapt their current process to recognize non-enumerated bona fide hedging positions for commodity derivative contracts that are subject to a federal position limit under § 150.2, or adopt a new one. In turn, market participants will need to seek recognition of a non-enumerated bona fide hedge from an exchange under that new process. In light of this implementation issue, the Commission proposes to limit the mandatory scope of the new definition of bona fide hedging position to contracts that are subject to a federal position limit.[858] This means that the Commission would permit exchanges to maintain both their current bona fide hedging position definition and their existing processes for recognizing non-enumerated bona fide hedging positions for physical commodity contracts not subject to federal limits under § 150.2. The Commission notes an exchange may, but need not, adopt for physical commodities not subject to federal limits the new bona fide hedging position definition and the new process to recognize non-enumerated bona fide hedging positions.

In addition, the Commission is proposing that, for enumerated bona fide hedging positions, exchange rules may allow traders to file an application for an enumerated bona fide hedging exemption within five business days after the trader assumed the position that exceeded a position limit.

Finally, as to § 150.5(b)(5)(ii) (Other exemptions), the Commission did not receive any comments regarding § 150.5(b)(5)(ii)(A) (Financial distress), and is reproposing this exemption without change.

Conditional Spot Month Limit Exemption for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

While the conditional spot month limit exemption is addressed in more detail under § 150.3, after consideration of comments, the Commission is reproposing § 150.5(b)(5)(ii)(B) with a modification.[859] The December 2013

[852] As the Commission explained in preamble to final part 48 in connection with comparability determinations, ''[t]he Commission's determination of the comparability of the foreign regulatory regime to which the FBOT applying for registration is subject will not be a ''line by line'' examination of the foreign regulator's approach to supervision of the FBOTs it regulates. Rather, it will be a principles-based review conducted in a manner consistent with the part 48 regulations pursuant to which the Commission will look to determine if that regime supports and enforces regulatory objectives in the oversight of the FBOT and the clearing organization that are substantially equivalent to the regulatory objectives supported and enforced by the Commission in its oversight of DCMs and DCOs.'' 76 FR 80674, 80680 (Dec. 23, 2011). *See also* § 48.5(d)(5).

[853] For example, both CME and ICE currently have conditional spot-month limit exemptions for cash-settled natural gas contracts at a level up to five times the level of the spot-month limit level on CME's economically-equivalent NYMEX Henry Hub Natural Gas (physical-delivery) futures contract to which they settle.

[854] As noted above, the relief was proposed in the 2016 Supplemental Position Limits Proposal, 81 FR at 38459–62. *See also* DCM Core Principle 5, Position Limitations or Accountability (contained in CEA section 5(d)(5), 7 U.S.C. 7(d)(5)) and SEF Core Principle 6, Position Limits or Accountability (contained in CEA section 5h(f)(6), 7 U.S.C. 7b–3(f)(6)).

[855] The modification made to § 150.5(b)(5)(i) is similar manner to its the Commission's modification of § 150.5(a)(2)(ii), but, as mentioned, § 150.5(b)(5)(i) is guidance rather than a regulatory requirement.

[856] *See* CL-Working Group-60947 at 14; *see also* CL–ICE–60929 at 8, 32. As previously proposed, § 150.5(b)(5)(i) provides, ''(i) Hedge exemption. Any hedge exemption rules adopted by a designated contract market or swap execution facility that is a trading facility must conform to the definition of bona fide hedging position in § 150.1 or provide for recognition as a non-enumerated bona fide hedge in a manner consistent with the process described in § 150.9(a).''

[857] *See also* December 2013 Position Limits Proposal, 78 FR at 75725 (stating ''[t]he Commission is proposing a phased approach to implement the statutory mandate. The Commission is proposing in this release to establish speculative position limits on 28 core referenced futures contracts in physical commodities. The Commission anticipates that it will, in subsequent releases, propose to expand the list of core referenced futures contracts in physical commodities. The Commission believes that a phased approach will (i) reduce the potential administrative burden by not immediately imposing position limits on all commodity derivative contracts in physical commodities at once, and (ii) facilitate adoption of monitoring policies, procedures and systems by persons not currently subject to positions limits (such as traders in swaps that are not significant price discovery contracts.). . . . Thus, in the first phase, the Commission generally is proposing limits on those contracts that it believes are likely to play a larger role in interstate commerce than that played by other physical commodity derivative contracts.'').

[858] *See also supra* discussion under regarding the bona fide hedging position definition.

[859] Most comments concerning the conditional spot month limit were submitted by CME and ICE;

Position Limits Proposal proposed guidance that an exchange may adopt a conditional spot month position limit exemption for cash-settled contracts, with one of two provisos being that such positions should not exceed five times the level of the spot-month limit specified by the exchange that lists the physical-delivery contract to which the cash-settled contracts were directly or indirectly linked.[860] As reproposed, the guidance recommends that such conditional exemptions should not exceed two times the level of the spot-month limit specified by the exchange that lists the applicable physical-delivery contract.

After review of comments and an impact analysis regarding the federal limits, the Commission believes that a five-times conditional exemption is too large, other than in natural gas because, in the markets that the Commission proposes to subject to federal limits, the Commission observed few or no market participants with positions in cash-settled contracts in the aggregate that exceed 25 percent of deliverable supply in the spot month. This is so even though cash-settled contracts that are swaps are not currently subject to position limits. A five-times conditional exemption would not ensure liquidity for bona fide hedgers in the spot month for cash-settled contracts because there appear to be few or no positions that large (other than in natural gas). Consequently, and in light of the other three policy objectives of CEA section 4a(a)(3)(B), the Commission reproposes a more cautious approach.[861]

Since transactions of large speculative traders may tend to cause unwarranted price changes, exchanges should exercise caution in determining whether such conditional exemptions are warranted; for example, an exchange may determine that a conditional exemption is warranted because such a speculative trader is demonstrably providing liquidity for bona fide hedgers. Where an exchange may not have access to data regarding a market participant's cash-settled positions away from a particular exchange, such exchange should require, for any conditional spot-month limit exemption it grants, that a trader report promptly to such exchange the trader's aggregate positions in cash-settled contracts, physical-delivery contracts, and cash market positions.

As noted above, under reproposed § 150.5(b)(5)(ii)(B), an exchange has the choice of whether or not to adopt a conditional spot month position limit exemption for cash-settled contracts that are not subject to federal limits. As also discussed above regarding reproposed § 150.3(c), the Commission is not proposing a conditional spot-month limit for agricultural contracts subject to federal limits under reproposed § 150.2. Further, the Commission notes that the current cash-settled natural gas spot month limit rules of two commenters, CME Group (which operates NYMEX) and ICE, both include the same spot-month limit level and the same conditional spot-month limit exemption. In each case the current cash-settled conditional exemption is five times the limit for the physical-delivery contract. Such natural gas contracts would be subject to federal limits under reproposed § 150.2, so the guidance in reproposed § 150.5(b) would not be applicable to those contracts.[862]

Treatment of Spread and Anticipatory Hedge Exemptions for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

In regards to the exemption for intramarket and intermarket spread positions under § 150.5(b)(5)(ii)(C), the comments received concerned the exchange process for providing spread exemptions under § 150.10. The Commission addresses those comments below in its discussion of § 150.10, and is reproposing § 150.5(b)(5)(ii)(C) as proposed in the 2016 Supplemental Position Limits Proposal.

The Commission points out, however, that reproposed § 150.5(b)(5)(ii)(C) would apply only to physical commodity derivative contracts, and would not apply to any derivative contract in an excluded commodity. Furthermore, as noted above, reproposed § 150.5(b)(5)(ii)(C) provides guidance rather than rigid requirements. Instead, under § 150.5(b)(5)(ii)(C), exchanges should take into account whether granting a spread exemption in a physical commodity derivative would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unduly reduce the effectiveness of position limits to diminish, eliminate, or prevent excessive speculation; deter and prevent market manipulation, squeezes, and corners; and ensure that the price discovery function of the underlying market is not disrupted.[863]

Five-Day Rule for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

While the Commission's determination regarding the five-day rule is addressed elsewhere,[864] the Commission points out that, as discussed in connection with the definition of bona fide hedging position and in relation to exchange processes under § 150.9, § 150.10, and § 150.11, and as noted above in connection with § 150.5(a), the five-day rule would only apply to certain enumerated positions (pass-through swap offsets, anticipatory, and cross-commodity hedges),[865] rather than when determining whether to recognize as non-enumerated bona fide hedging positions certain non-enumerated hedge strategies for non-referenced contracts. As reproposed, therefore, § 150.5(b) would apply the five-day rule only to pass-through swap offsets, anticipatory, and cross-commodity hedges. However, in regards to exchange processes under § 150.9, § 150.10, and § 150.11, the Commission

recent letters include: CL–CME–61007; CL–ICE–61009; CL–CME–61008; CL–ICE–60929; CL–CME–60926.

[860] The second proviso included in § 150.5(b)(5)(ii)(B) was that the person holding or controlling the positions should not hold or control positions in such spot-month physical-delivery contract.

[861] As noted above, it is the Commission's responsibility under CEA section 4a(a)(3)(B) to set limits, to the maximum extent practicable, in its discretion, that, in addition to ensuring sufficient market liquidity for bona fide hedgers, diminish, eliminate or prevent excessive speculation; deter and prevent market manipulation, squeezes, and corners; and ensure that the price discovery function of the underlying market is not disrupted.

[862] The Commission notes that reproposed § 150.5(b)(5)(ii)(B) retains both of the recommended provisos, although, as noted above, the guidance recommends that such positions should not exceed two times the level of the spot-month limit specified by the exchange that lists the applicable physical-delivery contract, rather than five times.

[863] As noted in the December 2013 Position Limits Proposal, the guidance is consistent with the statutory policy objectives for position limits on physical commodity derivatives in CEA section 4a(a)(3)(B). *See* December 2013 Position Limits Proposal, 78 FR at 38464. The Commission interprets the CEA as providing it with the statutory authority to exempt spreads that are consistent with the other policy objectives for position limits, such as those in CEA section 4a(a)(3)(B). *Id.* CEA section 4a(a)(3)(B) provides that the Commission shall set limits to the maximum extent practicable, in its discretion—to diminish, eliminate, or prevent excessive speculation as described under this section; to deter and prevent market manipulation, squeezes, and corners; to ensure sufficient market liquidity for bona fide hedgers; and to ensure that the price discovery function of the underlying market is not disrupted.

[864] *See* the discussion regarding the five-day rule in connection with the definition of bona fide hedging position and the discussion of § 150.9 (Process for recognition of positions as non-enumerated bona fide hedges).

[865] *See* § 150.1 definition of bona fide hedging position, sections (2)(ii)(A), (3)(iii), (4), and (5) (Other enumerated hedging position). To provide greater clarity as to which bona fide hedging positions the five-day rule applies, the reproposed rules reorganize the definition.

proposes to allow exchanges to waive the five-day rule on a case-by-case basis.

As the Commission cautioned above, exchanges should carefully consider whether to recognize a position as a bona fide hedge or to exempt a spread position held during the last few days of trading in physical-delivery contracts. The Commission points to the tools that exchanges currently use to address concerns during the spot month; as two commenters observed, current tools include requiring gradual reduction of the position (''step down'' requirements) or revoking exemptions to protect the price discovery process in core referenced futures contracts approaching expiration. Consequently, under the reproposed rule, exchanges may recognize positions, on a case-by-case basis in physical-delivery contracts that would otherwise be subject to the five-day rule, as non-enumerated bona fide hedging positions, by applying the exchanges experience and expertise in protecting its own physical-delivery market.

Reporting Requirements for Commodity Derivative Contracts in a Physical Commodity Not Subject to Federal Limits

In response to the comment questioning the proposed reporting requirements by a claim that, ''while the Commission has a surveillance obligation with respect to federal limits, the same obligation has never before existed with respect to exchange-set limits for non-referenced contracts, and does not exist today,'' [866] the Commission points out, as it did in the 2016 Supplemental Position Limits Proposal, that the Futures Trading Act of 1982 ''gave the Commission, under section 4a(5) [since redesignated as section 4a(e)] of the Act, the authority to directly enforce violations of exchange-set, Commission-approved speculative position limits in addition to position limits established directly by the Commission through orders or regulations.'' [867] And, since 2008, it has also been a violation of the Act for any person to violate an exchange position limit rule certified by the exchange.[868] To address any confusion that might have led to such a comment, the Commission reiterates, under CEA section 4a(e), its authority to enforce violations of exchange-set speculative position limits, whether certified or Commission-approved. As the Commission explained in the 2016 Supplemental Position Limits Proposal, exchanges, as SROs, do not act only as independent, private actors.[869] In fact, to repeat the explanation provided by the Commission in 1981, when the Act is read as a whole, ''it is apparent that Congress envisioned cooperative efforts between the self-regulatory organizations and the Commission. Thus, the exchanges, as well as the Commission, have a continuing responsibility in this matter under the Act.'' [870] The 2016 Supplemental Position Limits Proposal pointed out that the ''Commission's approach to its oversight of its SROs was subsequently ratified by Congress in 1982, when it gave the CFTC authority to enforce exchange set limits.'' [871] In addition, as the Commission observed in 2010, and reiterated in the 2016 Supplemental Position Limits Proposal, ''since 1982, the Act's framework explicitly anticipates the concurrent application of Commission and exchange-set speculative position limits.'' [872] The Commission further noted that the ''concurrent application of limits is particularly consistent with an exchange's close knowledge of trading activity on that facility and the Commission's greater capacity for monitoring trading and implementing remedial measures across interconnected commodity futures and option markets.'' [873]

The Commission retains the power to approve or disapprove the rules of exchanges, under standards set out pursuant to the CEA, and to review an exchange's compliance with the exchange's rules, by way of additional examples of the Commission's continuing responsibility in this matter under the Act.

v. Commission Determination Regarding § 150.5(c)

As noted above, in an overall non-substantive change made in reproposing § 150.5, the Commission moved all provisions applying to excluded commodities from § 150.5(b) into reproposed § 150.5(c) to provide greater clarity regarding which provisions concern excluded commodities. The Commission has determined to repropose the rule largely as proposed for excluded commodities (previously under § 150.5(b)), for the reasons noted above, with certain changes discussed below.[874]

Limit Levels for Excluded Commodities

The Commission is reproposing the provisions under § 150.5(c)(1) regarding levels of limits for excluded commodities as modified and reproposed under § 150.5(b)(1),[875] to reference excluded commodities and to remove provisions that were solely addressed to agricultural commodities.[876] These provisions generally provide guidance rather than rigid requirements; the guidance for levels of limits remains the same for

[866] CL–CME–60926 at 15.

[867] 2016 Supplemental Position Limits Proposal, 81 FR at 38466, n. 85 (quoting the Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR 4144, 4145 (Jan. 36, 2010)).

[868] *See* Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2299–30 (1983) (amending CEA section 4a by including, in what was then a new CEA section 4a(5), since been re-designated as CEA section 4a(e) ''. . . It shall be a violation of this chapter for any person to violate any bylaw, rule, regulation, or resolution of any contract market, derivatives transaction execution facility, or other board of trade licensed, designated, or registered by the Commission or electronic trading facility with respect to a significant price discovery contract fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery or under options on such contracts or commodities, if such bylaw, rule, regulation, or resolution has been approved by the Commission or certified by a registered entity pursuant to section 7a–2(c)(1) of this title: Provided, That the provisions of section 13(a)(5) of this title shall apply only to those who knowingly violate such limits.'').

[869] 2016 Supplemental Position Limits Proposal, 81 FR at 38465–66.

[870] Establishment of Speculative Position Limits, 46 FR 50938, 50939 (Oct. 16, 1981). As the Commission noted at that time that ''[s]ince many exchanges have already implemented their own speculative position limits on certain contracts, the new rule merely effectuates completion of a regulatory philosophy the industry and the Commission appear to share.'' *Id.* at 50940.

[871] 2016 Supplemental Position Limits Proposal, 81 FR at 38466. See also Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2299–30 (1983). In 2010, the Commission noted that the 1982 legislation ''also gave the Commission, under section 4a(5) of the Act, the authority to directly enforce violations of exchange-set, Commission-approved speculative position limits in addition to position limits established directly by the Commission through orders or regulations.'' Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR 4144, 4145 (Jan. 36, 2010) (''2010 Position Limits Proposal for Referenced Energy Contracts''). Section 4a(5) has since been re-designated as section 4a(e) of the Act.

[872] 2010 Position Limits for Referenced Energy Contracts at 4145; *see also* 2016 Supplemental Position Limits Proposal, 81 FR at 38466.

[873] *See* 2010 Position Limits for Referenced Energy Contracts, 75 FR at 4145; *see also* 2016 Supplemental Position Limits Proposal, 81 FR at 38466.

[874] The Commission is reproposing the following sections without further discussion, for the reasons provided above, because it received no substantive comments: § 150.5(c)(6) (Pre-enactment and transition period swap positions), § 150.5(c)(7) (Pre-existing positions), and § 150.5(b)(9) (Additional acceptable practices).

[875] As reproposed, § 150.5(c)(1)(iii), like § 150.5(b)(1)(iii), provides that the spot-month, individual non-spot month, and all-months combined limit levels should be ''comparable'' rather than the ''same.''

[876] *See supra* for discussion of the modifications made to the reproposed provisions of § 150.5(b)(1) as compared to the December 2103 Position Limits Proposal; the explanation provided above also pertains to the inclusion of those modifications in reproposed § 150.5(c)(1).

excluded commodities as for all other commodity derivative contracts that are not subject to the limits set forth in reproposed § 150.2, including derivative contracts in a physical commodity as defined in reproposed § 150.1.

Similarly, as to adjustment of limit levels for excluded commodity derivative contracts under § 150.5(c)(2), the reproposed provisions are modified to reference only excluded commodities and to remove provisions that were solely addressed to agricultural commodities. As reproposed, § 150.5(c)(2)(i) provides guidance that the spot month position limits for excluded commodity derivative contracts ''should be maintained at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.''

The Commission did not receive comments regarding § 150.5(c)(3). The guidance in § 150.5(c)(3), on exchange adoption of position accountability levels in lieu of speculative position limits, has been reproposed as was previously proposed in § 150.5(b)(3), modified to remove provisions under § 150.5(b)(3)(i), which were solely addressed to physical commodity derivative contracts, and to reference excluded commodities.

As to the calculation of open interest for use in setting exchange-set speculative position limits for excluded commodities, the Commission is reproposing, in § 150.5(c)(4), the same guidance for excluded commodities that is being reproposed under § 150.5(b)(4) as for all other commodity derivative contracts that are not subject to the limits set forth in § 150.2, including the modification to provide that a DCM or SEF that is a trading facility would include swaps in its open interest calculation only if such entity is required to administer position limits on swap contracts of its facility.

Exchange—Administered Exemptions for Excluded Commodities

In regards to hedge exemptions, the Commission is reproposing in new § 150.5(c)(5)(i) for contracts in excluded commodities a modification of what was previously proposed in § 150.5(b)(5)(i) that eliminates the guidance that exchanges ''may provide for recognition of a non-enumerated bona fide hedge in a manner consistent with the process described in § 150.9(a).'' That provision was intended to apply only to physical commodity contracts and not to exemptions granted by exchanges for contracts in excluded commodities.[877]

As noted above, in reproposing the definition of bona fide hedging position, the Commission is clarifying that an exchange may otherwise recognize as bona fide any position in a commodity derivative contract in an excluded commodity, so long as such recognition is pursuant to such exchange's rules. Although the Commission's standards in the December 2013 Position Limits Proposal applied the incidental test and the orderly trading requirements to all commodities, the Commission, as previously described, proposed in the 2016 Supplemental Position Limits Proposal to remove both those standards from the definition of bona fide hedging position.[878] Moreover, the reproposed definition of bona fide hedging position would provide only that the position is either: (i) Enumerated in the definition (in paragraphs (3), (4), or (5)) and meets the economically appropriate test; or (ii) recognized by an exchange under rules previously submitted to the Commission.[879] The Commission's standards for recognizing a position as a bona fide hedge in an excluded commodity, therefore, would not include the additional requirements applicable to physical commodities subject to federal limits. Consequently, as reproposed, the exchanges would have reasonable discretion to comply with core principles regarding position limits on excluded commodities so long as the exchange does so pursuant to exchange rules previously submitted to the Commission under Part 40.

In addition, in conjunction with the amendments to the definition of bona fide hedging positions in regards to excluded commodities,[880] the Commission is reproposing § 150.5(c)(5)(ii), proposed as § 150.5(b)(5)(ii)(D) in the 2016 Supplemental Position Limits Proposal, with no further modification, to afford greater flexibility for exchanges when granting exemptions for excluded commodities. The 2016 Supplemental Position Limits Proposal provided, in addition to granting exemptions under paragraphs (b)(5)(ii)(A), (b)(5)(ii)(B), and (b)(5)(ii)(C) of § 150.5, that exchanges may grant a ''limited'' risk management exemptions pursuant to rules consistent with the guidance in Appendix A of part 150. As reproposed, § 150.5(c)(5)(ii) eliminates the modifier ''limited'' from the risk management exemptions, and provides merely that exchanges may grant, in addition to the exemptions under paragraphs (b)(5)(ii)(A), (b)(5)(ii)(B), and (b)(5)(ii)(C), risk management exemptions pursuant to rules submitted to the Commission, ''including'' for a position that is consistent with the guidance in Appendix A of part 150.

In regards to the provisions addressing applications for exemptions for positions in excluded commodities, the Commission is modifying what was copied from § 150.5(b)(5)(iii) to provide, under § 150.5(c)(5)(iii), simply that an exchange may allow a person to file an exemption application for excluded commodities after the person assumes the position that exceeded a position limit.

Finally, in reproposing the aggregation provision for excluded commodities under § 150.5(c)(8), the Commission is not merely mirroring the aggregation provision as previously proposed in § 150.5(b)(8). As noted above, the reproposed aggregation provisions for physical commodity derivatives contracts, whether under § 150.5(a)(8) or § 150.5(b)(8), provide that exchanges must have aggregation provisions that conform to § 150.4. Reproposed § 150.5(c)(8), consistent with the rest of reproposed § 150.5(c), would instead provide guidance, that exchanges ''should'' have aggregation rules for excluded commodity derivative contracts that conform to § 150.4.

E. Part 19—Reports by Persons Holding Bona Fide Hedge Positions Pursuant to § 150.1 of This Chapter and by Merchants and Dealers in Cotton

1. Current Part 19

The market and large trader reporting rules are contained in parts 15 through 21 of the Commission's regulations.[881] Collectively, these reporting rules effectuate the Commission's market and financial surveillance programs by enabling the Commission to gather information concerning the size and composition of the commodity futures, options, and swaps markets, thereby permitting the Commission to monitor and enforce the speculative position

[877] In addition, as noted above, the Commission is reproposing § 150.5(b)(5)(i) with a modification that clarifies that this provision is guidance in the case of commodity derivatives contracts in a physical commodity not subject to federal limits.

[878] *See* 2016 Supplemental Position Limits Proposal, definition of bona fide hedging position (amending the definition previously proposed in the December 2013 Position Limits Proposal), 78 FR at 38463–64, 38505–06.

[879] The economically appropriate test has historically been interpreted primarily in the context of physical commodities, rather than applied to excluded commodities.

[880] In each case pursuant to rules submitted to the Commission, consistent with the guidance in Appendix A of this part.

[881] 17 CFR parts 15–21.

limits that have been established, among other regulatory goals. The Commission's reporting rules are implemented pursuant to the authority of CEA sections 4g and 4i, among other CEA sections. Section 4g of the Act imposes reporting and recordkeeping obligations on registered entities, and obligates FCMs, introducing brokers, floor brokers, and floor traders to file such reports as the Commission may require on proprietary and customer positions executed on any board of trade.[882] Section 4i of the Act requires the filing of such reports as the Commission may require when positions equal or exceed Commission-set levels.[883]

Current part 19 of the Commission's regulations sets forth reporting requirements for persons holding or controlling reportable futures and option positions ''which constitute bona fide hedging positions as defined in [§] 1.3(z)'' and for merchants and dealers in cotton holding or controlling reportable positions for future delivery in cotton.[884] In the several markets with federal speculative position limits—namely those for grains, the soy complex, and cotton—hedgers that hold positions in excess of those limits must file a monthly report pursuant to part 19 on *CFTC Form 204: Statement of Cash Positions in Grains,*[885] which includes the soy complex, and *CFTC Form 304 Report: Statement of Cash Positions in Cotton.*[886] These monthly reports, collectively referred to as the Commission's ''series '04 reports,'' must show the trader's positions in the cash market and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and option positions above the speculative limits.[887]

[882] *See* CEA section 4g(a); 7 U.S.C. 6g(a).

[883] *See* CEA section 4i; 7 U.S.C. 6i.

[884] *See* 17 CFR part 19. Current part 19 cross-references a provision of the definition of reportable position in 17 CFR 15.00(p)(2). As discussed below, that provision would be incorporated into proposed § 19.00(a).

[885] Current *CFTC Form 204: Statement of Cash Positions in Grains* is available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform204.pdf.*

[886] Current *CFTC Form 304 Report: Statement of Cash Positions in Cotton* is available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf.*

[887] In addition, in the cotton market, merchants and dealers file a weekly CFTC Form 304 Report of their unfixed-price cash positions, which is used to publish a weekly Cotton On-call report, a service to the cotton industry. The Cotton On-Call Report shows how many unfixed-price cash cotton purchases and sales are outstanding against each cotton futures month.

2. Amendments to Part 19

In the December 2013 Position Limits Proposal, the Commission proposed to amend part 19 so that it would conform to the Commission's proposed changes to part 150.[888] First, the Commission proposed to amend part 19 by adding new and modified cross-references to proposed part 150, including the new definition of bona fide hedging position in proposed § 150.1. Second, the Commission proposed to amend § 19.00(a) by extending reporting requirements to any person claiming any exemption from federal position limits pursuant to proposed § 150.3. The Commission proposed to add new series '04 reporting forms to effectuate these additional reporting requirements. Third, the Commission proposed to update the manner of part 19 reporting. Lastly, the Commission proposed to update both the type of data that would be required in series '04 reports as well as the timeframe for filing such reports.

Comments Received: One commenter acknowledges concerns presented by Commission staff at the Staff Roundtable that exemptions from position limits be limited to prevent abuse, but does not believe that the adoption of additional recordkeeping or reporting rules or the development of costly infrastructure is required because statutory and regulatory safeguards already exist or are already proposed in the December 2013 Position Limits Proposal, noting that: (i) The series '04 forms as well as DCM exemption documents will be required of market participants, who face significant penalties for false reporting, and the Commission may request additional information if the information provided is unsatisfactory; and (ii) market participants claiming a bona fide hedging exemption are still subject to anti-disruptive trading prohibitions in CEA section 4c(a)(5), anti-manipulation prohibitions in CEA sections 6(c) and 9(c), the orderly trading requirement in proposed § 150.1, and DCM oversight. The commenter stated that these requirements comprise a ''thorough and robust regulatory structure'' that does not need to be augmented with new recordkeeping, reporting, or other obligations to prevent misuse of hedging exemptions.[889] A second commenter echoed that additional recordkeeping or reporting obligations are unnecessary and would create unnecessary regulatory burdens.[890]

[888] *See* December 2013 Position Limits Proposal, 78 FR at 75741–75746.

[889] CL–Working Group–59959 at 3–4.

[890] CL–NFP–60393 at 15–16.

Another commenter stated that the various forms required by the regime, while not lengthy, represent significant data collection and categorization that will require a non-trivial amount of work to accurately prepare and file. The commenter claimed that a comprehensive position limits regime could be implemented with a ''far less burdensome'' set of filings and requested that the Commission review the proposed forms and ensure they are ''as clear, limited, and workable'' as possible to reduce burden. The commenter stated that it is not aware of any software vendors that currently provide solutions that can support a commercial firm's ability to file the proposed forms.[891]

One commenter recommended that the Commission eliminate the series '04 reports in light of the application and reporting requirements laid out in the 2016 Supplemental Position Limits Proposal. The commenter asserted that the application requirements are in addition to the series '04 forms, which the commenter claims ''only provide the Commission with a limited surveillance benefit.'' [892] Another commenter raised concerns regarding forms filed under part 19 and the data required to be filed with exchanges under §§ 150.9–11. The commenter stated that the 2016 Supplemental Position Limits Proposal requires that ''those exceeding the federal limits file the proposed forms including Form 204'' but lacks ''meaningful guidance'' regarding the data that must be maintained ''effectively in real-time'' to populate the forms.[893]

Several commenters requested that the Commission create user-friendly guidebooks for the forms so that all entities can clearly understand any required forms and build the systems to file such forms, including providing workshops and/or hot lines to improve the forms.[894]

One commenter expressed concern for reporting requirements in conflict with other regulatory requirements (such as FASB ASC 815).[895]

Finally, two commenters recommended modifying or removing the requirement to certify series '04 reports as ''true and correct''. One commenter suggested that the requirement be removed due to the difficulty of making such a certification

[891] CL–COPE–59662 at 24; CL–COPE–60932 at 10; CL–EEI–EPSA–60925 at 9.

[892] CL–FIA–60937 at 17.

[893] CL–EEI–EPSA–60925 at 9.

[894] CL–COPE–59662 at 24; CL–COPE–60932 at 10; CL–ASR–60933 at 4; CL–Working Group–60947 at 17–18; CL–EEI–EPSA–60925 at 3.

[895] CL–U.S. Dairy–59597 at 6.

and the fact that CEA section 6(c)(2) already prohibits the submission of false or misleading information.[896] Another noted that the requirement to report very specific information relating to hedges and cash market activity involves data that may change over time. The commenter suggested the Commission adopt a good-faith standard regarding ''best effort'' estimates of the data when verifying the accuracy of Form 204 submissions and, assuming the estimate of physical activity does not otherwise impact the bona fide hedge exemption (*e.g.* cause the firm to lose the exemption), not penalize entities for providing the closest approximation of the position possible.[897]

Commission Reproposal: The Commission responds to specific comments regarding the content and timing of the series '04 forms and other concerns below. The Commission agrees with the commenters that the forms should be clear and workable, and offers several clarifications and amendments below in response to comments about particular aspects of the series '04 reports.

The Commission notes that the information required on the series '04 reports represents a trader's most basic position data, including the number of units of the cash commodity that the firm has purchased or sold, or the size of a swap position that is being offset in the futures market. The Commission believes this information is readily available to traders, who routinely make trading decisions based on the same data that is required on the series '04 reports. The Commission is proposing to move to an entirely electronic filing system, allowing for efficiencies in populating and submitting forms that require the same information every month. Most traders who are required to file the series '04 reports must do so for only one day out of the month, further lowering the burden for filers. In short, the Commission believes potential burdens under the Reproposal have been reduced wherever possible while still providing adequate information for the Commission's Surveillance program. For market participants who may require assistance in monitoring for speculative position limits and gathering the information required for the series '04 reports, the Commission is aware of several software companies who, prior to the vacation of the Part 151 Rulemaking, produced tools that could be useful to market participants in fulfilling their compliance obligations under the new position limits regime.

The Commission notes that the reporting obligations proposed in the 2016 Supplemental Position Limits Proposal are intended to be complimentary to, not duplicative of, the series '04 reporting forms. In particular, the Commission notes the distinction between Form 204 enumerated hedging reporting and exchange-based non-enumerated hedging reporting. The 2016 Supplemental Position Limits Proposal provides exchanges with the authority to require reporting from market participants. That is, regarding an exchange's process for non-enumerated bona fide hedging position recognition, the exchange has discretion to implement any additional reporting that it may require. The Commission declines to eliminate series '04 reporting in response to the commenters because, as noted throughout this section, the data provided on the forms is critical to the mission of the Commission's Surveillance program to detect and deter manipulation and abusive trading practices in physical commodity markets.

In response to the commenters that requested guidebooks for the series '04 reporting forms, the Commission believes that it is less confusing to ensure that form instructions are clear and detailed than it is to provide generalized guidebooks that may not respond to specific issues. The Commission has clarified the sample series '04 forms found in Appendix A to part 19, including instructions to such forms, and invites comments in order to avoid future confusion. Specifically, the Commission has added instructions regarding how to fill out the trader identification section of each form; reorganized instructions relating to individual fields on each form; edited the examples of each form to reduce confusion and match changes to information required as described in this section; and clarified the authority for the certifications made on the signature/authorization page of each form.

The Commission's longstanding experience with collecting and reviewing Form 204 and Form 304 has shown that many questions about the series '04 reports are specific to the circumstances and trading strategies of an individual market participant, and do not lend themselves to generalization that would be helpful to many market participants.

The Commission also notes, in response to the commenter expressing concerns about other regulatory requirements, the policy objectives and standards for hedging under financial accounting standards differ from the statutory policy objectives and standards for hedging under the Act. Because of this, reporting requirements, and the associated burdens, would also differ between the series '04 reports and accounting statements.

Finally, the Commission is proposing to amend the certification language found at the end of each form to clarify that the certification requires nothing more than is already required of market participants in section 6(c)(2) of the Act. In response to the commenters' request for a ''best effort'' standard, the Commission added the phrase ''to the best of my knowledge'' preceding the certification from the authorized representative of the reporting trader that the information on the form is true and correct. The Commission has also added instructions to each form clarifying what is required on the signature/authorization page of each form. The Commission notes that, in the recent past, the Division of Market Oversight has issued advisories and guidance on proper filing of series '04 reports, and the Division of Enforcement has settled several cases regarding lack of accuracy and/or timeliness in filing series '04 forms.[898] The Commission believes the certification language is an important reminder to reporting traders of their responsibilities to file accurate information under several sections of the Act, including but not limited to CEA section 6(c)(2).

a. Amended cross references

Proposed Rule: As discussed above, in the December 2013 Position Limits Proposal, the Commission proposed to replace the definition of bona fide hedging transaction found in § 1.3(z) with a new proposed definition of bona fide hedging position in proposed § 150.1. As a result, proposed part 19 would replace cross-references to § 1.3(z) with cross-references to the new definition of bona fide hedging positions in proposed § 150.1.

The Commission also proposed expanding Part 19 to include reporting requirements for positions in swaps, in addition to futures and options positions, for any part of which a person relies on an exemption. To accomplish this, ''positions in commodity derivative contracts,'' as defined in proposed § 150.1, would replace ''futures and option positions'' throughout amended

[896] *See* CL–CMC–59634 at 17.

[897] CL–Working Group–59693 at 65.

[898] *See, e.g.,* ''Obligation of Reportable Market Participants to File CFTC Form 204 Reports,'' CFTC Staff Advisory 13–42, July 8, 2013; and CFTC Dockets Nos. 16–21, 15–41, 16–07, 16–20.

part 19 as shorthand for any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)).[899] This amendment was intended to harmonize the reporting requirements of part 19 with proposed amendments to part 150 that encompass swap transactions.

Proposed § 19.00(a) would eliminate the cross-reference to the definition of reportable position in § 15.00(p)(2). The Commission noted that the current reportable position definition essentially identifies futures and option positions in excess of speculative position limits. Proposed § 19.00(a) would simply make clear that the reporting requirement applies to commodity derivative contract positions (including swaps) that exceed speculative position limits, as discussed below.

Comments Received: The Commission received no comments on the proposed cross-referencing amendments.

Commission Reproposal: The Commission is repurposing the amended cross-references in part 19, as originally proposed.

b. Persons required to report—§ 19.00(a)

Proposed Rule: Because the reporting requirements of current part 19 apply only to persons holding bona fide hedge positions and merchants and dealers in cotton holding or controlling reportable positions for future delivery in cotton, the Commission proposed to extend the reach of part 19 by requiring all persons who wish to avail themselves of any exemption from federal position limits under proposed § 150.3 to file applicable series '04 reports.[900] The Commission also proposed to require that anyone exceeding a federal limit who has received a special call related to part 150 must file a series '04 form. Collection of this information would facilitate the Commission's surveillance program with respect to detecting and deterring trading activity that may tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of the referenced contracts and their underlying commodities. By broadening the scope of persons who must file series '04 reports, the Commission seeks to ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so.

Series '04 reports currently refers to Form 204 and Form 304, which are listed in current § 15.02.[901] The Commission proposed to add three new series '04 reporting forms to effectuate the expanded reporting requirements of part 19.[902] Proposed Form 504 would be added for use by persons claiming the conditional spot-month limit exemption pursuant to proposed § 150.3(c).[903] Proposed Form 604 would be added for use by persons claiming a bona fide hedge exemption for either of two specific pass-through swap position types, as discussed further below.[904] Proposed Form 704 would be added for use by persons claiming a bona fide hedge exemption for certain anticipatory bona fide hedging positions.[905]

Comments Received: The Commission received no comments on proposed § 19.00(a) regarding who must file series '04 reports.

Commission Reproposal: The Commission is reproposing the expansion of § 19.00(a), as originally proposed.

c. Manner of reporting—§ 19.00(b)

i. Excluding certain source commodities, products or byproducts of the cash commodity hedged—§ 19.00(b)(1)

Proposed Rule: For purposes of reporting cash market positions under current part 19, the Commission historically has allowed a reporting trader to ''exclude certain products or byproducts in determining his cash positions for bona fide hedging'' if it is ''the regular business practice of the reporting trader'' to do so.[906] The Commission has proposed to clarify the meaning of ''economically appropriate'' in light of this reporting exclusion of certain cash positions.[907] Therefore, in the December 2013 Position Limits Proposal, the Commission proposed in § 19.00(b)(1) that a source commodity itself can only be excluded from a calculation of a cash position if the amount is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position.[908]

The Commission explained in the December 2013 Position Limits Proposal that the original part 19 reporting exclusion was intended to cover only cash positions that were not capable of being delivered under the terms of any derivative contract, an intention that ultimately evolved to allow cross-commodity hedging of products and byproducts of a commodity that were not necessarily deliverable under the terms of any derivative contract. The Commission also noted that the instructions on current Form 204 go further than current § 19.00(b)(1) by allowing the exclusion of certain source commodities in addition to products and byproducts, when it is the firm's normal business practice to do so.

Comments Received: One commenter suggested the Commission expand the provision in proposed § 19.00(b)(1) that allows a reporting person to exclude source commodities, products or byproducts in determining its cash position for bona fide hedging to allow a person to also exclude inventory and contracts of the actual commodity in the course of his or her regular business practice. The commenter also noted that proposed § 19.00(b)(1) only permits this exclusion if the amount is de minimis, despite there being ''many circumstances'' that make the inclusion of such source commodities irrelevant for reporting purposes. The commenter requested that the Commission only require a reporting person to calculate its cash positions in accordance with its regular business practice and report the

[899] *See* discussion above.

[900] *See* 17 CFR part 19. Current part 19 cross-references the definition of reportable position in 17 CFR 15.00(p).

[901] 17 CFR 15.02.

[902] As noted in the December 2013 Position Limits Proposal, the Commission is avoiding the use of any form numbers with ''404'' to avoid confusion with the part 151 Rulemaking, which required Forms 404, 404A, and 404S. *See* December 2013 Position Limits Proposal, 78 FR at 75742.

[903] *See supra* discussion of proposed § 150.3(c).

[904] Proposed Form 604 would replace Form 404S (as contemplated in vacated part 151).

[905] The updated definition of bona fide hedging in proposed § 150.1 incorporates several specific types of anticipatory transactions: Unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, and anticipatory cross-commodity hedges. *See* paragraphs (3)(iii), (4)(i), (4)(iii), (4)(iv) and (5), respectively, of the Commission's amended definition of bona fide hedging transactions in proposed § 150.1 as discussed *above.*

[906] *See* 17 CFR 19.00(b)(1) (providing that ''[i]f the regular business practice of the reporting trader is to exclude certain products or byproducts in determining his cash position for bona fide hedging . . . ., the same shall be excluded in the report'').

[907] *See supra* discussion of the ''economically appropriate test'' as it relates to the definition of bona fide hedging position. In order for a position to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, the enterprise generally should take into account all inventory or products that the enterprise owns or controls, or has contracted for purchase or sale at a fixed price. For example, in line with its historical approach to the reporting exclusion, the Commission does not believe that it would be economically appropriate to exclude large quantities of a source commodity held in inventory when an enterprise is calculating its value at risk to a source commodity and it intends to establish a long derivatives position as a hedge of unfilled anticipated requirements.

[908] Proposed § 19.00(b)(1) adds a caveat to the alternative manner of reporting: When reporting for the cash commodity of soybeans, soybean oil, or soybean meal, the reporting person shall show the cash positions of soybeans, soybean oil and soybean meal. This proposed provision for the soybean complex is included in the current instructions for preparing Form 204.

cash positions that it considered in making its bona fide hedging determinations.[909]

Commission Reproposal: The Commission is reproposing § 19.00(b)(1), as originally proposed, because the Commission is concerned that adopting the commenter's request could lead to ''cherry-picking'' a cash market position in an attempt to justify a speculative position as a hedge. As noted in the December 2013 Position Limits Proposal, the Commission's clarification of the § 19.00(b)(1) reporting exclusion was proposed to prevent the definition of bona fide hedging positions in proposed § 150.1 from being swallowed by this reporting rule. The Commission stated ''. . . it would not be economically appropriate behavior for a person who is, for example, long derivative contracts to exclude inventory when calculating unfilled anticipated requirements. Such behavior would call into question whether an offset to unfilled anticipated requirements is, in fact, a bona fide hedging position, since such inventory would fill the requirement. As such, a trader can only underreport cash market activities on the opposite side of the market from her hedging position as a regular business practice, unless the unreported inventory position is de minimis or impractical to account for.'' [910] If a person were only required to report cash positions that are offset by particular derivative positions, then the form would not provide an indication as to whether the derivative position is economically appropriate to the reduction of risk, making the inclusion of source commodities very relevant for reporting purposes, contrary to the commenter's suggestion.

Because of these and other concerns, market participants have historically been required to report cash market information in aggregate form for the commodity as a whole, not the ''line item'' style of hedge reporting requested by the commenter (where firms report cash trades by category, tranche, or corresponding futures position). Further, since it is important for Surveillance purposes to receive a snapshot of a market participant's cash market position, the series '04 forms currently require a market participant to provide relevant inventories and fixed price contracts in the hedged (or cross-hedged) commodity. The Commission believes it is necessary to maintain this aggregate reporting in order for the Commission's Surveillance program to properly monitor for position limit violations and to prevent market manipulation.

Further, the Commission believes that firms may find reporting an aggregate cash market position less burdensome than attempting to identify portions of that position that most closely align with individual hedge positions as, according to some commenters, many firms hedge on a portfolio basis, making identifying the particular hedge being used difficult.[911]

ii. Cross-commodity Hedges, Standards and Conversion Factors—§ 19.00(b)(2)–(3)

Proposed Rules: In the December 2013 Position Limits Proposal, the Commission proposed under § 19.00(b)(2) instructions for reporting a cash position in a commodity that is different from the commodity underlying the futures contract used for hedging.[912] The Commission also proposed to maintain the requirement in § 19.00(b)(3) that standards and conversion factors used in computing cash positions for reporting purposes must be made available to the Commission upon request.[913] The Commission clarified that such information would include hedge ratios used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging, and an explanation of the methodology used for determining the hedge ratio. Finally, the Commission provided examples of completed series '04 forms in proposed Appendix A to part 19 along with blank forms and instructions.[914]

Comments Received: The Commission received no comments on proposed §§ 19.00(b)(2)–(3).

Commission Reproposal: The Commission is reproposing §§ 19.00(b)(2)–(3), as originally proposed.

d. Information Required—§ 19.01(a)

i. Bona Fide Hedgers Reporting on Form 204—§ 19.01(a)(3)

Proposed Rule: Current § 19.01(a) sets forth the data that must be provided by bona fide hedgers (on Form 204) and by merchants and dealers in cotton (on Form 304). The Commission proposed to continue using Forms 204 and 304, which will feature only minor changes to the types of data to be reported under § 19.01(a)(3).[915] These changes include removing the modifier ''fixed price'' from ''fixed price cash position;'' requiring cash market position information to be submitted in both the cash market unit of measurement (*e.g.* barrels or bushels) and futures equivalents; and adding a specific request for data concerning open price contracts to accommodate open price pairs. In addition, the monthly reporting requirements for cotton, including the granularity of equity, certificated and non-certificated cotton stocks, would be moved to Form 204, while weekly reporting for cotton would be retained as a separate report made on Form 304 in order to maintain the collection of data required by the Commission to publish its weekly public cotton ''on call'' report.

Comments Received: The Commission received several comments regarding the proposed revisions to Form 204. These comments can be grouped loosely into three categories: general comments on bona fide hedge reporting; comments regarding the general information required on Form 204; and comments regarding the more specific nature of the cash market information required to be reported. The Commission responds to each category separately below.

Comments: One commenter stated that CFTC should reduce the complexity and compliance burden of bona fide hedging record keeping and reporting by using a model similar to the current exchange-based exemption process.[916] The commenter also stated that the requirement to keep records and file reports, in futures equivalents, regarding the commercial entity's cash market contracts and derivative market positions on a real-time basis globally, will be complex and impose a significant compliance burden. The

[909] *See* CL–Working Group–60396 at 16–17; CL–Working Group–60947 at 15–17.

[910] *See* December 2013 Position Limits Proposal, 78 FR at 75743. The Commission provided an example: ''By way of example, the alternative manner of reporting in proposed § 19.00(b)(1) would permit a person who has a cash inventory of 5 million bushels of wheat, and is short 5 million bushels worth of commodity derivative contracts, to underreport additional cash inventories held in small silos in disparate locations that are administratively difficult to count.'' This person could instead opt to calculate and report these hard-to-count inventories and establish additional short positions in commodity derivative contracts as a bona fide hedge against such additional inventories.

[911] *See* CL-Working Group-59693 at 65.

[912] *See* December 2013 Position Limits Proposal, 78 FR at 75743. The proposed § 19.00(b)(2) is consistent with provisions in the current section, but would add the term commodity derivative contracts (as defined in proposed § 150.1). The proposed definition of cross-commodity hedge in proposed § 150.1 is discussed *above.*

[913] *See* December 2013 Position Limits Proposal, 78 FR at 75743.

[914] *Id.*

[915] The list of data required for persons filing on Forms 204 and 304 has been relocated from current § 19.01(a) to proposed § 19.01(a)(3).

[916] CL–ASR–59668 at 3.

commenter noted such records are not needed for commercial purposes.[917]

One commenter requested that the Commission provide for a single hedge exemption application and reporting process, and should not require applicants to file duplicative forms at the exchange and at the Commission. The commenter noted its support for rules that would delegate, to the exchanges, (1) the hedge exemption application and approval process, and (2) hedge exemption reporting (if any is required). The commenter argued that the exchanges, rather than the Commission, have a long history with enforcing position limits on all of their contracts and are in a much better position than the Commission to judge the applicant's hedging needs and set an appropriate hedge level for the hedge being sought. Thus, the commenter suggested, the exchanges should be the point of contact for market participants seeking hedge exemptions.[918]

One commenter requested that the Commission address all pending requests for CEA 4a(a)(7) exemptions and respond to all requests for bona fide hedging exemptions from the energy industry.[919]

Commission Reproposal: In response to the first commenter, the Commission notes that, while the exchange referred to by the commenter does not have a reporting process analogous to Form 204, it does require an application prior to the establishment of a position that exceeds a position limit. In contrast, advance notice is not required for most federal enumerated bona fide hedging positions.[920] In the Commission's experience, the series '04 reports have been useful and beneficial to the Commission's Surveillance program and the Commission finds no compelling reason to change the forms to conform to the exchange's process. Further, the Commission notes that Form 204 is filed once a month as of the close of business of the last Friday of the month; it is not and has never been required to be filed on a real-time basis globally. A market participant only has to file Form 204 if it is over the limit at any point during the month, and the form requires only cash market activity (not derivatives market positions).

The second commenter was responding to questions raised at the Energy and Environmental Markets Advisory Council Meeting in June 2014; the Commission notes in response to that commenter that there is no federal exemption application process for most enumerated hedges. For non-enumerated hedges and certain enumerated anticipatory hedges, in response to the EEMAC meeting and other comments from market participants, the Commission proposed a single exchange based process for recognizing bona fide hedges for both federal and exchange limits. Under this process, proposed in the 2016 Supplemental Position Limits Proposal, market participants would not be required to file with both the exchange and the Commission.[921]

Finally, in response to the commenter's request that the Commission respond to pending requests for exemptions under CEA section 4a(a)(7), the Commission notes that it responded to the outstanding section 4a(a)(7) requests in the December 2013 Position Limits Proposal. In particular, the Commission proposed to include some of the energy industry's requests in the definition of bona fide hedging position and declined to include other requests.[922]

Comments: One commenter recommended that the Commission clarify that column three of Form 204 should permit a market participant to identify the number of futures-equivalent referenced contracts that hedge an identified amount of cash-market positions, but without separately identifying the positions in each referenced contract. The commenter stated that separate identification would add to the financial burden, but that it does not believe that it adds any benefit to the Commission.[923] Two commenters also recommended the Commission remove from Form 204 the requirement for reporting non-referenced contracts, noting that the Commission did not explain why a market participant should report commodity derivative contracts that are not referenced contracts.[924]

One commenter also recommended that the Commission either delete or make optional the identification of a particular enumerated position in column two of Section A or provide a good-faith standard. The commenter claimed that many energy firms hedge on a portfolio basis, and would not be able to identify a particular enumerated position that applies to the referenced contract position needing bona fide hedging treatment.[925]

One commenter asked for clarification regarding whether Section C of Form 204, which requires information regarding cotton stocks, is required of market participants in all commodities or just those in cotton markets.[926]

One commenter recommended that the Commission remove the requirement in Form 204 to submit futures-equivalent derivative positions, stating that the Commission did not explain why it needs to obtain data on a market participant's futures-equivalent position as part of proposed Form 204 in light of the presumption that the Commission already has a market participant's future-equivalent position from large-trader reporting rules and access to SDR data.[927] Another commenter noted that Form 204 mixes units of measurement between futures and cash positions and requested the Commission require market participants to use either cash units or futures units. The commenter noted that it's an easy conversion to make but that the ''mix'' of both units is confusing.[928]

Commission Reproposal: With respect to the comments regarding column three of Form 204, the Commission clarifies that Form 204 allows filers to identify multiple referenced contracts used for hedging a particular commodity cash position in the same line of Form 204. Because position limits under § 150.2 are to be imposed on referenced contracts, cash positions hedged by such referenced contracts should be reported on an aggregate basis, not separated out by individual contract. However, the Commission declines to adopt the commenters' recommendation to delete the phrase ''Commodity Derivative Contract'' from the title of column three, because § 19.00(a)(3) allows the Commission to require filing of a series '04 form of anyone holding a reportable position under § 15.00(p)(1), which may involve a commodity derivative contract that does not fit the definition of referenced

[917] CL–ASR–59668 at 7; CL–ASR–60933 at 5.

[918] CL–AGA–59935 at 13.

[919] CL–NFP–60393 at 15–16.

[920] The Commission notes that advance notice is required for recognition of anticipatory hedging positions by the Commission. *See* below for more discussion of anticipatory hedging reporting requirements.

[921] *See supra* the discussion of proposed §§ 150.9 and 150.11.

[922] The reasoning behind the Commission's determinations with respect to previous requests for exemption under CEA section 4a(a)(7) is documented in the December 2013 Position Limits Proposal, 78 FR at 75719–75722. *See also* the definition of bona fide hedging position discussed *supra.*

[923] CL–FIA–59595 at 38.

[924] The Commission notes that the commenters are referring to titular language on column 3 of the example Form 204 found in proposed Appendix A to part 19, which states ''Commodity Derivative Contract or Referenced Contract'' as the information required in that column. CL–FIA–59595 at 38; CL–Working Group–59693 at 65.

[925] CL–Working Group–59693 at 65.

[926] CL–ASR–60933 at 4.

[927] CL–FIA–59595 at 37.

[928] CL–ASR–60933 at 4.

contract.[929] Further, the Commission can require a special call respondent to file their response using the relevant series '04 form, and the Form 204 may be filed in order to claim exemptions from §§ 150.3(b) or 150.3(d), exemptions which may not involve a referenced contract. In sum, because the Commission may require the filing of Form 204 for purposes other than bona fide hedging, the form should include both ''Commodity Derivative Contract'' and, separately, ''Referenced Contract'' in the title of column three. To avoid further confusion, the Commission has rephrased the wording of the column title and amended the instructions to the form.

With respect to column two of Form 204, the Commission is proposing to adopt the commenter's recommendation to delete the requirement to identify which paragraphs of the bona fide hedging definition are represented by the hedged position. The requirement seemed to be confusing to commenters who found it unclear whether the column required the identification of all bona fide hedge definition paragraphs used for the total cash market position or the identification of separate cash positions for each paragraph used. While the requirement was intended to provide insight into which enumerated provision of the bona fide hedging definition was being relied upon in order to provide context to the cash position, the column was never intended to prevent multiple paragraphs being cited at once. Given the confusion, the Commission is concerned that the information in column two may not provide the intended information while being burdensome to implement for both market participants and Commission staff. For these reasons, the Commission is proposing to delete column two of Form 204, and has updated the sample forms in Appendix A to part 19 accordingly.

In response to the commenter requesting clarification regarding Section C of Form 204, the Commission confirms that Section C is only required of entities which hold positions in cotton markets that must be reported on Form 204. Further, the Commission proposes that, in order for the Commission to effectively evaluate the legitimacy of a claimed bona fide hedging position, filers of Section C of Form 204 will be required to differentiate between equity stock held in their capacities as merchants, producers, and/or agents in cotton. The Commission has updated Section C of Form 204 and § 19.01(a)(3)(vi)(A) to reflect this change. The Commission does not believe this distinction will create any significant extra burden on cotton merchants, as the Commission understands that many entities in cotton markets will hold equity stocks in just one of the three capacities required on the form.

The Commission notes in response to the last commenter that Form 204 does not require the futures equivalent value of derivative positions but rather the futures equivalent of the cash position underlying a hedged position (*e.g.,* 20,000,000 barrels of crude oil is equivalent to 20,000 futures equivalents, given a 1,000 barrel unit of trading for the futures contract). The futures equivalent of the cash position quantity is not available from any Commission data source because cash positions are not reported to the Commission under, for example, large trader reporting or swap data repository regulations. The Commission is proposing to require firms to report both the cash market unit of measurement and the futures equivalent measurement for a position in order to easily identify the size of the position underlying a hedge position, and has updated § 19.01(a)(3), instructions to the sample Form 204 in Appendix A to part 19, and the field names on the Form 204 itself to clarify this requirement. The Commission agrees with the commenter that it is an easy conversion to make, and does not anticipate that this requirement will create any significant extra burden on market participants. Obtaining the futures equivalent information directly from the market participant—as opposed to calculating it upon receipt of the form—is necessary particularly with respect to cross-commodity hedging where calculating the hedging ratio may not be as clear-cut. In its experience administering and collecting Form 204, the Commission has noted much confusion regarding whether cash market information should be reported in futures equivalents or in cash market units. Currently, the form requires cash market units, but the Commission has seen both units of measurement used (sometimes on the same form), which requires Commission staff to contact traders in order to validate the numbers on the form. The Commission is proposing to require both in order to avoid such confusion.

Comment: One commenter proposed modifications to the information required to be reported on Form 204. Specifically, the commenter suggested that the filer should be required to report the aggregate quantity of cash positions that underlie bona fide hedging positions in equivalent core referenced futures contract units, excluding all or part of the commodity that it excludes in its regular business practice. The commenter also suggested that if the filer is cross hedging, the filer must also report the aggregated quantity of bona fide hedge positions it is cross hedging in terms of the actual commodity as well as specify the futures market in which it is hedging.[930]

Another commenter suggested that the information required on Form 204 is ''ambiguous'' and asked the Commission to clarify what scope of, for example, stocks or fixed price purchase and sales agreements must be reported as well as what level of data precision is required.[931]

A commenter requested that the Commission allow hedges to be reported on a ''macro'' basis (*e.g.* futures positions vs. cash positions) as opposed to requiring the matching of individual physical market transactions to enumerated bona fide hedges. The commenter stated that performing specific linkage of individual physical transactions to individual hedge transactions is burdensome and does not provide any ''managerial or economic benefit.'' [932]

In contrast, another commenter suggested that the Commission tailor the series '04 reports to require ''only the information that is required to justify the claimed hedge exemption.'' The commenter stated that Form 204 appears to require a market participant to list all cash market exposures, even if the exposures are not relevant to the bona fide hedge exemption being claimed, which it believes would provide no value to the Commission in determining whether a hedge was bona fide.[933]

Another commenter stated that because the prompt (spot) month for certain referenced contracts will no longer trade as of the last Friday of the month, a market participant that exceeds a spot-month position limit who no longer has that spot-month position should not be required to report futures-equivalent positions for referenced contract on Form 204.[934] The commenter recommended that the Commission should require a market

[929] The Commission notes that Form 704 has been removed from the list of series '04 forms that could be required under a special call. This is a non-substantive change resulting from changes made to § 150.7, discussed *infra.*

[930] CL–Working Group–60947 at 17–18.

[931] CL–COPE–60932 at 10. The commenter made the same requests for clarification regarding the cash market information required on Form 504; since the information is similar, the Commission is responding here to the comment for both forms.

[932] CL–ASR–60933 at 5.

[933] *See* CL–Working Group–60396 at 17.

[934] CL–FIA–59595 at 37–38.

participant with a position in excess of a spot-month position limit to report on Form 204 only the cash-market activity related to that particular spot-month derivative position, and not to require it to report cash-market activity related to non-spot-month positions where it did not exceed a non-spot-month position limit; the commenter stated that the burden associated with such a reporting obligation would increase significantly.[935] Separately, another commenter claimed that Form 204 appears to address only non-spot-month position limits and asked the Commission to clarify how it will distinguish reporting on Form 204 that is related to a spot-month position limit versus a non-spot-month position limit.[936]

One commenter recommended that reporting rules require traders to identify the specific risk being hedged at the time a trade is initiated, to maintain records of termination or unwinding of a hedge when the underlying risk has been sold or otherwise resolved, and to create a practical audit trail for individual trades, to discourage traders from attempting to mask speculative trades under the guise of hedges.[937]

Commission Reproposal: In response to the modifications to Form 204 proposed by the commenter, the Commission notes that no modifications are necessary because the form, as proposed, requires the reporting of aggregated quantity of cash positions that underlie bona fide hedging positions in equivalent core referenced futures contract units, excluding a de minimis portion of the commodity, products, and byproducts that it excludes in its regular business practice.[938] Reproposed Form 204 also requires cross-hedgers to report the aggregated quantity of bona fide hedging positions it is cross hedging in terms of the actual commodity as well as specify the futures market in which it is hedging.

The Commission reproposes that the Form 204 requires a market participant to report all cash market positions in any commodity in which the participant has exceeded a spot-month or non-spot-month position limit. Form 204 is not intended to match a firm's hedged positions to underlying cash positions on a one-to-one basis; rather, it is intended to provide a ''snapshot'' into the firm's cash market position in a particular commodity as of one day during a month. The information on this form is used for several purposes in addition to reviewing hedged positions, including helping Surveillance analysts understand changes in the market fundamentals in underlying commodity markets.[939] The Commission believes that adopting the commenters' recommendations to require cash market information underlying a single derivative hedge position would result in a more burdensome reporting process for firms, particularly those who hedge on a portfolio basis. Instead, the Commission is confirming that, as requested by the commenter, cash market positions should be reported on an aggregated or ''macro'' basis.

The Commission notes that this ''snapshot'' requirement has historically been—and is currently—required on Form 204 for the nine legacy agricultural contracts. Further, the Commission understands that exchange hedge application forms require similar cash position information; firms that have applied to an exchange for hedge exemptions in non-legacy contracts should already be familiar with providing cash market information when they exceed a position limit or a position accountability level.

The commenters that focus on the Form 204 as it relates to exceeding either spot-month position limits or non-spot-month position limits contrast each other: one believed Form 204 was to be filed in response to exceeding only spot-month position limits and the other that Form 204 was to be filed in response to exceeding only non-spot-month position limits. However, the Commission has never distinguished between spot-month limits and non-spot-month limits with respect to the filing of Form 204. The Commission notes that, as discussed in the December 2013 Position Limits Proposal, Form 204 is used to review positions that exceed speculative limits in general, not just in the spot-month.[940] Because of this, the Commission is not adopting the commenter's recommendation to only require Form 204 when a market participant exceeds a spot-month limit.

In response to the commenter who suggested the Commission require a ''practical audit trail'' for bona fide hedgers, the Commission notes that other sections of the Commission's regulations provide rules regarding detailed individual transaction recordkeeping as suggested by the commenter.

ii. Cotton Merchants and Dealers Reporting on Form 304—§ 19.02

Proposed Rule: In the December 2013 Position Limits Proposal, the Commission proposed to continue to require the filing of Form 304, which requires information on the quantity of call cotton bought or sold, on a weekly basis. The Commission noted that Form 304 is required in order for the Commission to produce its weekly cotton ''on call'' report.[941] The Commission also proposed to relocate the list of required information for Form 304 from current § 19.01(a) to proposed § 19.01(a)(3).

Comments Received: The Commission did not receive any comments on the proposed changes to Form 304.

Commission Reproposal: The Commission is reproposing Form 304, as originally proposed.

iii. Conditional Spot-Month Limit Exemption Reporting on Form 504—§ 19.01(a)(1)

Proposed Rule: As proposed, § 19.01(a)(1) would require persons availing themselves of the conditional spot-month limit exemption (pursuant to proposed § 150.3(c)) to report certain detailed information concerning their cash market activities for any commodity specially designated by the Commission for reporting under § 19.03 of this part. In the December 2013 Position Limits Proposal, the Commission noted its concern about the cash market trading of those availing themselves of the conditional spot-month limit exemption and so proposed to require that persons claiming a conditional spot-month limit exemption must report on new Form 504 daily, by 9 a.m. Eastern Time on the next business day, for each day that a person is over the spot-month limit in certain

[935] CL–FIA–59595 at 38.

[936] CL–ASR–60933 at 4.

[937] CL–Sen. Levin–59637 at 8.

[938] *See* supra discussion of the exclusion of certain source commodities, products, and byproducts of the cash commodity hedged when reporting on Form 204.

[939] In the December 2013 Position Limits Proposal, the Commission highlighted the importance of the data collected on Form 204 to its Surveillance program, stating that ''[c]ollection of this information would facilitate the Commission's surveillance program with respect to detecting and deterring trading activity that may tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of the referenced contracts and their underlying commodities.'' *See* December 2013 Position Limits Proposal, 78 FR at 75742.

[940] The Commission stated that the Form 204 ''must show the trader's positions in the cash market and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and option positions above the speculative limits'' because the Commission is seeking to ''ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so.'' *See* December 2013 Position Limits Proposal, 78 FR at 75741–2.

[941] The Commission's Weekly Cotton On-Call Report can be found here: *http://www.cftc.gov/MarketReports/CottonOnCall/index.htm.*

special commodity contracts specified by the Commission.

The Commission proposed to require reporting on new Form 504 for conditional spot-month limit exemptions in the natural gas commodity derivative contracts only.

Comments Received: One commenter stated its belief that the information required on Form 504 is redundant of information required on Form 204 and would overly burden hedgers.[942] The commenter suggested that, if the Commission decides to retain the conditional spot-month limit exemption, and thereby Form 504, the Commission should require only an affirmative representation from market participants that they do not hold any physical delivery Referenced Contracts.[943]

Another commenter stated that Form 504 creates a burden for hedgers to track their cash business and affected contracts and to create systems to file multiple forms. The commenter noted its belief that end-users/hedgers should never be subjected to the daily filing of reports.[944] Further, the commenter suggested the Commission delete Form 504 entirely, asserting that it will be unnecessary if the Commission adopts the commenter's separate cash settled limit idea (the commenter proposed a higher cash settled limit with no condition on the physical delivery market).[945] Another commenter suggested deleting the Form 504 because it believes that no matter how extensive the Commission makes reporting requirements, the Commission will still need to request additional information on a case-by-case basis to ensure hedge transactions are legitimate.[946]

A third commenter suggested that the Commission should modify the data requirements for Form 504 in a manner similar to the approach used by ICE Futures U.S. for natural gas contracts, that is, requiring a description of a market participant's cash-market positions as of a specified date filed in advance of the spot-month.[947]

Commission Reproposal: The Commission has tentatively determined under § 19.03 to designate the Henry Hub Natural Gas referenced contracts for reporting of a conditional spot-month limit exemption under § 19.00(a)(1)(i).

In response to the first three commenters, the Commission reiterates a key distinction between the Form 504 and the Form 204. Form 504 is required of speculators that are relying upon the conditional spot-month limit exemption. Form 204 is required for hedgers that exceed position limits. To the extent a firm is hedging, there is no requirement to file the Form 504.

In the unlikely event that a firm is both hedging and relying upon the conditional spot-month limit exemption, the firm would be required to file both forms at most one day a month, given the timing of the spot-month in natural gas markets (the only market for which Form 504 will be required at first). In that event, however, the Commission believes that requiring similar information on both forms should encourage filing efficiencies rather than duplicating the burden. For example, both forms require the filer to identify fixed price purchase commitments; the Commission believes it is not overly burdensome for the same firm to report such similar information on the Form 204 and the Form 504, should a market participant ever be required to file both forms.

The Commission is not adopting the commenters' recommendations to delete the Form 504 or to require only an affirmative representation that the condition of the conditional spot-month limit exemption has been met (*i.e.* that the trader holds no position in physical delivery referenced contracts). The Commission explained in the December 2013 Position Limits Proposal that its primary motive in requiring the cash market information required on Form 504 is the need to detect and deter manipulative activities in the underlying cash commodity that might be used to benefit a derivatives position (or vice-versa).[948]

In response to the third commenter, the Commission does not believe that a description of a cash market position is sufficient to allow Commission staff to administer its Surveillance program. Descriptions are not as exact as reported information, and the Commission believes the information gathered in daily Form 504 reports would be more complete—and thus more beneficial—in determining compliance and detecting and deterring manipulation.

The Commission notes that since the Commission is proposing to limit the conditional spot month limit exemption to natural gas markets, the Form 504 will only be required from participants in natural gas markets who seek to avail themselves of the conditional spot-month limit exemption and any corresponding burden will apply to only those participants.

iv. Pass-Through Swap Exemption Reporting on Form 604—§ 19.01(a)(2)

Proposed Rule: As proposed, § 19.01(a)(2) would require a person relying on the pass-through swap exemption who holds either of two position types to file a report with the Commission on new Form 604.[949] The first type of position, filed on Section A of Form 604, is a swap executed opposite a bona fide hedger that is not a referenced contract and for which the risk is offset with referenced contracts (*e.g.,* cross commodity hedging positions). The second type of position, filed on Section B of Form 604, is a cash-settled swap (whether or not the swap is, itself, a referenced contract) executed opposite a bona fide hedger that is offset with physical-delivery referenced contracts held into a spot-month.

These reports on Form 604 would explain hedgers' needs for large referenced contract positions and would give the Commission the ability to verify the positions were a bona fide hedge, with heightened daily surveillance of spot-month offsets. Persons holding any type of pass-through swap position other than the two described above would report on Form 204.[950]

Comments Received: The Commission received three comments regarding Form 604, all from the same commenter. These comments and the Commission's responses are detailed below.

Comment: One commenter recommended that the Commission remove the requirement in Form 604 to submit futures-equivalent derivative

[942] CL–Working Group–59693 at 65–66.

[943] CL–Working Group–59693 at 65–66.

[944] CL–COPE–59662 at 24.

[945] CL–COPE–59662 at 24.

[946] CL–NGFA–60941 at 7–8.

[947] CL–FIA–59595 at 37.

[948] Specifically, the Commission stated that ''[w]hile traders who avail themselves of this exemption could not directly influence particular settlement prices by trading in the physical-delivery referenced contract, the Commission remains concerned about such traders' activities in the underlying cash commodity.'' *See* December 2013 Position Limits Proposal, 78 FR at 75744.

[949] Under the definition of bona fide hedging position in Section 4a(c)(2) of the Act, a person who uses a swap to reduce risks attendant to a position that qualifies as a bona fide hedging position may pass-through those bona fides to the counterparty, even if the person's swap position is not in excess of a position limit. As such, positions in commodity derivative contracts that reduce the risk of pass-through swaps would qualify as bona fide hedging positions. *See supra* discussion of the proposed definition of bona fide hedging position.

[950] Persons holding pass-through swap positions that are offset with referenced contracts outside the spot month (whether such contracts are for physical delivery or are cash-settled) need not report on Form 604 because swap positions that are referenced contracts will be netted with offsetting referenced contract positions outside the spot month pursuant to proposed § 150.2(b).

positions, claiming that the Commission did not explain why it needs to obtain data on a market participant's futures-equivalent position as part of proposed Form 604 in light of the commenter's presumption that the Commission already has a market participant's future-equivalent position from large-trader reporting rules and access to SDR data.[951]

Commission Reproposal: In response to the commenter, the Commission notes that futures-equivalent position information is necessary to allow staff to match the offset futures position with the non-referenced-contract swap position underlying the hedge because such positions are not subject to part 20 reporting. The Commission notes that Form 604 is filed outside of the spot month only if the swap position being offset is not a referenced contract. Since only referenced contracts are automatically netted for purposes of determining compliance with position limits, the Commission would not have knowledge or reason to net a pass-through swap position with the participant's futures positions without the filing of Form 604. During the spot month, the Commission notes that, while it has access to referenced contract swap positions in part 20 data, the Commission would not know that a particular swap forms the basis for a pass-through swap offset exemption, and so again would not have knowledge or reason to net a pass-through swap position with the participant's futures position. Without Section B of Form 604 filed during the spot month, the Commission may believe a firm is in violation of physical-delivery spot month limits despite the firm being eligible for a pass-through swap offset exemption. The Commission is proposing to require the identification of a particular swap position and the offsetting referenced contract position to alleviate concerns about the disruption of the price discovery function of the underlying physical-delivery contract during the spot month period.

Comment: The same commenter also noted that the spot-month for certain referenced contracts will no longer trade as of the last Friday of the month and so recommended that a market participant exceeding a spot-month position limit who no longer has that spot-month position should not be required to report futures-equivalent derivatives positions for referenced contract on Form 604.[952]

Commission Reproposal: As proposed, pass-through swap offsets that last into the spot-month would be filed daily during the spot period, not as of the last Friday of the month.[953] Pass-through swap offset positions outside of the spot-month are required to be filed as of the last Friday of the month. The Commission expects that, in most cases, the Form 604 would be filed outside of the spot-month which means only Section A would need to be filed. That filing is required as of the last Friday of the month, the same timeline that is required for the Form 204, for convenience and ease of filing.

Comment: Finally, the commenter recommended that CFTC require a market participant with a position in excess of a spot-month position limit to report on Form 604 only the cash-market activity related to that particular spot-month derivative position, and not to require it to report cash-market activity related to non-spot-month positions where it did not exceed a non-spot-month position limit, since the burden associated with such a reporting obligation would increase significantly.[954]

Commission Reproposal: The Commission notes in response to the commenter that neither Sections A nor B of Form 604 would require the filer to report cash market activity.

This commenter makes the same remarks regarding Form 204, but the Form 204 requires cash-market activity in a particular commodity whereas the Form 604 requires information on a particular swap market position.

The Commission is reproposing Form 604, as originally proposed.

e. Time and Place of Filing Reports—§ 19.01(b)

Proposed Rule: As proposed, § 19.01(b)(1) would require all reports except those submitted in response to special calls or on Form 504, Form 604 during the spot-month, or Form 704 to be filed monthly as of the close of business on the last Friday of the month and not later than 9 a.m. Eastern Time on the third business day following the last Friday of the month.[955] For reports submitted on Form 504 and Form 604 during the spot-month, proposed § 19.01(b)(2) would require filings to be submitted as of the close of business for each day the person exceeds the limit during the spot period and not later than 9 a.m. Easter Time on the next business day following the date of the report.[956] Finally, proposed § 19.01(b)(3) would require series '04 reports to be transmitted using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission or its designee.

Comments Received: One commenter stated its support for the proposed monthly, rather than daily, filing of Form 204.[957] Another commenter recommended an annual Form 204 filing requirement, rather than a monthly filing requirement. The commenter noted that because the general size and nature of its business is relatively constant, the differences between each monthly report would be insignificant. The commenter recommended the CFTC ''not impose additional costs of monthly reporting without a demonstration of significant additional regulatory benefits.'' The commenter noted its futures position typically exceeds the proposed position limits, but such positions are bona fide hedging positions. In addition to futures, the commenter noted it executes a small notional volume of swaps as hedges of forward contracts.[958]

Similarly, another commenter suggested that if the Commission does not eliminate the forms in favor of the requirements in the 2016 Supplemental Position Limits Proposal the Commission should require only an annual notice that details its maximum cash market exposure that justifies an exemption, to be filed with the exchange.[959]

One commenter suggested that the reporting date for Form 204 should be the close of business on the day prior to the beginning of the spot period and that it should be required to filed no later than the 15th day of the month following a month in which a filer exceeded a federal limit to allow the market participant sufficient time to collect and report its information.[960]

With regards to proposed § 19.01(b)(2), one commenter recommended CFTC change the proposed next-day reporting of Form 504 for the conditional spot-month limit exemption and Form 604 for the pass-through swap offsets during the spot-month, to a monthly basis, noting

[951] CL–FIA–59595 at 37.

[952] CL–FIA–59595 at 37–38.

[953] *See supra* discussion regarding the time and place of filing series '04 reports.

[954] CL–FIA–59595 at 38.

[955] The timeframe for filing Form 704 is included as part of proposed § 150.7. *See supra* for discussion regarding the filing of Form 704.

[956] In proposed § 19.01(b)(2), the Commission inadvertently failed to include reports filed under § 19.00(a)(1)(ii)(B) *(i.e.* Form 604 during the spot month) in the same filing timeframe as reports filed under § 19.00(a)(1)(i) (*i.e.* Form 504). The correct filing timeframe was described in multiple places on the forms published in the **Federal Register** as part of the December 2013 Position Limits Proposal.

[957] CL–Working Group–59693 at 65.

[958] CL–DFA–59621 at 2.

[959] CL–FIA–60937 at 17.

[960] CL–Working Group–60947 at 17–18.

market participants need time to generate and collect data and verify the accuracy of the reported data. The commenter further stated that CFTC did not explain why it needs the data on Form 504 or Form 604 on a next-day basis.[961]

Another asserted that the daily filing requirement (Form 504) for participants who rely on the conditional spot-month limit exemption ''imposes significant burdens and substantial costs on market participants.'' The commenter urged a monthly rather than a daily filing of all cash market positions, which the commenter claimed is consistent with current exchange practices.[962]

Commission Reproposal: The Commission is reproposing § 19.01(b)(1), as originally proposed, with some minor clarifications to the language to make the text easier to follow. As discussed above, the Commission believes that Form 204 provides a monthly ''snapshot'' of the cash market positions of traders whose positions are in excess of spot-month or non-spot-month speculative position limits and for that reason it is necessary to provide its Surveillance program the ability to detect and deter market manipulation and protect the price discovery process. The Commission is retaining the last Friday of the month as the required reporting date in order to avoid confusion and uncertainty, particularly for those participants who already file Form 204 and thus are accustomed to that reporting date.

In response to the commenters' suggestions that Form 204 be filed annually, the Commission notes that throughout the course of a year, most commodities subject to federal position limits under proposed § 150.2 are subject to seasonality of prices as well as less predictable imbalances in supply and demand such that an annual filing would not provide Surveillance insight into cash market trends underlying changes in the derivative markets. This insight is necessary for Surveillance to determine whether price changes in derivative markets are caused by fundamental factors or manipulative behavior. Further, the Commission believes that an annual filing could actually be more burdensome for firms, as an annual filing could lead to special calls or requests between filings for additional information in order for the Commission's Surveillance program to fulfill its responsibility to detect and deter market manipulation. In addition, the Commission notes that while one participant's positions may remain constant throughout a year, the same is not true for many other market participants. The Commission believes that varying the filing arrangement depending on a particular market or market participant is impractical and would lead to increased burdens for market participants due to uncertainty regarding when each firm, or each firm by each commodity, is supposed to file.

The Commission is reproposing, as originally proposed, the provision in proposed § 19.01(b)(2) to require next-day, daily filing of Forms 504 and 604 in the spot-month. In response to the commenter, the Commission notes that it described its rationale for requiring Forms 504 and 604 daily during the spot-month in the December 2013 Position Limits Proposal.[963] In order to detect and deter manipulation during the spot-month, concurrent information regarding the cash positions of a speculator holding a conditional spot-month limit exemption (Form 504) or the swap contract underlying a large offsetting position in the physical delivery contract (Form 604) is necessary during the spot-month. Receiving Forms 504 or 604 before or after the spot-month period would not help the Surveillance program to protect the price discovery process of physical-delivery contracts and to ensure that market participants have a qualifying pass-through swap contract position underlying offsetting futures positions held during the spot-month.

The Commission notes that, as reproposed, the Form 504 is required only for the Natural Gas commodity, which has a 3-day spot period.[964] Daily reporting of the Form 504 during the spot-month allows Surveillance to monitor a market participant's cash market activity that could impact or benefit their derivatives position. Given the short filing period for natural gas and the importance of accurate information during the spot-month, the Commission believes that requiring the Form 504 to be filed daily provides an important benefit that outweighs the potential burdens for filers

As a practical matter, the Commission notes that the Form 604 is collected during the spot-month only under particular circumstances, *i.e.* for an offsetting position in physical delivery referenced contracts during the spot-month. Because the ''five-day rule'' applies to such positions, the spot-month filing of the Form 604 would only occur in contracts whose spot-month period is longer than 5 days (excluding, for example, energy contracts but including many agricultural commodities).[965]

The Commission is reproposing §§ 19.01(b)(1)–(2), as originally proposed, with some minor clarifications to the language to make the text easier to follow. The Commission inadvertently left out of proposed § 19.01(b)(2) a reference to the requirement to file Section B of Form 604 (pass-through swap offsets held into the spot-month). No commenter appeared to be confused about this requirement, as the correct timeframe was described in multiple places on the forms published in the **Federal Register** as part of the December 2013 Position Limits Proposal, but to avoid future confusion the Commission has modified the language—but not the substance—of § 19.01(b)(1)–(2) to clarify the time and place for filing series '04 reports.

Finally, the Commission is reproposing the electronic filing requirement, as originally proposed.[966] Further instructions on submitting '04 reports will be available at *http://www.cftc.gov/Forms/index.htm.*

F. § 150.7—Reporting Requirements for Anticipatory Hedging Positions

1. Reporting Requirements for Anticipatory Hedging Positions and New Form 704

Proposed Rule: The Commission's revised definition of bona fide hedging in § 150.1 enumerates two new types of anticipatory bona hedging positions. Two existing types of anticipatory hedges are being continued from the existing definition of bona fide hedging in current § 1.3(z): Hedges of unfilled anticipated requirements and hedges of

[961] CL–FIA–59595 at 35.

[962] CL–ICE–59669 at 7.

[963] December 2013 Position Limits Proposal, 78 FR at 75744–5. The Commission noted that its experience overseeing the ''dramatic instances of disruptive trading practices in the natural gas markets'' warranted enhanced reporting for that commodity during the spot month on Form 504. The Commission noted its intent to wait until it gained additional experience with limits in other commodities before imposing enhanced reporting requirements for those commodities. The Commission further noted that it was concerned that a trader could hold an extraordinarily large position early in the spot month in the physical-delivery contract along with an offsetting short position in a cash-settled contract (such as a swap), and that such a large position could disrupt the price discovery function of the core referenced futures contract.

[964] Reproposed § 150.3(c) provides a conditional spot-month limit exemption only for the natural gas cash-settled referenced contracts.

[965] It should be noted, however that an exchange, using its discretion, could require the filing of Form 604, for example, in an energy contract, as part of the exchange's recognition of a non-enumerated bona fide hedging position under § 150.9, discussed below.

[966] The Commission notes that the electronic filing requirement was proposed in § 19.01(b)(3) but due to other changes within that section it is now located in § 19.01(b)(4). The substance of the requirement has not changed.

unsold anticipated production, as well as anticipatory cross-commodity hedges of such requirements or production.[967] The revised § 150.1 definition expands the list of enumerated anticipatory bona fide hedging positions to include hedges of anticipated royalties and hedges of anticipated services contract payments or receipts, as well as anticipatory cross-commodity hedges of such contracts.[968] As discussed above, § 1.48 has long required special reporting for hedges of unfilled anticipated requirements and hedges of unsold anticipated production because the Commission remains concerned about distinguishing between anticipatory reduction of risk and speculation. Such concerns apply equally to any position undertaken to reduce the risk of anticipated transactions. Hence, the Commission proposed to extend the special reporting requirements in proposed § 150.7 for all types of enumerated anticipatory hedges that appear in the definition of bona fide hedging positions in proposed § 150.1.

The Commission proposed to add a new series '04 reporting form, Form 704, to effectuate these additional and updated reporting requirements for anticipatory hedges. Persons wishing to avail themselves of an exemption for any of the anticipatory hedging transactions enumerated in the updated definition of bona fide hedging in § 150.1 are required to file an initial statement on Form 704 with the Commission at least ten days in advance of the date that such positions would be in excess of limits established in proposed § 150.2. Advance notice of a trader's intended maximum position in commodity derivative contracts to offset anticipatory risks allows the Commission to review a proposed position before a trader exceeds the position limits and, thereby, allows the Commission to prevent excessive speculation in the event that a trader were to misconstrue the purpose of these limited exemptions.[969] The trader's initial statement on Form 704 provides a detailed description of the person's anticipated activity (*i.e.,* unfilled anticipated requirements, unsold anticipated production, etc.).[970] Under proposed § 150.7(b), the Commission may reject all or a portion of the position as not meeting the requirements for bona fide hedging positions under proposed § 150.1. To support this determination, proposed § 150.7(c) would allow the Commission to request additional specific information concerning the anticipated transaction to be hedged. Otherwise, Form 704 filings that conform to the requirements set forth in § 150.7 would become effective ten days after submission. As proposed, § 150.7(e) would require an anticipatory hedger to file a supplemental report on Form 704 whenever the anticipatory hedging needs increase beyond that in its most recent filing.

As proposed, § 150.7(f) would add a requirement for any person who files an initial statement on Form 704 to provide annual updates that detail the person's actual cash market activities related to the anticipated exemption. With an eye towards distinguishing bona fide hedging of anticipatory risks from speculation, annual reporting of actual cash market activities and estimates of remaining unused anticipated exemptions beyond the past year would enable the Commission to verify whether the person's anticipated cash market transactions closely track that person's real cash market activities. In addition, § 150.7(g) would enable the Commission to review and compare the actual cash activities and the remaining unused anticipated hedge transactions by requiring monthly reporting on Form 204. Absent monthly filing, the Commission would need to issue a special call to determine why a person's commodity derivative contract position is, for example, larger than the pro rata balance of her annually reported anticipated production.

As is the case under current § 1.48, § 150.7(h) requires that a trader's maximum sales and purchases must not exceed the lesser of the approved exemption amount or the trader's current actual anticipated transaction.

For purposes of simplicity, the special reporting requirements for anticipatory hedges are located within the Commission's position limits regime in part 150, and alongside the Commission's updated definition of bona fide hedging positions in § 150.1. Thus, the Commission is proposing to delete the reporting requirements for anticipatory hedges in current § 1.48 because that section would be duplicative.

Comments Received: One commenter asserted that the reporting requirements for anticipatory hedges of an operational or commercial risk comprising an initial, supplementary and annual report are unduly burdensome. The commenter recommended that the Commission require either an initial and annual report or an initial and supplementary report.[971]

Another commenter suggested deleting the Form 704 because it believes that no matter how extensive the Commission makes reporting requirements, the Commission will still need to request additional information on a case-by-case basis to ensure hedge transactions are legitimate.[972] The commenter suggested that the Commission should be able to achieve its goal of obtaining enough information to determine whether to request additional information using the Form 204 along with currently collected data sources and so the additional burden of the new series '04 reports outweighs the benefit to the Commission.[973]

Several commenters remarked on the cost associated with the proposed Form 704. One commenter stated that the additional reporting requirements, including new Form 704 to replace the reporting requirements under current rule 1.48, and annual and monthly reporting requirements under proposed rules 150.7(f) and 150.7(g) ''will impose significant additional regulatory and compliance burdens on commercials and believes that the Commission should consider alternatives, including targeted special calls when appropriate.'' [974] Another commenter stated the reporting requirements for the series 04 forms is overly burdensome and would impose a substantial cost to market participants because while the proposal would require the Commission to respond fairly quickly, it does not provide an indication of whether the Commission will deem the requirement accepted if the Commission doesn't respond within a time frame. The commenter is concerned that a market participant may have to refuse business if it does not receive an approved exemption in advance of a transaction.[975] A third commenter stated that Form 704 is ''commercially impracticable and unduly burdensome'' because it would require filers to

[967] *See* current definition of bona fide hedging transactions at 17 CFR 1.3(z)(2)(i)(B) and (ii)(C), respectively. Cross-commodity hedges are permitted under 17 CFR 1.3(z)(2)(iv). *Compare with* paragraphs (3)(iii) and (4)(i), respectively, of the definition of bona fide hedging positions in proposed § 150.1, discussed *above.*

[968] *See* sections (4)(iii), (4)(iv), and (5), respectively, of the definition of bona fide hedging positions in § 150.1, discussed *above.*

[969] Further, advance filing may serve to reduce the burden on a person who exceeds position limits and who may then otherwise be issued a special call to determine whether the underlying requirements for the exemption have been met. If the Commission were to reject such an exemption, such a person would have already violated position limits.

[970] Proposed 150.7(d)(2) would require additional information for cross hedges, for reasons discussed above.

[971] CL–IECAssn–59679 at 11.

[972] CL–NGFA–60941 at 7–8.

[973] *Id.*

[974] CL–APGA–59722 at 10.

[975] CL–EDF–59961 at 6.

''analyze each transaction to see if it fits into an enumerated hedge category.'' The commenter is concerned that such ''piecemeal review'' would require a legal memorandum and the development of new software to track positions and, since the Commission proposed that Form 704 to be used in proposed § 150.11, the burden associated with the form has increased.[976]

One commenter highlighted discrepancies between the instructions for Form 704 and the data on the sample Form 704. The commenter noted that instructions for column five request the ''Cash commodity same as (S) or cross-hedged (C–H) with Core Reference Futures Contract (CFRC)'' while the sample Form 704 lists ''CL–NYMEX'' as the information reported in that column. The commenter also noted that Form 704 has eleven columns, while the sample Form 704 contains only ten columns, omitting a column for ''Core Referenced Futures contract (CRFC).''[977]

The commenter also requested that the Commission clarify instructions for column six of proposed Form 704 to permit a reasonable estimate of anticipated production (or other anticipatory hedge) based on commercial experience, in the event the market participant does not have three years of data related to the anticipated hedge, for example, of anticipated production of a newly developed well.[978]

Commission Reproposal: As discussed in the December 2013 Position Limits Proposal, the Commission remains concerned about distinguishing between anticipatory reduction of risk and speculation.[979] Therefore, the Commission is again proposing the requirement to file Form 704 for anticipatory hedges. The Commission notes that most of the information required on Form 704 is currently required under § 1.48, and that such information is not found in any other Commission data source, including Form 204.

The Commission is proposing several changes to § 150.7 in order to make the requirements for Form 704 clearer and more concise. For example, the Commission is adopting the commenter's suggestion to require the initial statement and annual update but eliminate the supplemental filing as proposed in § 150.7(e). Current § 1.48 contains a requirement for supplemental filings similar to proposed § 150.7(e), but unlike current § 1.48, the proposed rules also require monthly reporting on Form 204 and annual updates to the initial statement. After considering the commenter's concerns, the Commission believe the monthly reporting on Form 204 and annual updates on Form 704 will provide sufficient updates to the initial statement and is deleting the supplemental filing provision in proposed § 150.7(e) to reduce the burden on filers as suggested by the commenter.

In addition, the Commission is combining the list of required information on Form 704 into one section, since such information is almost identical for the initial statement and the required annual updates. In this Reproposal, two nearly identical lists of information have been combined into one list in § 150.7(d). This reorganization is intended to make compliance with § 150.7, including the filing of Form 704, simpler and easier to understand for market participants. Changes have been made throughout part 19 and part 150 to conform to the deletion of the required supplemental filing and the reorganization of § 150.7. In particular, the Commission altered § 19.01(a)(4) to reflect the deletion of the supplemental update and to clarify that persons required to file series '04 reports under § 19.00(a)(1)(iv) must file only Form 204 as required in § 150.7(e).

Finally, the sample Form 704 found in Appendix A to part 19 has also been updated to reflect the combination of the initial statement and annual update into one section. Specifically, on proposed Form 704 had two sections: Section A required information regarding the initial statement and supplemental updates and Section B was required for annual updates. Due to the above-mentioned changes, Section B has been deleted and Section A has been re-labeled as requiring information regarding both the initial statement and the annual update. In order to differentiate between a firm's initial statement and its annual updates regarding the same, the Commission has added a check-box field that requires traders to identify whether they are filing Form 704 to submit an initial statement or to file the required annual update. The Commission believes the addition of this field poses no significant additional burden; rather, the Commission believes the changes to the form, as discussed above, reduce burden to a far greater extent than a minor addition of a check box adds burden.

In response to the commenter who suggested the Commission consider target special calls and other alternatives to the annual and monthly filings, the Commission believes these filings are critical to the Commission's Surveillance program. Anticipatory hedges, because they are by definition forward-looking, require additional detail regarding the firm's commercial practices in order to ensure that a firm is not using the provisions in proposed § 150.7 to evade position limits. In contrast, special calls are backward-looking and would not provide the Commission's Surveillance program with the information needed to prevent markets from being susceptible to excessive speculation. However, the Commission expects the new filing requirements to be an improvement over current practice under § 1.48 because as facts and circumstances change, Surveillance will have a more timely understanding of the market participant's hedging needs.

The Commission notes in response to the commenter that Form 704 is filed in anticipation of risk to be assumed at a future date; market participants will need to provide a detailed description of anticipated activity but there is no requirement to analyze individual transactions or submit a memorandum.

The Commission also notes that concerns regarding a firm having to decline business, because an exemption has not been approved, are unwarranted. Series '04 reports (other than the initial statement of Form 704) are self-effectuating and do not require Commission notification to become effective. With respect to Form 704, the Commission explained in the December 2013 Position Limits Proposal that if the Commission does not notify a market participant within the timeframe indicated in § 150.7(b), the filing becomes effective automatically.[980]

The commenter is correct in noting that there is an error on the Sample Form 704 such that column five (''Core Referenced Futures Contract (CRFC)'') was inadvertently omitted from the Sample Form provided in the proposed rules. The Commission is amending the Sample Form 704 in the reproposed rules to ensure it accurately reflects the requirements of the Form 704 as described in § 150.7(d). Further, the Commission is deleting the condition that requires the specified operating

[976] CL–EEI–EPSA–60925 at 9.

[977] CL–FIA–59595 at 39.

[978] CL–FIA–59595 at 39.

[979] *See* December 2013 Position Limits Proposal, 78 FR at 75746.

[980] *See* the December 2013 Position Limits Proposal, 78 FR at 75746: ''Under proposed § 150.7(b), the Commission may reject all or a portion of the position as not meeting the requirements for bona fide hedging positions under § 150.1. . . . Otherwise, Form 704 filings that conform to the requirements set forth in proposed § 150.7 would become effective ten days after submission.''

period may not exceed one year for agricultural commodities, as end-users in certain agricultural commodities may hedge their positions several years out along the curve.

The Commission notes, in response to the commenter's concern regarding column 6 of Form 704, that the requirement to file the past three years of annual production is also in current § 1.48. Understanding the recent history of a firm's production is necessary to ensure the requested anticipated hedging amount is reasonable. However, the Commission notes that it may permit a reasonable, supported estimate of anticipated production for less than three years of annual production data, in the Commission's discretion, if a market participant does not have three years of data. The Commission is amending the form instructions to clarify that Commission staff could determine that such an estimate is reasonable and so would be accepted.

Finally, the Commission notes that several references to other provisions within part 150 contained in §§ 150.7(b), 150.7(d), and 150.7(h) were incorrectly cited in the December 2013 Position Limits Proposal; the Commission is revising these paragraphs to ensure all references are up-to-date and correct.

2. Delegation

Proposed Rule: In § 150.7(i), the Commission proposed to delegate to the Division of Market Oversight director or staff the authority: To provide notice to a firm who has filed Form 704 that they do not meet the requirements for bona fide hedging; to request additional or updated information under § 150.7(c); and to request under § 150.7(d)(2) information concerning the basis for and derivation of conversion factors used in computing the position information provided in Form 704.

Comments Received: The Commission received no comments on the proposed delegation of authority under § 150.7.

Commission Reproposal: The Commission is reproposing § 150.7(i), as originally proposed.

G. § 150.9—Process for Recognition of Positions as Non-Enumerated Bona Fide Hedging Positions

1. Overview of Proposed Rules Related to Recognition of Bona Fide Hedging Positions and Granting of Spread Exemptions

In the 2016 Supplemental Position Limits Proposal, the Commission noted that it was proposing three sets of Commission rules under which an exchange could take action to recognize certain bona fide hedging positions and to grant certain spread exemptions, with regard to both exchange-set and federal position limits.[981] The Commission pointed out that in each case, the proposed rules would establish a formal CFTC review process that would permit the Commission to revoke all such exchange actions.

As the Commission observed at that time, its authority to permit certain exchanges to recognize positions as bona fide hedging positions is found, in part, in CEA section 4a(c)(1), and under CEA section 8a(5), which provides that the Commission may make such rules as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. CEA section 4a(c)(1) provides that no CFTC rule applies to ''transaction or positions which are shown to be bona fide hedging transactions or positions,'' as those terms are defined by Commission rule consistent with the purposes of the CEA.[982] The Commission noted that ''shown to be'' is passive voice, which could encompass either a position holder or an exchange being able to ''show'' that a position is entitled to treatment as a bona fide hedging position, and does not specify that the Commission must determine in advance whether the position or transaction was shown to be bona fide. The Commission interpreted CEA section 4a(c)(1) to authorize the Commission to permit certain SROs (*i.e.,* DCMs and SEFs, meeting certain criteria) to recognize positions as bona fide hedging positions for purposes of federal limits, subject to Commission review.

The Commission observed that for decades, exchanges have operated as self-regulatory organizations, and pointed out further that these self-regulatory organizations have been charged with carrying out regulatory functions, including, since 2001, complying with core principles, and operate subject to the regulatory oversight of the Commission pursuant to the CEA as a whole, and more specifically, CEA sections 5 and 5h.[983] In addition, the Commission pointed out that as self-regulatory organizations, exchanges do not act only as independent, private actors;[984] when the Act is read as a whole, as the Commission noted in 1981, ''it is apparent that Congress envisioned cooperative efforts between the self-regulatory organizations and the Commission. Thus, the exchanges, as well as the Commission, have a continuing responsibility in this matter under the Act.''[985] The Commission

[981] *See generally* 2016 Supplemental Position Limits Proposal, 81 FR at 38464–82; the Commission incorporates herein its explanation of its proposed adoption of §§ 150.9, 150.10 and 150.11. Under the proposal, exchanges would be able to: (i) Recognize certain non-enumerated bona fide hedging positions, *i.e.,* positions that are not enumerated by the Commission's rules (pursuant to proposed § 150.9); (ii) grant exemptions to position limits for certain spread positions (pursuant to proposed § 150.10); and (iii) recognize certain enumerated anticipatory bona fide hedging positions (pursuant to proposed § 150.11).

[982] 2016 Supplemental Position Limits Proposal, 81 FR at 38464.

[983] *Id.* at 38465. The Commission noted that CFTC § 1.3(ee) defines SRO to mean a DCM, SEF, or registered futures association (such as the National Futures Association), and also pointed out that under the Commission's regulations, self-regulatory organizations have certain delineated regulatory responsibilities, which are carried out under Commission oversight and which are subject to Commission review. *Id.*

[984] *Id.* The Commission stated that it ''views as instructive'' three examples of case law addressing grants of authority by an agency (the Securities and Exchange Commission, the 'SEC') to a self-regulatory organization ('SRO') (in the SEC cases the SRO was NASD, now FINRA), providing insight into the factors addressed by the court regarding oversight of an SRO;

(i) In 1952, the Second Circuit reviewed an SEC order that failed to set aside a penalty fixed by NASD suspending the defendant broker-dealer from membership. *Citing Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940), the Second Circuit found that, in light of the statutory provisions vesting the SEC with power to approve or disapprove NASD's rules according to reasonably fixed statutory standards, and the fact that NASD disciplinary actions are subject to SEC review, there was 'no merit in the contention that the Maloney Act unconstitutionally delegates power to the NASD.' *R.H. Johnson* v. *Securities and Exchange Commission,* 198 F. 2d 690, 695 (2d Cir. 1952).

(ii) In 1977, the Third Circuit, in *Todd & Co.* v. *Securities and Exchange Commission* ('*Todd*'), 557 F.2d 1008 (3rd Cir. 1977), likewise concluded that the Act did not unconstitutionally delegate legislative power to a private institution. The *Todd* court articulated critical factors that kept the Maloney Act within constitutional bounds. First, the SEC had the power, according to reasonably fixed statutory standards, to approve or disapprove NASD's rules before they could go into effect. Second, all NASD judgments of rule violations or penalty assessments were subject to SEC review. Third, all NASD adjudications were subject to a de novo (non-deferential) standard of review by the SEC, which could be aided by additional evidence, if necessary. *Id.* at 1012. Based on these factors, the court found that '[NASD's] rules and its disciplinary actions were subject to full review by the SEC, a wholly public body, which must base its decision on its own findings' and thus that the statutory scheme was constitutional. *Id.* at 1012–13. *See also First Jersey Securities* v. *Bergen,* 605 F.2d 690 (1979), applying the same three-part test delineated in *Todd,* and then upholding a statutory narrowing of the Todd test.

(iii) In 1982, the Ninth Circuit considered the constitutionality of Congress' delegation to NASD in *Sorrel* v. *Securities and Exchange Commission,* 679 F. 2d 1323 (9th Cir. 1982). *Sorrel* followed *R.H. Johnson, Todd* and *First Jersey* in holding that because the SEC reviews NASD rules according to reasonably fixed standards, and the SEC can review any NASD disciplinary action, the Maloney Act does not impermissibly delegate power to NASD.''

[985] 2016 Supplemental Position Limits Proposal, 81 FR at 38465.

noted that its approach to its oversight of its SROs was subsequently ratified by Congress in 1982, when it gave the CFTC authority to enforce exchange set limits. Further, the Commission observed that as it stated in 2010, ''since 1982, the Act's framework explicitly anticipates the concurrent application of Commission and exchange-set speculative position limits. The Commission further noted that the 'concurrent application of limits is particularly consistent with an exchange's close knowledge of trading activity on that facility and the Commission's greater capacity for monitoring trading and implementing remedial measures across interconnected commodity futures and option markets.' ''[986]

The Commission also noted that under its proposal, it would retain the power to approve or disapprove the rules of exchanges, under standards set out pursuant to the CEA, and to review an exchange's compliance with those rules.[987] Moreover, the Commission observed that it was not diluting its ability to recognize or not recognize bona fide hedging positions or to grant or not grant spread exemptions, as it reserved to itself the ability to review any exchange action, and to review any application by a market participant to an exchange, whether prior to or after disposition of such application by an exchange.

2. Proposed § 150.9—General

Proposed Rule: In light of DCM experience in granting non-enumerated bona fide hedging position exemptions to exchange-set position limits for futures contracts, and after consideration of comments recommending exchange review of non-enumerated bona fide hedging position requests, the Commission proposed to permit exchanges to recognize non-enumerated bona fide hedging positions with respect to the proposed federal speculative position limits. Under proposed § 150.9, an exchange, as an SRO[988] that is under Commission oversight and whose rules are subject to Commission review,[989] could establish rules under which the exchange could recognize as non-enumerated bona fide hedging positions, positions that meet the general definition of bona fide hedging position in proposed § 150.1, which implements the statutory directive in CEA section 4a(c) for the general definition of bona fide hedging positions in physical commodities.[990] The exchange's recognition would be subject to review by the Commission. Exchange recognition of a position as a non-enumerated bona fide hedging position would allow the market participant to exceed the federal position limit to the extent that it relied upon the exchange's recognition unless and until such time that the Commission notified the market participant to the contrary.[991] The Commission could issue such a notification in accordance with the proposed review procedures. That is, if a party were to hold positions pursuant to a non-enumerated bona fide hedging position recognition granted by the exchange, such positions would not be subject to federal position limits, unless or until the Commission were to determine that such non-enumerated bona fide hedging position recognition was inconsistent with the CEA or CFTC regulations thereunder. Under this framework, the Commission would continue to exercise its authority in this regard by reviewing an exchange's determination and verifying whether the facts and circumstances in respect of a derivative position satisfy the requirements of the general definition of bona fide hedging position proposed in § 150.1.[992] If the Commission determined that the exchange-granted recognition was inconsistent with section 4a(c) of the Act and the Commission's general definition of bona fide hedging position in § 150.1 and so notified a market participant relying on such recognition, the market participant would be required to reduce the derivative position or otherwise come into compliance with position limits within a commercially reasonable amount of time.

The Commission noted its belief that permitting exchanges to so recognize non-enumerated bona fide hedging positions is consistent with its statutory

[986] *Id.* at 38466.

[987] The Commission stated that ''In connection with recognition of bona fide hedging positions, the Commission notes that the statute is silent or ambiguous with respect to the specific issue—whether the CFTC may authorize SROs to recognize positions as bona fide hedging positions. CEA section 4a(c) provides that no Commission rule establishing federal position limits applies to positions which are shown to be bona fide hedging positions, as such term shall be defined by the CFTC. As noted above, the 'shown to be' phrase is passive voice, which could encompass either a position holder or an exchange being able to ''show'' that a position is entitled to treatment as a bona fide hedge, and does not specify that the Commission must be the party determining in advance whether the position or transaction was shown to be bona fide; the Commission interprets that provision to permit certain SROs (*i.e.,* DCMs and SEFs, meeting certain criteria) to recognize positions as bona fide hedges for purposes of federal limits when done so within a regime where the Commission can review and modify or overturn such determinations. Under the 2016 Position Limits Supplemental Proposal, an SRO's recognition is tentative, because the Commission would reserve the power to review the recognition, subject to the reasonably fixed statutory standards in CEA section 4a(c)(2) (directing the CFTC to define the term bona fide hedging position). An SRO's recognition would also be constrained by the SRO's rules, which would be subject to CFTC review under the proposal. The SROs are parties that are subject to Commission authority, their rules are subject to Commission review and their actions are subject to Commission de novo review under the proposal—SRO rules and actions may be changed by the Commission at any time.'' *Id.*

[988] As noted above, under the Commission's regulations, SROs have certain delineated regulatory responsibilities, which are carried out under Commission oversight and which are subject to Commission review. *See also* 2016 Position Limits Supplemental Proposal, n. 126 (describing reviews of DCMs carried out by the Commission).

[989] *See* CEA section 5c(c), 7 U.S.C. 7a–2(a) (providing Commission with authority to review rules and rule amendments of registered entities, including DCMs).

[990] As previously noted, Congress has required in CEA section 4a(c) that the Commission, within specific parameters, define what constitutes a bona fide hedging position for the purpose of implementing federal position limits on physical commodity derivatives, including, as previously stated, the inclusion in new section 4a(c)(2) of a directive to narrow the bona fide hedging definition for physical commodity positions from that currently in Commission regulation § 1.3(z). *See* 2016 Supplemental Position Limits Proposal, nn. 32 and 105 and accompanying text; *see also* December 2013 Positions Limits Proposal at 75705. In response to that mandate, the Commission proposed in its December 2013 Position Limits Proposal to add a definition of bona fide hedging position in § 150.1, to replace the definition in current § 1.3(z). *See* 78 FR at 75706, 75823.

For the avoidance of doubt, the Commission is still reviewing comments received on these provisions. The Commission is proposing to finalize the general definition of bona fide hedging position based on the standards of CEA section 4a(c), and may further define the bona fide hedging position definition consistent with those standards.

[991] *See generally* the discussion of proposed § 150.9(d) and the requirements regarding the review of applications by the Commission in the 2016 Position Limits Supplemental Proposal. The Commission noted that exchange participation is voluntary, not mandatory and that exchanges could elect not to administer the process. Market participants could still request a staff interpretive letter under § 140.99 or seek exemptive relief under CEA section 4a(a)(7), per the December 2013 Position Limits Proposal. The process does not protect exchanges or applicants from charges of violations of applicable sections of the CEA or other Commission regulations. For instance, a market participant's compliance with position limits or an exemption thereto would not confer any type of safe harbor or good faith defense to a claim that he had engaged in an attempted manipulation, a perfected manipulation or deceptive conduct; *see* the discussion of § 150.6 (Ongoing application of the Act and Commission regulations) as proposed in the December 2013 Position Limits Proposal, 78 FR at 75746–7.

[992] *See* the general discussion of the Commission's review process proposed in § 150.9(d); *see also* the requirement for a weekly report, proposed in § 150.9(c), which would support the Commission's surveillance program by facilitating the tracking of non-enumerated bona fide hedging positions recognized by exchanges, keeping the Commission informed of the manner in which an exchange is administering its procedures for recognizing such non-enumerated bona fide hedging positions.

obligation to set and enforce position limits on physical commodity contracts, because the Commission would be retaining its authority to determine ultimately whether any non-enumerated bona fide hedging positions so recognized is in fact a bona fide hedging position. The Commission's authority to set position limits does not extend to any position that is shown to be a bona fide hedging position.[993] Further, most, if not all, DCMs already have a framework and application process to recognize non-enumerated positions, for purposes of exchange-set limits, as within the meaning of the general bona fide hedging definition in § 1.3(z)(1).[994] The Commission has a long history of overseeing the performance of the DCMs in granting exemptions under current exchange rules regarding exchange-set position limits[995] and believed that it would be efficient and in the best interest of the markets, in light of current resource constraints,[996] to rely on the exchanges to initially process applications for recognition of positions as non-enumerated bona fide hedging positions. In addition, because many market participants are familiar with current DCM practices regarding bona fide hedging positions, permitting DCMs to build on current practice may reduce the burden on market participants. Moreover, the Commission believed that the process outlined in the 2016 Position Limits Supplemental Proposal should reduce duplicative efforts because market participants seeking recognition of a non-enumerated bona fide hedging position would be able to file one application for relief, only to an exchange, rather than to both an exchange with respect to exchange-set limits and to the Commission with respect to federal limits.[997]

Comments Received

Exchange Authority Under the Proposal

The Commission received some comments on its 2016 Supplemental Position Limits Proposal that addressed concerns only marginally responsive to that proposal; the Commission will address those comments in connection with the relevant provisions.[998]

Several commenters supported the Commission's proposal to allow exchanges to recognize non-enumerated bona fide hedge positions with respect to federal speculative position limits;[999] on the other hand, some commenters expressed views against any Commission involvement in the exchange-administered exemption process. That is, according to those commenters, exchanges should be given full discretion or greater leeway to manage an exemption process without Commission interference.[1000] In addition, a commenter requested that the Commission provide additional regulatory certainty for end-users, including that the Commission should simply expand the DCM's current authority to grant bona fide hedge exemptions and maintain the Commission's current oversight role in respect of DCM processes and rules under the DCM Core Principles.[1001]

Similarly, some commenters expressed the view that there could be circumstances where multiple

[993] CEA section 4a(c)(1), 7 U.S.C. 6a(c)(1). *See also* 2016 Position Limits Supplemental Proposal, n. 65.

[994] Rulebooks for some DCMs can be found in the links to their associated documents on the Commission's Web site at *http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations*.

[995] The Commission based this view on its long experience overseeing DCMs and their compliance with the requirements of CEA section 5 and part 38 of the Commission's regulations, 17 CFR part 38. As the Commission noted in the 2016 Supplemental Position Limits Proposal, under part 38, a DCM must comply, on an initial and ongoing basis, with twenty-three Core Principles established in section 5(d) of the CEA, 7 U.S.C. 7(d), and part 38 of the CFTC's regulations and with the implementing regulations under part 38. The Division of Market Oversight's Market Compliance Section conducts regular reviews of each DCM's ongoing compliance with core principles through the self-regulatory programs operated by the exchange in order to enforce its rules, prevent market manipulation and customer and market abuses, and ensure the recording and safe storage of trade information. These reviews are known as rule enforcement reviews (''RERs''). Some periodic RERs examine a DCM's market surveillance program for compliance with Core Principle 4, Monitoring of Trading, and Core Principle 5, Position Limitations or Accountability. On some occasions, these two types of RERs may be combined in a single RER. Market Compliance can also conduct horizontal RERs of the compliance of multiple exchanges in regard to particular core principles. In conducting an RER, the Division of Market Oversight (DMO) staff examines trading and compliance activities at the exchange in question over an extended time period selected by DMO, typically the twelve months immediately preceding the start of the review. Staff conducts extensive review of documents and systems used by the exchange in carrying out its self-regulatory responsibilities; interviews compliance officials and staff of the exchange; and prepares a detailed written report of findings. In nearly all cases, the RER report is made available to the public and posted on CFTC.gov. *See* materials regarding RERs of DCMs at *http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf* on the Commission's Web site. Recent RERs conducted by DMO covering DCM Core Principle 5 and exemptions from position limits have included the Minneapolis Grain Exchange, Inc. (''MGEX'') (June 5, 2015), ICE Futures U.S. (July 22, 2014), the Chicago Mercantile Exchange (''CME'') and the Chicago Board of Trade (''CBOT'') (July 26, 2013), and the New York Mercantile Exchange (May 19, 2008). While DMO may sometimes identify deficiencies or make recommendations for improvements, it is the Commission's view that it should be permissible for DCMs to process applications for exchange recognition of positions as non-enumerated bona fide hedging positions. Consistent with the fifteen SEF core principles established in section 5h(f) of the CEA, 7 U.S.C. 7b–3(f), and with the implementing regulations under part 37, 17 CFR part 37, the Commission will perform similar RERs for SEFs. The Commission's preliminary view is that it should be permissible for SEFs to process applications as well, after obtaining the requisite experience administering exchange-set position limits discussed below. *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38469, n. 126 and accompanying text.

[996] Since the enactment of the Dodd-Frank Act, Commissioners, CFTC staff, and public officials have expressed repeatedly and publicly that Commission resources have not kept pace with the CFTC's expanded jurisdiction and increased responsibilities. The Commission anticipates there may be hundreds of applications for non-enumerated bona fide hedging positions. This is based on the number of exemptions currently processed by DCMs. For example, under the existing process, during the period from June 15, 2011 to June 15, 2012, the Market Surveillance Department of ICE Futures U.S. received 142 exemption applications, 121 of which related to bona fide hedging position requests, while 21 related to arbitrage or cash-and-carry requests; 92 new exemptions were granted. Rule Enforcement review of ICE Futures U.S., July 22, 2014, p. 40. Also under the existing process, during the period from November 1, 2010 to October 31, 2011, the Market Surveillance Group from the CME Market Regulation Department took action on and approved 420 exemption applications for products traded on CME and CBOT, including 114 new exemptive applications, 295 applications for renewal, 10 applications for increased levels, and one temporary exemption on an inter-commodity spread. Rule Enforcement Review of the Chicago Mercantile Exchange and the Chicago Board of Trade, July 26, 2013, p. 54. These statistics are now a few years old, and it is possible that the number of applications under the processes outlined in this proposal will increase relative to the number of applications described in the RERs. The CFTC would need to shift substantial resources, to the detriment of other oversight activities, to process so many requests and applications and has determined, as described below, to permit exchanges to process applications initially. The Commission anticipates it will regularly, as practicable, check a sample of the exemptions granted, including in cases where the facts warrant special attention, retrospectively as described below, including through RERs.

[997] One commenter specifically requested that the Commission streamline duplicative processes. CL–AGA–60382 at 12 (stating that ''AGA . . . urges the Commission to ensure that hedge exemption requests and any hedge reporting do not require duplicative filings at both the exchanges and the Commission, and therefore recommends revising the rules to streamline the process by providing that an applicant need only apply to and report to the exchanges, while the Commission could receive any necessary data and applications by coordinating data flow between the exchanges and the Commission.''). *See also* CL–Working Group–60396 (explaining that ''To avoid employing duplicative efforts, the Commission should simply rely on DCMs to administer *bona fide* hedge exemptions from federal speculative position limits as they carry out their core duties to ensure orderly markets.'').

[998] One commenter expressed the view that Class III milk should not be subject to the prohibition on holding cross commodity hedge positions in the spot month or during the last five days, because it is a cash settled contract. CL–DFA–60927 at 5. The Commission is addressing Class III milk separately.

[999] CL–NMPF–60956 at 2; CL–ISDA–60931 at 6–7; CL–API–60939 at 4; CL–NFP–60942 at 6–8; and CL–IECAssn–60949 at 3–4.

[1000] CL–CME–60926 at 7; CL–NGFA–60941 at 3.

[1001] CL–NFP–60942 at 6–8.

commercial firms face similar risks and require recognition of positions as non-enumerated bona fide hedges for the same purpose, and there should be a method for a generic recognition of non-enumerated bona fide hedge positions for commercial firms meeting satisfy specified facts and circumstances, allowing an exchange to announce generic recognition of non-enumerated bona fide hedges for hedgers that satisfy certain facts and circumstances; to allow exchange to announce generic recognition for hedgers that certain specified facts.[1002]

Others did not support providing exchanges with such authority. Instead, those commenters asserted that only the Commission can appropriately and comprehensively administer exemptions to federal limits,[1003] or cited concerns with respect to conflicts of interest that could arise between for-profit exchanges and their exemption-seeking customers.[1004] In the alternative, several of these commenters recommended that the Commission make any final non-enumerated bona fide hedging position determinations, or that exchanges have a limited advisory role with respect to granting exemptions. One commenter expressed the view that it is concerned that the Commission's constrained resources will prevent the Commission from effectively overseeing self-regulatory organizations' recognition of bona fide hedging position exemptions. The commenter suggested that the Commission at least provide guidance regarding what is the Commission's authority in the event that an exchange-managed position accountability level fails in numerous contracts to prevent speculation, or raises other concerns.[1005] Further to this point, the commenter expressed the view that it was concerned that granting exemptions from position limits for swaps that are traded by high frequency trading strategies will exacerbate price volatility to the detriment of commercial hedgers by increasing momentum or rumor trading and the costs of hedging in such a price volatile environment. The commenter believes that this will impact the Commission's ability to review and oversee exchange exemptions, especially if the Commission does not have access to open interest swap data and the intra-day high frequency trading data to determine whether such exchange-granted exemption is economically appropriate.[1006]

Implementation Timeline

Regarding implementation of final regulations, one commenter requested that the CFTC provide a sufficient phase-in period for exchanges to review non-enumerated hedges ahead of implementation because it is hard to discern the number of current positions that will not be considered bona fide hedging positions in the proposed rule unless granted a non-enumerated bona fide hedging position e exemption from an exchange.[1007]

Commission Reproposal Regarding § 150.9

As explained further below, in this Reproposal, the Commission is adopting certain amendments to the proposed § 150.9 and providing certain clarifications. In response to various general comments and recommendations for the non-enumerated bona fide hedging position process, the Commission provides the following responses.

Exchange Authority Under Reproposed § 150.9

In response to comments that the Commission should give exchanges greater leeway or discretion for purposes of federal position limits in the exemption process and expand DCM's current authority to grant bona fide hedge exemptions, the Commission believes, as noted above, that it would be an illegal delegation to give full discretion to exchanges to recognize positions or transactions as bona fide hedging positions, for purposes of federal position limits, without reasonably fixed statutory standards (such as the requirement that exchanges use the Commission's bona fide hedging position definition, which incorporates the standards of CEA section 4a(c)), and with no ability for the Commission to make a de novo review.[1008] Instead, as observed above, the Commission believes it has the authority to provide exchanges with the ability to do so pursuant to reasonably fixed statutory standards and subject to CFTC de novo review.[1009]

Similarly, regarding requests to provide exchanges with a method for a generic recognition of a non-enumerated bona fide hedging position that allows an exchange to announce generic recognition of non-enumerated bona fide hedging positions for hedgers that satisfy certain facts and circumstances, the Commission notes that, as discussed above, it would be an illegal delegation of Commission authority to give full discretion to exchanges to recognize positions or transactions as enumerated bona fide hedging positions without reasonably fixed statutory standards, and without review by the Commission, for purposes of federal position limits. Instead, the Commission points out that any exchange can petition the Commission under § 13.2 for recognition of a typical position as an enumerated bona fide hedging position if the exchange believes there is a fact pattern that is so certain as to not require a facts and circumstances review.

In this light, the Commission is reproposing a consistent approach, subject to amendments described below, for processing recognitions of bona fide hedging positions for purposes of federal position limits (*i.e.,* a standard process that the Commission, exchanges and market participants know and understand). As was noted in the 2016 Position Limits Proposal, the Commission believes that the consistent approach under reproposed § 150.9 should increase administrative certainty for applicants seeking recognition of non-enumerated bona fide hedging positions in the form of reduced application-production time by market participants and reduced response time by exchanges and reduce duplicative efforts because applicants would be saved the expense of applying to both an exchange for relief from exchange-set

[1002] CL–EEI–EPSA–60925 at 9 (noting also that ''unlike a hedge exemption, the exchanges are not granting a firm specific quantity of bona fide hedging contracts but, rather, are validating the bona fide nature of a hedge transaction''); CL–COPE–60932 at 8–9 (recommending that ''[t]he Supplemental NOPR should be revised to permit the DCM to generically recognize a non-enumerated bona fide hedge in cases where multiple commercial firms have sought a non-enumerated bona fide hedge for a similar risk, based upon similar circumstances.'').

[1003] CL–Better Markets–60928 at 3–5; CL–Public Citizen–60940 at 3; CL–PMAA–NEFI–60952 at 2; CL–AFR–60953 at 2–3; CL–RER1–60961 at 1.

[1004] CL–Public Citizen–60940 at 3; CL–PMAA–NEFI–60952 at 2; CL–RER2–60962 at 1; CL–AFR–60953 at 2–3; CL–RER1–60961 at 1; CL–PMAA–NEFI–60952 at 2; CL–RER2–60962 at 1; CL–Better Markets–60928 at 3–5; CL–Public Citizen–60940 at 1–2; CL–AFR–60953 at 3–4.

[1005] CL–IATP–60951 at 2.

[1006] CL–IATP–60951 at 6.

[1007] CL–NCFC–60930 at 5.

[1008] *See supra* section G.1. (discussing the Commission's authority to adopt § 150.9); *see also* discussion regarding adoption of § 150.9(d).

[1009] As observed above, the Second Circuit found in *Sunshine Anthracite Coal Co.* v. *Adkins,* that in light of statutory provisions vesting the SEC with power to approve or disapprove NASD's rules according to reasonably fixed statutory standards, and the fact that NASD disciplinary actions are subject to SEC review, there was ''no merit in the contention that the Maloney Act unconstitutionally delegates power to the NASD.'' *R.H. Johnson* v. *Securities and Exchange Commission,* 198 F. 2d 690, 695 (2d Cir. 1952). *See supra* discussion under preamble section G.1; *see also* preamble discussion regarding the adoption of § 150.9(d).

position limits and to the Commission for relief from federal limits.[1010]

The Commission, however, clarifies that exchanges can recognize strategies as non-enumerated bona fide hedging positions for purposes of federal position limits (including those that the Commission has not enumerated) so long as a facts-and-circumstances review leads the exchange to believe that such strategies meet the definition of bona fide hedging position. Further, regarding comments that exchanges should not have authority to grant exemptions, the Commission disagrees and believes the exchange's experience administering position limits to its actively traded contract, and the Commission's de novo review of exchange determinations that positions are bona fide hedging positions (afterwards) are adequate to guard against or remedy any conflicts of interest. The Commission points out that it has had a long history of cooperative enforcement of position limits with DCMs and, in addition notes that when recognizing non-enumerated bona fide hedging positions for purposes of federal limits, exchanges are required to use the Commission's bona fide hedging position definition.[1011]

As to the concerns that allowing bona fide hedging position determinations for swap positions that are traded by high frequency trading strategies will exacerbate price volatility to the detriment of commercial hedgers and impact the Commission's ability to review and oversee exchange determinations (especially if the Commission does not have access to open interest swap data and the intra-day high frequency trading data to determine whether such exchange-granted determination is economically appropriate), the Commission notes that it does have access to open interest swap data, trade data and order data. The Commission views its access to open interest swap data, trade data and order data as well as its ability under § 150.9 to review all exchange recognitions as sufficient to allow it to carry out its responsibilities under the Act.

General Reproposal Under § 150.9

Regarding implementation timing, the Commission is proposing to implement a delayed compliance date after publication of a final rule, as discussed above.[1012]

[1010] *See, e.g.,* 2016 Position Limits Proposal at 38470, 38488.

[1011] *See* § 150.9(a)(1).

[1012] *See* discussion under Proposed Compliance Date, above; *see also* § 150.2(e)(1).

3. Proposed § 150.9(a)—Requirements for a Designated Contract Market or Swap Execution Facility To Recognize Non-Enumerated Bona Fide Hedging Positions

a. Proposed § 150.9(a)(1)

Proposed Rule

The Commission contemplated in proposed § 150.9(a)(1) that exchanges may voluntarily elect to process non-enumerated bona fide hedging position applications by filing new rules or rule amendments with the Commission pursuant to part 40 of the Commission's regulations. The Commission anticipated that, consistent with current practice, most exchanges will self-certify such new rules or rule amendments pursuant to § 40.6. The Commission expected that the self-certification process should be a low burden for exchanges, especially for those that already recognize non-enumerated positions meeting the general definition of bona fide hedging position in § 1.3(z)(1).[1013] The Commission explained its view that allowing DCMs to continue to follow current practice, and extend that practice to exchange recognition of non-enumerated bona fide hedging positions for purposes of the federal position limits, would permit the Commission to more effectively allocate its limited resources to oversight of the exchanges' actions.[1014]

[1013] DCMs currently process applications for exemptions from exchange-set position limits for non-enumerated bona fide hedging positions and enumerated anticipatory bona fide hedges, as well as for exemptions from exchange-set position limits for spread positions, pursuant to CFMA-era regulatory guidance. *See* 2016 Supplemental Position Limits Proposal, n. 102, and accompanying text. This practice continues because, among other things, the Commission has not finalized the rules proposed in the December 2013 Position Limits Proposal.

As noted above and as explained in the December 2013 Position Limits Proposal, while current § 150.5 regarding exchange-set position limits pre-dates the CFMA ''the CFMA core principles regime concerning position limitations or accountability for exchanges had the effect of undercutting the mandatory rules promulgated by the Commission in § 150.5. Since the CFMA amended the CEA in 2000, the Commission has retained § 150.5, but only as guidance on, and acceptable practice for, compliance with DCM core principle 5.'' December 2013 Position Limits Proposal, 78 FR at 75754.

The DCM application processes for bona fide hedging position exemptions from exchange-set position limits generally reference or incorporate the general definition of bona fide hedging position contained in current § 1.3(z)(1), and the Commission believes the exchange processes for approving non-enumerated bona fide hedging position applications are at least to some degree informed by the Commission process outlined in current § 1.47.

[1014] If the Commission becomes concerned about an exchange's general processing of non-enumerated bona fide hedging position applications, the Commission may review such processes pursuant to a periodic rule enforcement review or a request for information pursuant to § 37.5. Separately, under proposed § 150.9(d), the proposal provides that the Commission may review a DCM's determinations in the case of any specific non-enumerated bona fide hedging position application.

Proposed § 150.9(a)(1) provided that exchange rules must incorporate the general definition of bona fide hedging position in § 150.1. It also provided that, with respect to a commodity derivative position for which an exchange elects to process non-enumerated bona fide hedging position applications, (i) the position must be in a commodity derivative contract that is a referenced contract; (ii) the exchange must list such commodity derivative contract for trading; (iii) such commodity derivative contract must be actively traded on such exchange; (iv) such exchange must have established position limits for such commodity derivative contract; and (v) such exchange must have at least one year of experience administering exchange-set position limits for such commodity derivative contract. The requirement for one year of experience was intended as a proxy for a minimum level of expertise gained in monitoring futures or swaps trading in a particular physical commodity.

The Commission believed that the exchange non-enumerated bona fide hedging position process should be limited only to those exchanges that have at least one year of experience overseeing exchange-set position limits in an actively traded referenced contract in a particular commodity because an individual exchange may not be familiar enough with the specific needs and differing practices of the commercial participants in those markets for which the exchange does not list any actively traded referenced contract in a particular commodity. Thus, if a referenced contract is not actively traded on an exchange that elects to process non-enumerated bona fide hedging position applications for positions in such referenced contract, that exchange might not be incentivized to protect or manage the relevant commodity market, and its interests might not be aligned with the policy objectives of the Commission as expressed in CEA section 4a. The Commission expected that an individual exchange will describe how it will determine whether a particular listed referenced contract is actively traded in its rule submission, based on its familiarity with the specific needs and differing practices of the commercial participants in the relevant market.[1015]

The Commission was also mindful that some market participants, such as commercial end users in some circumstances, may not be required to trade on an exchange, but may nevertheless desire to have a particular derivative position recognized as a non-enumerated bona fide hedging position. The Commission noted its belief that commercial end users should be able to avail themselves of an exchange's non-enumerated bona fide hedging position application process in lieu of requesting a staff interpretive letter under § 140.99 or seeking CEA section 4a(a)(7) exemptive relief. This is because the Commission believed that exchanges that list particular referenced contracts would have enough information about the markets in which such contracts trade and would be sufficiently familiar with the specific needs and differing practices of the commercial participants in such markets in order to knowledgeably recognize non-enumerated bona fide hedging positions for derivatives positions in commodity derivative contracts included within a particular referenced contract. The Commission also viewed this to be consistent with the efficient allocation of Commission resources.

Consistent with the restrictions regarding the offset of risks arising from a swap position in CEA section 4a(c)(2)(B), proposed § 150.9(a)(1) would not permit an exchange to recognize a non-enumerated bona fide hedging position involving a commodity index contract and one or more referenced contracts. That is, an exchange may not recognize a non-enumerated bona fide hedging position where a bona fide hedging position could not be recognized for a pass through swap offset of a commodity index contract.[1016]

Comments on Proposed § 150.9(a)(1)

Requirement That Exchanges Recognize Non-Enumerated Bona Fide Hedging Positions Consistent With the General Bona Fide Hedging Definition

In connection with the requirement under § 150.9 to apply the bona fide hedging definition to recognitions, two commenters requested that the Commission specifically allow exchanges to recognize anticipatory merchandising as a non-enumerated bona fide hedging positions should the facts and circumstances warrant including those rejected strategies [transactions or positions that fail to meet the 'change in value' requirement or the 'economically appropriate test'].[1017]

Another commenter expressed the view that the Commission should extend the process proposed in the 2016 Supplemental Position Limits Proposal to include risk management exemptions.[1018] The commenter acknowledged but disagrees with the Commission's view that such risk management exemptions would not be allowed under the statutory standards for a bona fide hedging position, and suggests that the Commission could use CEA section 4a(a)(7) authority to provide exemptions for risk management positions.

A commenter recommended that the rules clarify that the Exchanges may recognize and grant exemptions on the basis of a strategy, or hedging need, or a combination of strategies or hedging requirements associated with managing an ongoing business.[1019]

Separately, one commenter recommended that ''the Commission should confirm that exchanges may continue to adopt their own rules for exemptions from speculative position limits for futures contracts that are subject to DCM limits, but not to federal limits,'' [1020] while two others stated that the Commission should confirm that the 2016 Supplemental Position Limits Proposal's ''prescriptive procedures'' will not apply to exemptions involving exchange-set limits lower than federally-set levels, or where the exchanges set the limits themselves.[1021]

Requests for Recognition of Non-Enumerated Bona Fide Hedging Positions in the Spot Month

A commenter expressed the view that the Commission should not ''categorically prohibit exchanges from granting non-enumerated and anticipatory hedge exemptions, as appropriate, during the spot month'' and reminded the Commission that orderly trading requirements remain applicable to all positions, as provided under the bona fide hedging position definition. The commenter further expressed the view that the statutory definition of *bona fide* hedging position allows for such recognition during the spot month and that a ''one-size-fits-all'' prohibition will ''unnecessarily restrict commercially reasonable hedging activity during the spot month.'' [1022]

Several commenters were generally against the application of the five-day rule to non-enumerated bona fide hedging position exemptions, and recommended that the Commission authorize the exchanges to grant non-enumerated hedge and spread exemptions during the last five days of trading or the spot period, and other alternatives and proposed regulation text.[1023]

Standards Exchanges Must Meet To Provide Recognitions

Several commenters recommended that the Commission not adopt the proposed ''active trading'' and ''one year experience'' requirements regarding a DCM's qualification to administer exemptions from federal position limits.[1024] One commenter requested removal of the ''actively traded'' requirement, expressing concerns that, based on its understanding, the requirement would impose an ''absolute prohibition'' on exchange-administered exemptions for new contracts of at least one year.[1025] Similarly, a commenter stated that the standard ''would arbitrarily limit competition and operate

[1015] For example, a DCM (''DCM A'') may list a commodity derivative contract (''KX,'' where ''K'' refers to contract and ''X'' refers to the commodity) that is a referenced contract, actively traded, and DCM A has the requisite experience and expertise in administering position limits in that one contract KX. DCM A can therefore recognize non-enumerated bona fide hedging positions in contract KX. But DCM A is not limited to recognition of just that one contract KX–DCM A can also recognize any other contract that falls within the meaning of referenced contract for commodity X. So a market participant could, for example, apply to DCM A for recognition of a position in any contract that falls within the meaning of referenced contract for commodity X. However, that market participant would still need to seek separate recognition from each exchange where it seeks an exemption from that other exchange's limit for a commodity derivative contract in the same commodity X.

[1016] This is consistent with the Commission's interpretation in the December 2013 Position Limits Proposal that CEA section 4a(c)(2)(b) is a direction from Congress to narrow the scope of what constitutes a bona fide hedge in the context of index trading activities. ''Financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks from financial products is inconsistent with the proposed definition of bona fide hedging for physical commodities.'' December 2013 Position Limits Proposal, 78 FR at 75740. *See also* the discussion of the temporary substitute test in the December 2013 Position Limits Proposal, 78 FR at 75708–9.

[1017] CL–ICE–60929 at 12; CL–Working Group–60947 at 6.

[1018] CL–AMG–60946 at 6–7.

[1019] CL–CCI–60935 at 5.

[1020] CL–FIA–60937 at 4.

[1021] CL–ICE–60929 at 7; CL–Working Group–60947 at 14.

[1022] CL–ICE–60929 at 9.

[1023] CL–ICE–60929 at 22; CL–NCGA–NGSA–60919 at 13; CL–CME–60926 at 6 and 8; CL–API–60939 at 3; CL–FIA–60937 at 3 and 12; CL–Working Group–60947 at 7–9; CL–NCC–ACSA–60972 at 2; CL–CMC–60950 at 9–11; CL–ISDA–60931 at 3 and 10; CL–CCI–60935 at 8–9; CL–MGEX–60936 at 11; CL–FIA–60937 at 10, 11; CL–MGEX–60936 at 11.

[1024] CL–CCI–60935 at 3–4; CL–CME–60926 at 13; CL–FIA–60937 at 9; CL–CMC–60950 at 3; CL–Working Group–60947 at 10; CL–IECAssn–60949 at 12–13.

[1025] CL–CMC–60950 at 3.

as a bar to the establishment of new exchanges and new contracts.'' [1026]

In the alternative, one commenter argues that one year of experience in administering position limits in similar contracts within a particular ''asset class'' would be a more reasonable requirement.[1027] In addition, a commenter expressed the view that the Commission should not define ''actively traded'' in terms of minimum monthly volume.[1028]

Previously Granted Hedge Exemptions

One commenter expressed the view that since the exchanges have been working with commercial end user for several decades and currently have a process under § 1.3(z) that may contain specific scenarios that work well and are not listed in the 2016 Position Limits Proposal, the Commission should deem every currently recognized hedge strategy by any exchange as a non-enumerated bona fide hedging position which would eliminate disruption and encourage the autonomy of the exchanges.[1029]

The commenter also expressed the view that, with respect to the status of previously exchange-recognized non-enumerated bona fide hedging positions for which such exchange no longer provides an annual review, the non-enumerated bona fide hedging positions should remain a non-enumerated bona fide hedging position and the participants utilizing that strategy should have ample notice that the exchange will no longer provide the annual review in order to allow time for the individual entity to apply to the CFTC directly for a non-enumerated bona fide hedging position exemption.[1030]

Recognition of OTC Positions as Bona Fide Hedges

Another commenter requested Commission clarification regarding an exchange's obligation with respect to recognizing and monitoring non-enumerated bona fide hedging position determinations for OTC positions. The commenter cited to preamble language to support the possibility of an obligation, but argued that the text of proposed § 150.9 does not mention or contemplate such requests for OTC positions. The commenter also questioned whether such recognition is feasible given the exchanges' lack of visibility into OTC markets.[1031]

Commission Reproposal Regarding § 150.9(a)(1) [1032]

The Commission is reproposing the rule, as originally proposed, subject to the amendments described below.

Requirement That Exchanges Recognize Non-Enumerated Bona Fide Hedging Positions Consistent With the General Bona Fide Hedging Position Definition

Regarding comments that the Commission should permit the recognition of anticipatory merchandising as non-enumerated bona fide hedging strategies, as noted above, while exchanges' recognition of non-enumerated bona fide hedging positions must be consistent with the Commission's bona fide hedging position definition, the Commission agrees that exchanges should, in each case, make a facts-and-circumstances determination as to whether to recognize an anticipatory hedge as a non-enumerated bona fide hedging position, consistent with the Commission's recognition ''that there can be a gradation of probabilities that an anticipated transaction will occur.'' [1033]

In response to the request that the Commission expand the proposed bona fide hedging position recognition process to include risk management exemptions, the Commission notes that this suggestion is contrary to the intent of Congress (to narrow the bona fide hedging position definition to preclude commodity index hedging, a.k.a. risk management exemptions).

Regarding comments requesting clarification on exchange authority to recognize as bona fide hedging positions multiple hedging strategies, the Commission clarifies that a single application to an exchange can specify and apply to multiple hedging strategies or needs.

As to comments requesting clarification regarding whether the proposed application process applies to exchange-set limits, the Commission notes that the requirements of reproposed § 150.9(a) addresses processes for recognition of bona fide hedge positions for purposes of federal limits and not exemption processes such as those exchanges currently implement and oversee for any exchange-set limits. In addition, such processes for exchange-set limits that are lower than the federal limit could differ as long as the exemption provided by the exchange is capped at the level of the applicable federal limit in § 150.2.[1034]

Requests for Recognition of Non-Enumerated Bona Fide Hedging Positions in the Spot Month

The Commission considered the recommendations that the Commission: Allow exchanges to recognize a position as a bona fide hedging position for up to a five-day retroactive period in circumstances where market participants need to exceed limits to address a sudden and unforeseen hedging need; specifically authorize exchanges to recognize positions as bona fide hedging positions and grant spread exemptions during the last five days of trading or less, and/or delegate to the exchanges for their consideration the decision whether to apply the five-day rule to a particular contract after their evaluation of the particular facts and circumstances. As the Commission clarified above, the reproposed rules do not apply the prudential condition of the five-day rule to non-enumerated hedging positions other than to pass through swap offsets.[1035] Therefore, as reproposed, the five-day rule would only apply to certain positions (pass-through swap offsets, anticipatory and cross-commodity hedges).[1036] However, to provide exchanges with flexibility, in regards to exchange process under § 150.9, the Commission will allow exchanges to waive the five-day rule on a case-by-case basis.[1037] As the Commission noted above, it expects that exchanges will carefully consider whether allowing retroactive recognition of a positions as a non-enumerated bona fide hedge would, as raised by one commenter, diminish the overall integrity of the process. In

[1026] CL–IECAssn–60949 at 12–13.

[1027] CL–CME–60926 at 14.

[1028] CL–IECAssn–60949 at 13.

[1029] CL–IECAssn–60949 at 11–12.

[1030] *Id.* at 12.

[1031] CL–CME–60926 at 11–12.

[1032] *See* the 2016 Supplemental Position Limits Proposal, 81 FR at 38469–71 (providing further explanation of proposed § 150.9(a)(1)).

[1033] December 2013 Position Limits Proposal, 78 FR at 75719.

[1034] Similarly, as noted above, reproposed § 150.5(a)(2)(i) provides that any exchange may grant exemptions from any speculative position limits it sets under paragraph § 150.5(a)(1), provided that such exemptions conform to the requirements specified in § 150.3, and provided further that any exemptions to exchange-set limits not conforming to § 150.3 are capped at the level of the applicable federal limit in § 150.2.

[1035] *See* the discussion regarding the five-day rule in connection with the definition of bona fide hedging position and in the discussion of 150.9 (Process for recognition of positions as non-enumerated bona fide hedging positions).

[1036] *See* § 150.1 definition of bona fide hedging position sections (2)(ii)(A), (3)(iii), (4), and (5) (Other enumerated hedging position). To provide greater clarity as to which bona fide hedging positions the five-day rule applies, the reproposed rules reorganize the definition.

[1037] In addition, reproposed § 150.5(a)(2)(ii) (Application for exemption) permits exchanges to adopt rules that allow a trader to file an application for an enumerated bona fide hedging exemption within five business days after the trader assumed the position that exceeded a position limit, and adopted a similar modification to 150.5(b)(5)(i).

addition, the Commission also points out that exchanges should carefully consider whether to adopt in those rules the two safeguards noted by commenters: (i) Requiring market participants making use of the retroactive application to demonstrate that the applied-for hedge was required to address a sudden and unforeseen hedging need; and (ii) providing that if the emergency hedge recognition was not granted, exchange rules would continue to require the applicant to unwind its position in an orderly manner and also would deem the applicant to have been in violation for any period in which its position exceeded the applicable limits.

Standards Exchanges Must Meet To Provide Recognitions

Regarding comments on the ''active trading'' and ''one year of experience'' requirements under proposed § 150.9(a)(1)(v), as noted in the 2016 Supplemental Position Limits Proposal preamble [1038] and above, the Commission is not persuaded that an exchange with no active trading and no experience would have their interests aligned with the Commission's policy objectives in CEA section 4a. However, it is clear from the comments that some interpreted the requirement as a narrower standard than intended.

The Commission is, therefore, amending § 150.9(a)(1)(v) to clarify that the active one-year of experience requirement can be met by any contract listed in the particular referenced contract.[1039] As such, the Commission is reproposing § 150.9(a)(1)(v) to provide that the exchange has at least one year of experience and expertise administering position limits for ''a particular commodity'' rather than for ''such commodity derivative contract.'' Further, in response to concerns that the standard would limit competition and operate as a bar to the establishment of new exchanges and new contracts, the Commission notes that experience manifests in the people carrying out surveillance in a commodity rather than in an institutional structure. An exchange's experience could be demonstrated through the relevant experience of the surveillance staff regarding the particular commodity. In fact, the Commission has historically reviewed the experience and qualifications of exchange regulatory divisions when considering whether to designate a new exchange as a contract market or to recognize a facility as a SEF; as such exchanges are new, staff experience has clearly been gained at other exchanges.[1040]

In addition, regarding the Commission's authority to adopt this standard, the Commission notes that CEA section 4a(c) provides that the Commission ''shall'' define what constitutes a bona fide hedging transaction or position. In light of this responsibility, the Commission believes it is important that exchanges authorized to recognize non-enumerated bona fide hedging positions have experience (as indicated by their one year of experience regulating a particular contract) and interests (as indicated by their actively traded contract) that are aligned with the Commission's interests. The commenter provides no alternatives to the one-year experience in the actively traded contract as proxies for an exchange's interests being aligned with that of the Commission.

The Commission clarifies, however, that an exchange can petition the Commission, pursuant to § 140.99, for a waiver of the one-year experience requirement if such exchange believes that their experience and interests are aligned with the Commission's interests with respect to recognizing non-enumerated bona fide hedging positions.

Previously Granted Hedge Exemptions

With respect to comments regarding currently recognized exchange-granted non-enumerated bona fide hedging position exemptions, as noted above, the Commission believes the statutory directive to define bona fide hedging position narrows the current § 1.3(z)(1) definition. As a result, currently recognized bona fide hedging strategies may not meet the new narrower bona fide hedging position standards. While certain strategies may not meet the definition of bona fide hedging position reproposed in this rulemaking, to reduce the potential for market disruption by forced liquidations, the Commission proposes, as discussed above, to clarify and expand the relief in § 150.3(f) (previously granted exemptions) to grandfather previously granted risk-management strategies applicable to previously established derivative positions in commodity index contract.[1041]

Regarding comments that exchanges should be required to provide additional notice or phase-out time for any bona fide hedging position recognitions that may expire, the Commission notes that, under reproposed § 150.5, exchanges may issue recognition determinations for one year only. As such a market participant is provided a one-year notice for the potential expiration of the recognition of their position as a non-enumerated bona fide hedging position, and may seek recognition of the position from another (or the same) DCM, or from the CFTC directly prior to the expiration of the one-year period. The Commission is not proposing to authorize exchanges to provide an unlimited recognition of positions as non-enumerated bona fide hedging positions, and is not proposing to require exchanges to provide further notice to market participants prior to the expiration of previous determinations.

Recognition of OTC Positions as Bona Fide Hedging Positions

Regarding comments requesting a clarification with respect to OTC positions, the Commission clarifies that exchanges do not have an obligation to monitor for compliance with OTC-only positions.

[1038] 2016 Supplemental Position Limits Proposal, 81 FR at 38471.

[1039] Regarding the comment that the Commission should not define ''actively traded,'' the Commission concurs, and notes that, as proposed in the 2016 Supplemental Position Limits Proposal, this interpretation will be left to the exchanges' reasonable discretion.

[1040] For example, the Commission reviews the experience of chief compliance officers when reviewing SEF applications. *See* § 37.1501(b)(2) (''Qualifications of chief compliance officer. The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position.'').

[1041] As stated above, § 150.3(f) provides (1) recognition of the offset of the risk of a pre-existing financial instrument as bona fide using a derivative position, including a deferred derivative contract month entered after the effective date of a final rule, provided a nearby derivative contract month is liquidated (such recognition will not extend such relief to an increase in positions after the effective date of a limit); (2) possible application of previously granted exemptions to pre-existing financial instruments that are within the scope of existing § 1.47 exemptions, rather than only to pre-existing swaps; and (3) recognition of exchange-granted non-enumerated exemptions in non-legacy commodity derivatives outside of the spot month (consistent with the Commission's recognition of risk management exemptions outside of the spot month), provided such exemptions are granted prior to the compliance date of a final rule, and apply only to pre-existing financial instruments as of the effective date of a final rule. These last two were proposed to reduce the potential for market disruption, since a market intermediary would continue to be able to offset risks of pre-effective-date financial instruments, pursuant to previously-granted federal or exchange risk management exemptions. *See supra* discussion of the Commission's reproposed definition for bona fide hedging position; *see also* the discussion regarding the reproposed § 150.3(f). In response to the comment requesting that the Commission use its authority under CEA section 4a(a)(7) to provide exemptions for risk management positions, as noted above, that appears contrary to Congressional intent to narrow the definition of a bona fide hedging position.

b. Proposed § 150.9(a)(2); § 150.9(a)(3); and § 150.9(a)(4)—Application Process

Proposed Rules. As proposed, § 150.9(a)(2) would permit an exchange to establish a less expansive application process for non-enumerated bona fide hedging positions previously recognized and published on such exchange's Web site than for non-enumerated bona fide hedging positions based on novel facts and circumstances. This is because the Commission believed that some lesser degree of scrutiny may be adequate for applications involving recurring fact patterns, so long as the applicants are similarly situated. However, the Commission understood that DCMs currently use a single-track application process to recognize non-enumerated positions, for purposes of exchange limits, as within the meaning of the general bona fide hedging position definition in § 1.3(z)(1).[1042] The Commission did not know whether any exchange would elect to establish a separate application process for non-enumerated bona fide hedging positions based on novel versus non-novel facts and circumstances, or what the salient differences between the two processes might be, or whether a dual-track application process might be more likely to produce inaccurate results, *e.g.,* inappropriate recognition of positions that are not bona fide hedging positions within the parameters set forth by Congress in CEA section 4a(c).[1043] In proposing to permit separate application processes for novel and non-novel non-enumerated bona fide hedging positions, the Commission sought to provide flexibility for exchanges, but will insist on fair and open access for market participants to seek recognition of compliant positions as non-enumerated bona fide hedging positions.

The Commission believed that there is a core set of information and materials necessary to enable an exchange to determine, and the Commission to verify, whether the facts and circumstances attendant to a position satisfy the requirements of CEA section 4a(c). Accordingly, the Commission proposed to require in § 150.9(a)(3)(i), (iii) and (iv) that all applicants submit certain factual statements and representations. Proposed § 150.9(a)(3)(i) required a description of the position in the commodity derivative contract for which the application is submitted and the offsetting cash positions.[1044] Proposed § 150.9(a)(3)(iii) required a statement concerning the maximum size of all gross positions in derivative contracts to be acquired during the year after the application is submitted.[1045] Proposed § 150.9(a)(3)(iv) required detailed information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted during the past three years.[1046] These proposed application requirements are similar to existing requirements for recognition under current § 1.48 of a non-enumerated bona fide hedge.

The Commission also proposed to require in § 150.9(a)(3)(ii) and (v) that all applicants submit detailed information to demonstrate why the position satisfies the requirements of CEA section 4a(c)[1047] and any other information necessary to enable the exchange to determine, and the Commission to verify, whether it is appropriate to recognize such a position as a non-enumerated bona fide hedge.[1048] The Commission anticipated that such detailed information may include both a factual and legal analysis indicating why recognition is justified for such applicant's position. The Commission expected that if the materials submitted in response to proposed § 150.9(a)(3)(ii) are relatively comprehensive, requests for additional information pursuant to proposed § 150.9(a)(3)(v) would be relatively infrequent. Nevertheless, the Commission believed that it is important to include the requirement in proposed § 150.9(a)(3)(v) that applicants submit any other information necessary to enable the exchange to determine, and the Commission to verify, that it is appropriate to recognize a position as a non-enumerated bona fide hedging position so that DCMs can protect and manage their markets.

Under the proposal, the Commission would permit an exchange to recognize a smaller than requested position for purposes of exchange-set limits. For instance, an exchange might recognize a smaller than requested position that otherwise satisfies the requirements of CEA section 4a(c) if the exchange determines that recognizing a larger position would be disruptive to the exchange's markets. This is consistent with current exchange practice. This is also consistent with DCM and SEF core principles. DCM core principle 5(A) provides that, ''[t]o reduce the potential threat of market manipulation or congestion (especially during trading during the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.''[1049] SEF core principle 6(A) contains a similar provision.[1050]

By requiring in proposed § 150.9(a)(3) that all applicants submit a core set of information and materials, the Commission anticipated that all exchanges would develop similar non-

[1042] 17 CFR 1.3(z)(1).

[1043] 7 U.S.C. 6a(c). The Commission noted that it could, under the proposal, review determinations made by a particular exchange, for example, that recognizes an unusually large number of bona fide hedging positions, relative to those of other exchanges.

[1044] *See* § 1.47(b)(1), 17 CFR 1.47(b)(1), requiring a description of the futures positions and the offsetting cash positions.

[1045] *See* § 1.47(b)(4), 17 CFR 1.47(b)(4), requiring the maximum size of gross futures positions which will be acquired during the following year.

[1046] *See* §§ 1.47(b)(6), 1.48(b)(1)(i) and (2)(i), 17 CFR 1.47(b)(6), 1.48(b)(1)(i) and 2(i), requiring three years of history of production or usage.

[1047] Although many commenters have requested that the Commission retain the pre-Dodd Frank Act standard contained in current § 1.3(z), 17 CFR 1.3(z), there is explicit and implicit support in the comments on the December 2013 Position Limits Proposal for pegging what applicants must demonstrate to the current statutory provision as amended by the Dodd-Frank Act. One commenter requested that the Commission ''publicly clarify that hedge positions are bona fide when they satisfy the hedge definition codified by Congress in section 4a(c)(2) of the Act, as added by the Dodd-Frank Act.'' CL–CME–59718 at 46. Another commenter supported a ''process for Commission approval of a 'non-enumerated' hedge that . . . complies with the statutory definition of the term 'bona fide hedge.' '' CL–NGSA–59673 at 2. CEA section 4a(c)(2) contains standards for positions that constitute bona fide hedging positions. The Commission expects that exchanges would consider the Commission's relevant regulations and interpretations, when determining whether a position satisfies the requirements of CEA section 4a(c)(2). However, exchanges may confront novel facts and circumstances with respect to a particular applicant's position, dissimilar to facts and circumstances previously considered by the Commission. In these cases, an exchange may request assistance from the Commission; *see* the discussion of proposed § 150.9(a)(8) in the 2016 Position Limits Supplemental Proposal.

[1048] *See* § 1.47(b)(2), 17 CFR 1.47(b)(2), requiring detailed information to demonstrate that the futures positions are economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise. *See also* § 1.47(b)(3), 17 CFR 1.47(b)(3), requiring, upon request, such other information necessary to enable the Commission to determine whether a particular futures position meets the requirements of the general definition of bona fide hedging. Under current application processes, market participants provide similar information to DCMs, make various representations required by DCMs and agree to certain terms imposed by DCMs with respect to exemptions granted. The Commission has recognized that DCMs already consider any information they deem relevant to requests for exemptions from position limits. *See, e.g.,* Rule Enforcement Review of ICE Futures U.S., July 22, 2014, p. 41.

[1049] CEA section 5(d)(5)(A), 7 U.S.C. 7(d)(5)(A); § 38.300, 17 CFR 38.300. The Commission proposed, consistent with previous Commission determinations, a preliminary finding that speculative position limits are necessary in the December 2013 Position Limits Proposal. December 2013 Position Limits Proposal, 78 FR at 75685.

[1050] CEA Section 5h(f)(6)(A), 7 U.S.C. 7b–3(f)(6)(A); § 38.300, 17 CFR 38.300.

enumerated bona fide hedging position application processes. However, the Commission intended that exchanges have sufficient discretion to accommodate the needs of their market participants. The Commission also intended to promote fair and open access for market participants to obtain recognition of compliant derivative positions as non-enumerated bona fide hedges.

Proposed § 150.9(a)(4) set forth certain timing requirements that an exchange must include in its rules for the non-enumerated bona fide hedge application process. A person intending to rely on an exchange's recognition of a position as a non-enumerated bona fide hedging position would be required to submit an application in advance and to reapply at least on an annual basis. This is consistent with commenters' views and DCMs' current annual exemption review process.[1051] Proposed § 150.9(a)(4) would require an exchange to notify an applicant in a timely manner whether the position was recognized as a non-enumerated bona fide hedging position or rejected, including the reasons for any rejection.[1052] On the other hand, and consistent with the status quo, proposed § 150.9(a)(4) would allow the exchange to revoke, at any time, any recognition previously issued pursuant to proposed § 150.9 if the exchange determined the recognition is no longer in accord with section 4a(c) of the Act.[1053]

The Commission did not propose to prescribe time-limited periods (*e.g.,* a specific number of days) for submission or review of non-enumerated bona fide hedge applications. The Commission proposed only to require that an applicant must have received recognition for a non-enumerated bona fide hedging position before such applicant exceeds any limit then in effect, and that the exchange administer the process, and the various steps in the process, in a timely manner. This means that an exchange must, in a timely manner, notify an applicant if a submission is incomplete, determine whether a position is a non-enumerated bona fide hedging position, and notify an applicant whether a position will be recognized, or the application rejected. The Commission anticipated that rules of an exchange may nevertheless set deadlines for various parts of the application process. The Commission does not believe that reasonable deadlines or minimum review periods are inconsistent with the general principle of timely administration of the application process. An exchange could also establish different deadlines for a dual-track application process. The Commission believed that the individual exchanges themselves are in the best position to evaluate how quickly each can administer the application process, in order best to accommodate the needs of market participants. In addition to review of an exchange's timeline when it submits its rules for its application process under part 40, the Commission would review the exchange's timeliness in the context of a rule enforcement review.

Comments Received

One commenter expressed the view that it does not support different application processes for novel and non-novel hedges.[1054]

Two commenters expressed the view that the 2016 Supplemental Position Limits Proposal should be revised to eliminate, to the maximum extent possible, the ''overly prescriptive rules'' governing what exchanges must collect from non-enumerated bona fide hedging position applicants and instead give the exchanges more discretion and flexibility to fashion non-enumerated bona fide hedging position rules that are more closely aligned with current hedge approval processes.[1055] Conversely, another commenter recommended that the Commission require a standardized and harmonized process across all participating exchanges for non-enumerated bona fide hedging position applications.[1056]

One commenter recommended that the Commission, to the greatest extent possible, allow the exchanges to administer exemptions for non-enumerated bona fide hedging positions, enumerated bona fide hedging positions, and spread positions in the same manner as they have been to date.[1057]

Several commenters recommended that the Commission not require exchanges to demand and collect three years of cash market information in order to process an entity's application for a non-enumerated bona fide hedging exemption. According to the commenters, it would be burdensome on both the applicant and the exchange, as well as unnecessary and not authorized by the CEA.[1058] As an alternative, commenters cited practices currently authorized for, and practiced by, the exchanges, and that typically only require applicants to provide such data from the preceding year, though the market participant requesting the hedge exemption must stand ready to provide further supporting documentation for the requested exemption on request.[1059]

One commenter expressed the view that exchanges do not need the ''detailed information'' that the 2016 Supplemental Position Limits Proposal requires of market participants seeking an exchange-administered hedge exemption. The commenter believes that requiring an exemption applicant to perform its own legal and economic analysis would be cost prohibitive and impractical. Further, the commenter asserted that it is unclear whether an exchange could still grant an exemption even if it disagrees with an applicant's analysis.[1060]

Some commenters requested clarification regarding the proposed § 150.9(a)(3) requirement with respect to

[1051] *See, e.g.,* statement of Ron Oppenheimer on behalf of the Working Group (supporting an annual non-enumerated bona fide hedge application), statement of Erik Haas, Director, Market Regulation, ICE Futures U.S. (describing the DCM's annual exemption review process), and statement of Tom LaSala, Chief Regulatory Officer, CME Group (envisioning market participants applying for non-enumerated bona fide hedge on a yearly basis), transcript of the EEMAC open meeting, July 29, 2015, at 40, 53, and 58, available at *http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf.*

[1052] *See, e.g.,* statement of Ron Oppenheimer on behalf of the Working Group (noting that exchanges retain the ability to revoke an exemption if market circumstances warrant), transcript of the EEMAC open meeting, July 29, 2015, at 57, available at *http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript072915.pdf.*

[1053] As noted above, the 2016 Supplemental Position Limits Proposal did not impair the ability of any market participant to request an interpretation under § 140.99 for recognition of a position as a bona fide hedging position if an exchange rejects their recognition application or revokes recognition previously issued. *See* 2016 Position Limits Supplemental Proposal, n. 78 and accompanying text.

[1054] CL–IECAssn–60949 at 14.

[1055] CL–ETP–60915 at 1; CL–MGEX–60936 at 5–6.

[1056] CL–EDF–60944 at 1–3.

[1057] CL–NCGA–NGSA–60919 at 9.

[1058] CL–NCGA–NGSA–60919 at 10; CL–EEI–EPSA–60925 at 4; CL–ICE–60929 at 8; 16, CL–COPE–60932 at 9; CL–CCI–60935 at 7; CL–COPE–60932 at 9; CL–FIA–60937 at 3; 12, CL–AGA–60943 at 6; CL–AMG–60946 at 3–4; CL–Working Group–60947 at 11; CL–NCGA–NGSA–60919 at 10; CL–CCI–60935 at 7; CL–CME–60926 at 9; CL–FIA–60937 at 3, 12; CL–Working Group–60947 at 11 (footnotes omitted); and CL–ICE–60929 at 8, 16 (noting that in many cases exchanges already have access to this data, or can easily obtain it).

[1059] CL–NCGA–NGSA–60919 at 10; CL–CCI–60935 at 7; CL–CME–60926 at 9; CL–Working Group–60947 at 11 (footnotes omitted); CL–FIA–60937 at 3, 12; CL–Working Group–60947 at 11; CL–NCGA–NGSA–60919 at 10; CL–CCI–60935 at 7; CL–CME–60926 at 9; CL–AGA–60943 at 6; and CL–AMG–60946 at 3–4 (recommending that exchanges have authority to, but not be required to, collect up to 3 years of data).

[1060] CL–CME–60926 at 9. *See also* CL–AMG–60946 at 4 (requesting a clarification that that this demonstration (of how the position meets the definition of a bona fide hedging position does not require submission of legal opinion from counsel which would be ''unduly burdensome'' for market participants).

the compilation of gross positions for every commodity derivative contact that the applicant holds, and whether the proposed regulations are intended to apply to an applicant's maximum size of all gross positions for each and every commodity derivative contract the applicant holds (as opposed to the maximum gross positions in the commodity derivative contract(s) for which the exemption is sought).[1061] In addition, one commenter suggested that ''the Commission should clarify that an application for a non-enumerated hedge or spread exemption only must include derivative positions related to the requested exemption.'' [1062]

One commenter expressed the view that it is concerned regarding how exchanges should coordinate the granting of exemptions with respect to contracts on the same underlying commodities that trade on different exchanges, and requests guidance from the Commission on that matter.[1063]

In connection with proposed § 150.9(a)(4), several commenters expressed the view that the Commission should allow exchanges to recognize an enumerated or non-enumerated bona fide hedging position exemption retroactively in circumstances where market participants need to exceed limits to address a sudden and unforeseen hedging need.[1064]

Commission Reproposal

The Commission has determined to repropose the rule, largely as originally proposed, except that the Commission has revised the regulatory text to: (i) Clarify what the statement must address under § 150.9(a)(3)(iii) and 150.9(a)(3)(iv); and (ii) require only one year of history rather than three years in § 150.9(a)(3)(iv), each as described further below.

Regarding comments that the Commission should not have different application processes for novel vs. non-novel products, (pursuant to proposed § 150.9(a)(2)) the Commission is clarifying that exchanges are authorized but not required to have a different application process for novel and non-novel hedge applications. Further, § 150.9 does not prevent industry from working together to adopt a universal application for novel and non-novel hedges.

Regarding comments on current exchange processes for administering exemptions, and comments regarding the information required in the application process, reproposed § 150.9 would require that exchanges collect a minimum amount of information, and exchanges would have discretion to require additional information. That is, § 150.9 provides parameters for a basic application and processing process for the recognition of non-enumerated bona fide hedging positions; the parameters allow exchanges flexibility, while also facilitating Commission review. Also, the Commission reiterates that reproposed § 150.9 addresses federal limits and not exchange exemption processes, such as those exchanges currently implement and oversee for any exchange-set limits. Such processes for exchange-set limits that are lower than the federal limit could differ as long as the exemption provided by the exchange is capped at the level of the applicable federal limit in § 150.2.

Regarding concerns that § 150.9(a)(3)(ii), as proposed, required an application to include a legal opinion or analysis for exchange recognition of a position as a non-enumerated bona fide hedging position, the Commission clarifies that the regulation does not require applicants to obtain a legal opinion or analysis. Rather, under § 150.9(a)(3), it is the exchange's duty to make a determination regarding whether a contract meets the application requirements; it may ask for additional information than the minimum required if it determines that further information is necessary to make its determination. To further clarify this point, the Commission is proposing the following change to § 150.9(a)(3)(ii) to provide that the exchange require at a minimum ''information to demonstrate why the position satisfies the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1,'' rather than ''detailed information.'' The same change is also being proposed for § 150.9(a)(3(iv) for the same reasons.

Regarding interpreting § 150.9(a)(3)(iii) as requiring the inclusion in a non-enumerated bona fide hedging position application of a statement regarding the maximum gross positions to be acquired by the applicant during the year after the application is submitted, the Commission clarifies that the provision requires only information related to the contract for which the application is submitted; consequently, the Commission is reproposing § 150.9(a)(3)(iii) to require a ''statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted.'' The Commission further clarifies that the statement should be based on a good faith estimate.

In addition, the Commission notes that the minimum information to be required by the exchange under § 150.9(a)(3)(iii), would be for the gross position for the following year, since the applicant will need to reapply each year for exchange recognition of its position as a bona fide hedging position.

With respect to the condition that exchanges require applicants to provide three years of data supporting their application, the Commission is reproposing § 150.9(a)(3)(iv) to require only one year of data.

Regarding commenter concerns about whether or how exchanges should coordinate in granting exemptions consistently across exchanges, the reproposed rules would allow each exchange to use their own expertise to decide which positions should be recognized as bona fide hedging positions and what limit levels to impose for their venue. The Commission notes that it serves in an oversight role to monitor exchange determinations and position limits across exchanges. The Reproposal does not require exchanges to coordinate with respect to making such determinations; however, neither does reproposed § 150.9 prohibit coordination.

Regarding application of the five-day rule to non-enumerated bona fide hedging positions, as the Commission discussed above, the Reproposal does not apply the prudential condition of the five-day rule to non-enumerated bona fide hedging positions. As discussed in connection with the definition of bona fide hedging position and in the context of § 150.5(a),[1065] the five-day rule would only apply to certain positions (pass-through swap offsets, anticipatory and cross-commodity hedges).[1066] However, in regards to exchange processes under § 150.9 (and § 150.10, and § 150.11), the Commission is allowing exchanges to waive the five-day rule on a case-by-case basis.

Regarding exchanges' authority to retroactively recognize positions as bona

[1061] CL–CCI–60935 at 6–7; and (CL–Working Group–60947 at 10).

[1062] CL–FIA–60937 at 4, 13.

[1063] CL–ISDA–60931 at 6–7.

[1064] *See, e.g.,* CL–NCGA–NGSA–60919 at 10–11; CL–EEI–EPSA–60925 at 4; CL–ICE–60929 at 11; CL–ISDA–60931 at 13; CL–FIA–60937 at 13; CL–Working Group–60947 at 13–14; and CL–CME–60926 at 12.

[1065] *See* 2016 Position Limits Supplemental Proposal for the discussion regarding the five-day rule in connection with the definition of bona fide hedging position and in the discussion of § 150.5 (Exchange-set speculative position limits).

[1066] *See* § 150.1 definition of bona fide hedging position sections (2)(ii)(A), (3)(iii), (4), and (5) (Other enumerated hedging position). As noted above, to provide greater clarity as to which bona fide hedge positions the five-day rule applies, the reproposed rules reorganize the definition.

fide hedging positions, reproposed § 150.9(a)(5) would require an applicant to receive exchange recognition in advance of the date that a position would otherwise be in excess of a position limit. Thus, the Reproposal would not permit retroactive recognition of a non-enumerated bona fide hedging position. The Commission preliminarily does not believe that it should authorize an exchange to recognize a non-enumerated bona fide hedging position retroactively, as this may diminish the ability of the Commission to review timely such an exchange determination, potentially diminishing the utility of position limits in preventing unwarranted price fluctuations.[1067] By way of contrast with regard to enumerated bona fide hedging positions, the Commission expects that exchanges will carefully consider whether allowing retroactive recognition of an enumerated bona fide hedging exemption, under reproposed § 150.5, would, as noted by one commenter, diminish the overall integrity of the process. And the exchanges should also consider whether to adopt in those rules the two safeguards noted: (i) Requiring market participants making use of the retroactive application to demonstrate that the applied-for hedge was required to address a sudden and unforeseen hedging need; and (ii) providing that if the emergency hedge recognition was not granted, exchange rules would continue to require the applicant to unwind its position in an orderly manner and also would deem the applicant to have been in violation for any period in which its position exceeded the applicable limits.[1068]

c. Proposed 150.9(a)(5) and Commission Reproposal

Proposed § 150.9(a)(5) made it clear that the position will be deemed to be recognized as a non-enumerated bona fide hedging position when an exchange recognizes it; proposed § 150.9(d) provided the process through which the exchange's recognition would be subject to review by the Commission.[1069] As noted above, DCMs currently exercise discretion with regard to exchange-set limits to approve exemptions meeting the general definition of bona fide hedging position. The Commission works cooperatively with DCMs to enforce compliance with exchange-set speculative position limits. In the 2016 Position Limits Supplemental Proposal, the Commission believed that a continuation of this cooperative process, and an extension to the proposed federal position limits, would be consistent with the policy objectives in CEA section 4a(3)(B).[1070] The Commission is reproposing § 150.9(a)(5), as originally proposed.

d. Proposed § 150.9(a)(6)

Proposed Rule: Proposed § 150.9(a)(6) required exchanges that elect to process non-enumerated bona fide hedging position applications to promulgate reporting rules for applicants who own, hold or control positions recognized as non-enumerated bona fide hedging positions. The Commission expected that the exchanges would promulgate enhanced reporting rules in order to obtain sufficient information to conduct an adequate surveillance program to detect and potentially deter excessively large positions that may disrupt the price discovery process. At a minimum, these rules should require applicants to report when an non-enumerated bona fide hedging position has been established, and to update and maintain the accuracy of such reports. These rules should also elicit information from applicants that will assist exchanges in complying with proposed § 150.9(c) regarding exchange reports to the Commission.

Comments Received: Several commenters did not support a Commission requirement for additional filings with respect to non-enumerated bona fide hedging positions to be held in the five day/spot month period.[1071] Commenters also requested that the Commission remove the proposed requirement that an exchange must adopt enhanced reporting rules for market participants that rely on exchange recognitions of positions as non-enumerated bona fide hedging positions.[1072] Generally, commenters suggested that any additional reporting requirements be kept simple, streamlined and minimally burdensome.[1073] One commenter expressed the view that the Commission should clarify certain aspects relating to the mechanics and content of proposed reporting requirements for those seeking an exchange-administered hedge exemption.[1074]

Commission Reproposal: The Commission has determined to amend and clarify the proposal as follows. First, the Commission clarifies that it does not require additional filings under § 150.9(a)(6); rather, it is in the exchanges' discretion to determine whether there is a reporting requirement for a non-enumerated bona fide hedging position. Consequently, the Commission is amending the regulation text to clarify that exchanges are authorized to, rather than required to, determine whether to require enhanced reporting, providing only that exchanges that determine to process non-enumerated bona fide hedging position applications shall have rules, submitted to the Commission under part 40, that require applicants ''to file reports pertaining to the use of

[1067] Current § 1.47 requires a filing in advance for Commission recognition of a position as a non-enumerated bona fide hedging position.

[1068] *See* 2016 Position Limits Supplemental Proposal discussion regarding proposed § 150.5.

[1069] *See* 2016 Position Limits Supplemental Proposal, nn. 121–123 and accompanying text; *see also* the 2016 Position Limits Supplemental Proposal discussion of proposed § 150.9(d), review of applications by the Commission. Exchange recognition of a position as a non-enumerated bona fide hedging position would allow the market participant to exceed the federal position limit until such time that the Commission notified the market participant to the contrary, pursuant to the proposed review procedure that the exchange action was dismissed. That is, if a party were to hold positions pursuant to a non-enumerated bona fide hedging position recognition granted by the exchange, such positions would not be subject to federal position limits, unless or until the Commission were to determine that such non-enumerated bona fide hedging position recognition is inconsistent with the CEA or CFTC regulations thereunder. Under this framework, the Commission would continue to exercise its authority in this regard by reviewing an exchange's determination and verifying whether the facts and circumstances in respect of a derivative position satisfy the requirements of the Commission's general definition of bona fide hedging position in § 150.1. If the Commission determines that the exchange-granted recognition is inconsistent with section 4a(c) of the Act and the Commission's general definition of bona fide hedging position in § 150.1, a market participant would be required to reduce the derivative position or otherwise come into compliance with position limits within a commercially reasonable amount of time.

[1070] 7 U.S.C. 6a(3)(B).

[1071] CL–IECAssn–60949 at 13; CL–NMPF–60956 at 2; CL–NCFC–60930 at 4–5; CL–ICE–60929 at 22; CL–ICE–60929 at 22; and CL–FIA–60937 at 18, 19.

[1072] *See, e.g.,* CL–FIA–60937 at 15; CL–CMC–60950 at 12–13; CL–CCI–60935 at 7–8; CL–NCGA–NGSA–60919 at 12–13; CL–MGEX–60936 at 6; CL–ISDA–60931 at 10; CL–NGFA–60941 at 4; CL–Working Group–60947 at 12 (footnotes omitted); CL–AMG–60946 at 4–5; CL–CCI–60935 at 7–8; CL–AGA–60943 at 6; CL–CMC–60950 at 12–13; and CL–NCGA–NGSA–60919 at 12–13 (expressing the view that, reporting of positions for non-enumerated bona fide hedges should mirror the mechanism for reporting EBFHs recognized by exchanges that utilize the process where reports of such positions are made to the Commission with an identical copy to be filed with the applicable exchange(s). *See also* CL–MGEX–60936 at 5–6 (requesting that reporting and recordkeeping requirements be removed or at least reduced unless there is a demonstrated need for them and b) only exemptions granted in excess of federal limits should require reporting to the Commission.); and CL–AGA–60943 at 7 (commenting that ''because Exchanges may, at any time, request records of hedgers' cash market and derivative positions or other details and explanations concerning the commercial risks being hedged, any Exchange surveillance function can be met by exchange data inquiries, rather than by an affirmative reporting obligation by a commercial hedger.'').

[1073] CL–NFP–60942 at 6–8); and CL–FIA–60937 at 4, 15.

[1074] CL–CME–60926 at 10.

any such exemption that has been granted in the manner, form, and frequency, as determined by the designated contract market or swap execution facility.''

e. Proposed 150.9(a)(7)—Transparency to Market Participants

Proposed Rule: Proposed § 150.9(a)(7) required an exchange to publish on its Web site, no less frequently than quarterly, a description of each new type of derivative position that it recognizes as a non-enumerated bona fide hedge. The Commission envisioned that each description would be an executive summary. The 2016 Position Limits Supplemental Proposal required that the description include a summary describing the type of derivative position and an explanation of why it qualifies as a non-enumerated bona fide hedging position. The Commission believed that the exchanges are in the best position when quickly crafting these descriptions to accommodate an applicant's desire for trading anonymity while promoting fair and open access for market participants to information regarding which positions might be recognized as non-enumerated bona fide hedging positions. The Commission proposed to spot check these summaries pursuant to proposed § 150.9(e).

i. Comments Received

Several commenters proposed that the Commission clarify or confirm that exchanges are not required to divulge confidential information (such as trade secrets, intellectual property, the market participant's identity or position) when providing the summary description of non-enumerated bona fide hedge positions.[1075] One commenter requested ''that the Commission explicitly provide in Rule 150.9(a)(7) that the summaries must be published 'in a manner that preserves the anonymity of the applicant' and provide additional guidance regarding the types of sensitive items that should be omitted from any summary, such as the size of the position(s) taken or to be taken by the applicant or the delivery point(s) or other information that might identify the applicant.'' [1076] Another commenter expressed the view that an exchange should not be required to disclose its own internal analyses when explaining its decision to grant an exemption for a derivative position recognized as a non-enumerated bona fide hedging position.[1077]

Commission Reproposal: While the Commission is reproposing the rule, as originally proposed, it clarifies that that any data published pursuant to § 150.9(a)(7) should not disclose the identity of, or confidential information about, the applicant. Rather, any published summaries are expected to be general (generic facts and circumstances) and not include detail that would disclose trade secrets or intellectual property.

f. Proposed § 150.9(a)(8) and Commission Reproposal

Under proposed § 150.9(a)(8), an exchange could elect to request the Commission review a non-enumerated bona fide hedging position application that raises novel or complex issues using the process set forth in proposed § 150.9(d).[1078] If an exchange makes a request pursuant to proposed § 150.9(a)(8), the Commission, as would be the case for an exchange, would not be bound by a time limitation. This is because the Commission proposed only that non-enumerated bona fide hedging position applications be processed in a timely manner.[1079] Essentially, this proposed provision largely preserved the Commission's review process under current § 1.47,[1080] except that a market participant first seeks recognition of a non-enumerated bona fide hedging position from an exchange.

The Commission is reproposing § 150.9(a)(8), as originally proposed.

4. Proposed § 150.9(b)—Recordkeeping Requirements

Proposed Rule: Proposed § 150.9(b) outlined the recordkeeping requirements for exchanges that elected to process non-enumerated bona fide hedging position applications under proposed § 150.9(a).[1081] The proposal required that exchanges maintain complete books and records of all activities relating to the processing and disposition of applications in a manner consistent with the Commission's existing general regulations regarding recordkeeping.[1082] In consideration of the fact that DCMs currently recognize non-enumerated bona fide hedging positions which must be updated annually and that the proposal would require annual updates, the Commission proposed that exchanges keep books and records until the termination, maturity, or expiration date of any recognition of a non-enumerated bona fide hedging position and for a period of five years after such date. The Commission stated that five years should provide an adequate time period for Commission reviews, whether that be a review of an exchange's rule enforcement or a review of a market participant's representations.

Exchanges would be required to store and produce records pursuant to current § 1.31 of the Commission's regulations, and would be subject to requests for information pursuant to other applicable Commission regulations including, for example, § 38.5. Consistent with current § 1.31, the Commission clarified its expectation that the records would be readily accessible until the termination, maturity, or expiration date of the recognition and during the first two years of the subsequent five year period. In addition, the Commission did not intend in proposed § 150.9(b)(1) to create any new obligation for an exchange to record conversations with applicants, which includes their representatives; however, the Commission expected that an exchange would preserve any written or electronic notes of verbal interactions with such parties.

Finally, the Commission emphasized that parties who avail themselves of exemptions under § 150.3(a), as proposed in the 2016 Supplemental Position Limits Proposal, would be subject to the recordkeeping requirements of § 150.3(g), as well as

[1075] *See, e.g.,* CL–ICE–60929 at 23; CL–NCGA–NGSA–60919 at 14 (footnote omitted); CL–DFA–60927 at 6; CL–NCFC–60930 at 5; CL–IATP–60951 at 6; CL–EEI–EPSA–60925 at 9; CL–COPE–60932 at 9; CL–DFA–60927 at 6; and CL–NCFC–60930 at 5.

[1076] CL–NCGA–NGSA–60919 at 14 (footnote omitted).

[1077] CL–CME–60926 at 11.

[1078] Under proposed § 150.9(a)(8), if the exchange determines to request that the Commission consider the application, the exchange must, under proposed § 150.9(a)(4)(v)(C), notify an applicant in a timely manner that the exchange has requested that the Commission review the application. This provision provides the exchanges with the ability to request Commission review early in the review process, rather than requiring the exchanges to process the request, make a determination and only then begin the process of Commission review provided for under proposed § 150.9(d). The Commission noted that although most of its reviews would occur after the exchange makes its determination, the Commission could, as provided for in proposed § 150.9(d)(1), initiate its review, in its discretion, at any time.

[1079] Novel facts and circumstances may present particularly complex issues that could benefit from extended consideration, given the Commission's current resource constraints.

[1080] 17 CFR 1.47.

[1081] *Id.* Proposed § 150.10(b) and § 150.11(b) contain substantially similar recordkeeping requirements regarding spread exemptions and anticipatory hedge exemptions.

[1082] Requirements regarding the keeping and inspection of all books and records required to be kept by the Act or the Commission's regulations are found at § 1.31, 17 CFR 1.31. DCMs and SEFs are already required to maintain records of their business activities in accordance with the requirements of § 1.31 and 17 CFR 38.951. *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38474 (providing a more comprehensive discussion of proposed § 150.9(b)).

requests from the Commission for additional information under § 150.3(h), as each was proposed in the December 2013 Position Limits Proposal. The Commission noted that it might request additional information, for example, in connection with review of an application.[1083]

Commission Reproposal: The Commission did not receive comments on § 150.9(b) (nor on § 150.10(b) or § 150.11(b)), and is reproposing § 150.9(b), as originally proposed, for the reasons explained in the 2016 Supplemental Position Limits Proposal.[1084]

5. Proposed § 150.9(c)—Exchange Reporting

Proposed Rule: Proposed § 150.9(c)(1) required an exchange that elected to process non-enumerated bona fide hedge applications to submit a weekly report to the Commission.[1085] The proposed report would provide information regarding each commodity derivative position recognized by the exchange as a non-enumerated bona fide hedging position during the course of the week. Information provided in the report would include the identity of the applicant seeking such an exemption, the maximum size of the derivative position that was recognized by the exchange as a non-enumerated bona fide hedging position,[1086] and, to the extent that the exchange determined to limit the size of such bona fide hedging position under the exchange's own speculative position limits program, the size of any limit established by the exchange.

The Commission envisioned that the proposed report would specify the maximum size and/or size limitations by contract month and/or type of limit (*e.g.,* spot month, single month, or all-months-combined), as applicable.[1087] The proposed report would also provide information regarding any revocation of, or modification to the terms and conditions of, a prior determination by the exchange to recognize a commodity derivative position as a non-enumerated bona fide hedge. In addition, the report would include any summary of a type of recognized non-enumerated bona fide hedge that was, during the course of the week, published or revised on the exchange's Web site pursuant to proposed § 150.9(a)(7).

The Commission noted that the proposed weekly report would support its surveillance program by facilitating the tracking of non-enumerated bona fide hedges recognized by exchanges,[1088] keeping the Commission informed of the manner in which an exchange was administering its procedures for recognizing such positions. For example, the report would make available to the Commission, on a regular basis, the summaries of types of recognized non-enumerated bona fide hedges that an exchange posts to its Web site pursuant to proposed § 150.9(a)(7). This would facilitate any review by the Commission of such summaries, pursuant to proposed § 150.9(e), and would help to ensure, if the Commission determines that revisions to a summary are necessary, that such revisions were carried out in a timely manner by the exchange.

The Commission noted that in certain instances, information included in the proposed weekly report could prompt the Commission to request records required to be maintained by an exchange pursuant to proposed § 150.9(b).[1089] The 2016 Supplemental Position Limit Proposal clarified that it was the Commission's expectation that the summary would focus on the facts and circumstances upon which an exchange based its determination to recognize a commodity derivative position as a non-enumerated bona fide hedging position, or to revoke or modify such recognition. The Commission also noted that it might decide, in light of the information provided in the summary, or any other information included in the proposed weekly report regarding the position, that it should request the exchange's complete record of the application for recognition of the position as an non-enumerated bona fide hedge—in order to determine, for example, whether the application presents novel or complex issues that merit additional analysis pursuant to proposed § 150.9(d)(2), or to evaluate whether the disposition of the application by the exchange was consistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1.

In addition, proposed 150.9(c)(2) required an exchange to submit to the Commission any report made to the exchange by an applicant, pursuant to proposed § 150.9(a)(6), that notified the exchange that the applicant owned or controlled a commodity derivative position that the exchange had recognized as an non-enumerated bona fide hedging position, at least monthly,[1090] unless otherwise instructed by the Commission.[1091] The exchange's submission of these reports would notify the Commission that an applicant had taken a commodity derivative position recognized by the exchange as a non-enumerated bona fide hedging position, and would also show the applicant's offsetting positions in the cash markets. Requiring an exchange to submit these reports to the Commission would therefore support

[1083] The Commission pointed out that in the December 2013 Position Limits Proposal, persons claiming exemptions under proposed § 150.3 must still ''maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions. Furthermore, such persons must make such books and records available to the Commission upon request under proposed § 150.3(h), which would preserve the 'special call' rule set forth in current 17 CFR 150.3(b).'' 78 FR 75741 (footnote omitted).

[1084] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38474.

[1085] *Id.*

[1086] The Commission noted that an exchange could determine to recognize all, or a portion, of the commodity derivative position in respect of which an application for recognition had been submitted, as a non-enumerated bona fide hedging position, provided that such determination was made in accordance with the requirements of proposed § 150.9 and was consistent with the Act and the Commission's regulations. *Id.*

[1087] Under the proposal, an exchange could determine to recognize all, or a portion, of the commodity derivative position in respect of which an application for recognition has been submitted, as an non-enumerated bona fide hedge, for different contract months or different types of limits (*e.g.,* a separate limit level for the spot month). *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38474.

[1088] The Commission stated that the exchange's assignment of a unique identifier to each of the non-enumerated bona fide hedge applications that the exchange received, and, separately, the exchange's assignment of a unique identifier to each type of commodity derivative position that the exchange recognized as a non-enumerated bona fide hedge, would assist the Commission's tracking process. Accordingly, the Commission suggested that, as a ''best practice,'' the exchange's procedures for processing non-enumerated bona fide hedge applications contemplate the assignment of such unique identifiers. The Commission noted that under proposed § 150.9(c)(1)(i), an exchange that assigned such unique identifiers would be required to include the identifiers in the exchange's weekly report to the Commission.

[1089] For example, as proposed, for each derivative position recognized by the exchange as a non-enumerated bona fide hedge, or any revocation or modification of such recognition, the report would include a concise summary of the applicant's activity in the cash markets for the commodity underlying the position.

[1090] As proposed, the timeframe within which an applicant would be required to report to the exchange would be established by the exchange in its rules, as appropriate and in accordance with proposed § 150.9(a)(6). The Commission also pointed out that an exchange could decide to require such reports from its participants more frequently than monthly.

[1091] As proposed, under § 150.9(f)(1)(ii), the Commission would delegate to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director designated from time to time, the authority to provide instructions regarding the submission to the Commission of information required to be reported by an exchange pursuant to proposed § 150.9(c). *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38475.

the Commission's surveillance program, by facilitating the tracking of non-enumerated bona fide hedging positions recognized by the exchange, and helping the Commission to ensure that an applicant's activities conform to the terms of recognition that the exchange had established.

Proposed § 150.9(c)(3)(i) and (ii) would require an exchange, unless instructed otherwise by the Commission, to submit weekly reports under proposed § 150.9(c)(1), and applicant reports under proposed § 150.9(c)(2). Proposed § 150.9(c)(3)(i) and (ii) contemplated that, in order to facilitate the processing of such reports, and the analysis of the information contained therein, the Commission would establish reporting and transmission standards, and that it may require reports to be submitted to the Commission using an electronic data format, coding structure and electronic data transmission procedures approved in writing by the Commission, as specified on the Forms and Submissions page at *www.cftc.gov.*[1092] Proposed § 150.9(c)(3)(iii) would require such reports to be submitted to the Commission no later than 9:00 a.m. Eastern time on the third business day following the report date, unless the exchange was otherwise instructed by the Commission.[1093]

Comments Received: Several commenters expressed views against the § 150.9(c) reporting requirements, or requested that the Commission reduce or alter the reporting requirements for exchanges.[1094] One commenter requested that the Commission clarify that proposed weekly reporting requirements for exchanges only require reporting of the ''most essential information'' regarding exchange-administered hedge exemptions.[1095] As an alternative to the entire proposed exchange-administered exemption reporting requirements, one commenter proposed that exchanges provide a weekly report to the Commission summarizing newly approved hedge exemptions.[1096]

Commission Reproposal: The Commission is reproposing the rule, largely as originally proposed, except that the Commission has revised §§ 150.9(c)(1)(i) and 150.9(c)(2) for purposes of clarification. In regards to § 150.9(c)(1)(i), the Commission is clarifying that the reports required under (c)(1)(i) are those for each commodity derivatives position that had been recognized that week and for any revocation or modification of a previously granted recognition. As to § 150.9(c)(2), in response to commenters, the Commission clarifies that exchanges are authorized under § 150.9(c)(2), but are not required, to determine whether to incorporate additional reporting requirements in connection with its recognition of non-enumerated bona fide hedging positions. If an exchange does determine to require additional reporting, § 150.9(c)(2) requires that the exchange submit reports no less frequently than monthly.[1097] In addition, the Commission believes the weekly reporting requires only the most essential information regarding exchange-administered exemptions.

6. Proposed § 150.9(d)—Review of Applications by the Commission

Proposed Rule: Proposed § 150.9(d) provided for Commission review of applications to ensure that the processes administered by the exchange, as well as the results of such processes, were consistent with the requirements of section 4a(c) of the Act and the Commission's regulations thereunder.[1098] The Commission proposed to review records required to be maintained by an exchange pursuant to proposed § 150.9(b); however, under the proposal the Commission could request additional information under proposed § 150.9(d)(1)(ii) if, for example, the Commission found additional information was needed for its own review.

Under the proposal, the Commission could decide to review a pending application prior to disposition by an exchange, but anticipated that it would most likely wait to review applications until after some action has already been taken by an exchange. As proposed, § 150.9(d)(2) and (3) would require the Commission to notify the exchange and applicable applicant that they had 10 business days from the date of the request to provide any supplemental information. The Commission noted that this approach provided the exchanges and the particular market participant with an opportunity to respond to any issues raised by the Commission.

During the period of any Commission review of an application, an applicant could continue to rely upon any recognition previously granted by the exchange. If the Commission determined that remediation was necessary, the Commission would provide for a commercially reasonable amount of time for the market participant to comply with limits after announcement of the Commission's decision under proposed § 150.9(d)(4).[1099] In determining a time, the Commission could consider factors such as current market conditions and the protection of price discovery in the market. Proposed § 150.10(d) and § 150.11(d) contain substantially similar requirements regarding review of applications by the Commission of

[1092] The delegation proposed in § 150.9(f)(1)(ii) would also, in connection with proposed § 150.9(c)(3), delegate to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director designated from time to time, the authority: (i) To provide instructions for the proposed submissions; and (ii) to specify on the Forms and Submissions page at *www.cftc.gov* the manner for submitting to the Commission information required to be reported by an exchange pursuant to proposed § 150.9(c), and to determine the format, coding structure and electronic data transmission procedures for submitting such information. *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38475.

[1093] For purposes of proposed § 150.9(c)(2), the timeframe set forth in proposed § 150.9(c)(3)(iii) would be calculated from the date of a exchange's submission to the Commission, and not from the date of an applicant's report to the exchange.

[1094] CL–AMG–60946 at 3; CL–CME–60926 at 11; CL–ICE–60929 at 8–9 and 16; and CL–CMC–60950 at 13–14.

[1095] CL–CME–60926 at 11.

[1096] CL–ICE–60929 at 8–9 and 16.

[1097] As reproposed, § 150.9(c)(2) also provides that instead of submitting any such reports monthly, the Commission could otherwise instruct the exchange otherwise.

[1098] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38475–76. As the proposal noted, the Commission agreed with the comment of one participant at the June 19, 2014 Roundtable on Position Limits, who said that if the Commission were to permit exchanges to administer a process for non-enumerated bona fide hedging positions, the Commission should continue to do ''a certain amount of de novo analysis and review.'' *Id.*

The Commission noted that, under the proposal, the SRO's recognition was tentative, because the Commission would reserve the power to review the recognition, subject to the reasonably fixed statutory standards in CEA section 4a(c)(2) (directing the CFTC to define the term bona fide hedging position) that are incorporated into the Commission's proposed general definition of bona fide hedging position in § 150.1. The SRO's recognition would also be constrained by the SRO's rules, which would be subject to CFTC review under the proposal. The Commission pointed out that SROs are parties subject to Commission authority, their rules are subject to Commission review and their actions are subject to Commission de novo review under the proposal—SRO rules and actions may be changed by the Commission at any time. In addition, the Commission noted that under the proposal, the exchange was required to make its determination consistent with both CEA section 4a(c) and the Commission's general definition of bona fide hedging position in § 150.1. Further, the Commission noted that CEA section 4a(c)(1) requires a position to be shown to be bona fide as defined by the Commission.

[1099] The Commission noted a commercially reasonable time period as necessary to exit the market in an orderly manner, generally, ''would be less than one business day.'' 2016 Supplemental Position Limits Proposal, 81 FR at 38476, n. 168 (citing the December 2013 Position Limits Proposal, 78 FR at 75713).

spread exemptions and anticipatory hedge exemptions.

Comments Received: Several commenters were concerned about the Commission review process and/or provided suggestions on how the Commission should modify or limit its authority to review exchange-granted exemptions.[1100]

One commenter requested that the Commission define in more detail, in the final rule, how this review process will work.[1101] Another commenter recommended that exemptions granted by an exchange be given deference by the Commission upon subsequent review, with reversal occurring only when there is evidence of negligence or abuse, or when it may lead to market disruption.[1102] Four commenters suggested that the Commission limit the time available for it to review a non-enumerated bona fide hedging position exemption granted by an exchange in an effort to provide regulatory certainty to entities relying on that exemption.[1103] Fourteen commenters expressed the view that a ''commercially reasonable'' amount of time for an entity to unwind its position should not be limited to one business day or less. Instead, these commenters advocated that the Commission or the exchange should determine how long an entity has to unwind a position given the facts and circumstances of each situation.[1104] Three commenters expressed the view that when the Commission reviews and affirms a non-enumerated bona fide hedging position determination, such a determination should result in a new enumerated bona fide hedging position.[1105]

Some commenters opined that the Commission should instead explicitly require Commission review and approval of all hedge exemption requests received by an exchange.[1106] These commenters believe that the Commission should always make the final decision regarding whether to grant a particular hedge exemption.

Commission Reproposal: After carefully considering the comments received, the Commission is reproposing § 150.9(d), as originally proposed. The Commission believes the proposed de novo review of exchange-granted non-enumerated bona fide hedging position exemptions is adequate to maintain proper exchange oversight and to verify that such exemptions provide fair and open access by all market participants. Further, the Commission notes that it must maintain de novo review on a case-by-case basis; otherwise, as discussed above, the exchange exemption process may be considered an illegal delegation of Commission authority to exchanges.[1107]

Regarding the recommendation that the Commission limit its available time to review exchange granted exemptions, this limitation may appear inconsistent with case law regarding authorizations for self-regulatory organizations to make determinations, subject to de novo agency review.[1108] Regarding whether the Commission would expose exchanges to undue regulatory penalties or uncertainty for exemptions the Commission overturns, the Commission declines to speculate on any actions that it may take, beyond the notice to the applicant. Regarding giving entities a ''commercially reasonable'' time for an entity to unwind their positions, the Commission has not proposed a fixed time period, but would consider the facts and circumstances of each situation.

In response to comments that the Commission should create a new enumerated hedge for any non-enumerated bona fide hedging position determination the Commission reviews and affirms, the Commission clarifies that under the de novo review standard, no deference is provided to a prior determination; rather, the Commission will review as if no decision has been previously made. This is the same as a ''hearing de novo.'' [1109] The Commission also notes that, as previously discussed, an exchange can petition under § 13.2 for Commission recognition of a generic position as an enumerated bona fide hedging position, and that market participants have the flexibility of two processes for recognition of a position as an enumerated bona fide hedging position: (i) Request an exemptive, no-action or interpretative letter under § 140.99; and/or (ii) petition under § 13.2 for changes to Appendix B to part 150.

The reproposed rule is confined to federal limits and does not interfere with existing exemption processes that exchanges currently implement and oversee with regard to exchange-set limits. Exchanges remain bound by the bona fide hedging position definition in this part for any recognition for purposes of federal limits. But, as noted above, in regards to reproposed § 150.9(a), exchange processes for exchange-set limits that are lower than the federal limit could differ as long as

[1100] CL–CMC–60950 at 14; CL–NFP–60942 at 6–8; CL–DFA–60927 at 1–2; CL–ICE–60929 at 5–8; CL–ISDA–60931 at 6–7; CL–AGA–60943 at 7; CL–FIA–60937 at 2, 6, 7; CL–COPE–60932 at 7; CL–COPE–60932 at 7–8; CL–EEI–EPSA–60925 at 10–11; CL–RER2–60962 at 1; CL–Public Citizen–60940 at 2; and CL–MGEX–60936 at 7. *See also* CL–FIA–60937 at 7, 8; CL–COPE–60932 at 7; CL–NGFA–60941 at 3; CL–ICE–60929 at 18; CL–API–60939 at 4; CL–EEI–EPSA–60925 at 10–11; CL–IECAssn–60949 at 9–10 (recommending for an appeals process and/or notice and public comment feature for the Commission review process); CL–FIA–60937 at 7, 8 (recommending that market participants have continued reliance on any overturned exemption for one year after the overturn or modification); CL–NGFA–60941 at 3 (suggesting that a vote by the full Commission should be required on the ''weighty decision'' to invalidate a hedge exemption after thorough analysis and careful consideration); and CL–MGEX–60936 at 7 (expressing concerns that there is legal uncertainty and lack of clarity in how the non-enumerated bona fide hedging position process will work).

[1101] CL–AFIA–60955 at 2.

[1102] CL–MGEX–60936 at 7–8.

[1103] CL–FIA–60937 at 3; CL–ICE–60929 at 18; CL–API–60939 at 4; and CL–API–60939 at 1. *See also* CL–API–60939 at 1 (requesting that, if the Commission conducts a review of an exchange granted non-enumerated bona fide hedging position exemption, then the Commission should limit the time period to 180 days to issue a decision to overturn an exemption); CL–AGA–60943 at 8 (suggesting that the Commission ''should adopt a rule that follows its current approach under CFTC Rule 1.47); CL–IECAssn–60949 at 11–12 (recommending a reasonable time period to unwind positions for which an exemption has been overturned would help to allow the market to operate smoothly); and CL–FIA–60937 at 7 (noting that the Commission should ''require an exchange to post a general description of a non-enumerated hedge, spread, or anticipatory hedge exemption on its Web site within 30 days of granting the exemption,'' and thereafter, ''the Commission should have 180 days to decide whether to review and overturn or modify an exemption posted on an exchange's Web site.'').

[1104] *See, e.g.,* CL–API–60939 at 4; CL–FIA–60937 at 3, 8; CL–MGEX–60936 at 7–8; CL–ISDA–60931 at 7; CL–NGFA–60941 at 3; CL–NFP–60942 at 8; CL–AGA–60943 at 2; CL–AGA–60943 at 7; CL–AMG–60946 at 5; CL–ICE–60929 at 18; CL–CMC–60950 at 11; CL–NCGA–NGSA–60919 at 13; CL–EEI–EPSA–60925 at 10; and CL–ISDA–60931 at 7. *See also* CL–FIA–60937 at 3, 8 (recommending the Commission consider ''(1) the size of, and risks associated with, the participant's cash and related derivative positions; (2) the risks created by the need to reduce what will become an un-hedged cash market exposure; and (3) the availability of sufficient liquidity to enable the market participant to reduce the hedging and the underlying positions without incurring losses solely as a result of being forced to liquidate the hedge within a constrained timeframe.'').

[1105] CL–COPE–60932 at 7; CL–EEI–EPSA–60925 at 11; and CL–COPE–60932 at 7.

[1106] CL–Public Citizen–60940 at 2; and CL–RER2–60962 at 1.

[1107] *See also* 2016 Supplemental Position Limits Proposal, 81 FR at38464–66 (discussing the Commission's authority to permit certain exchanges to recognize positions as bona fide hedging positions for purposes of federal limits, as well as the careful provisions proposed in § 150.9 to do so within the limitations on its authority).

[1108] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38465, n. 83. The recommendation might also unduly constrain agency resources.

[1109] *See* Black's Law Dictionary 837 (10th ed. 2014) (defining ''hearing de novo'' as ''[a] reviewing court's decision of a matter anew, giving no deference to a lower court's findings. A new hearing of a matter, conducted as if the original hearing had not taken place.'').

the exemption provided by the exchange is capped at the level of the applicable federal limit in § 150.2.

Regarding requests to revise the Commission's review process (*i.e.,* include an appeals process, provide notice and public comment opportunity, require a vote by the Commission to overturn an exchange-granted exemption, provide more detail on the review process), the Commission notes that it has not proposed to delegate authority to staff to overturn an exchange determination.

7. Proposed § 150.9(e)—Review of summaries by the Commission

Proposed Rule: In connection with proposed § 150.9(a)(7), for the Commission to rely on the expertise of the exchanges to summarize and post executive summaries of non-enumerated bona fide hedging positions to their respective Web sites, the Commission proposed, in § 150.9(e), to review such executive summaries to ensure the summaries provided adequate disclosure to market participants of the potential availability of relief from speculative position limits. The Commission stated that it believed an adequate disclosure would include generic facts and circumstances sufficient to alert similarly situated market participants to the possibility of receiving recognition of a non-enumerated bona fide hedging position. Such market participants could then use that information to help evaluate whether to apply for recognition of a non-enumerated bona fide hedging position. Thus, the Commission noted, adequate disclosure should help ensure fair and open access to the application process. Due to resource constraints, the Commission pointed out that it might not be able to preclear each summary, so it proposed to spot check executive summaries after the fact.

Commission Reproposal

The Commission did not receive comments on § 150.9(e) (nor on § 150.10(e)), and is reproposing § 150.9(e), as originally proposed, for the reasons explained in the 2016 Supplemental Position Limits Proposal.[1110]

8. Proposed § 150.9(f)—Delegation of Authority

Proposed Rule

The Commission proposed to delegate certain of its authorities under proposed § 150.9 (and § 150.10 and § 150.11), to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director designated from time to time. In § 150.9(f), the Commission proposed to delegate, until it ordered otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director designated from time to time, the authorities under certain parts of §§ 150.9(a); 150.9(c); 150.9(d); and 150.9(e). As noted, similar delegations were contained in proposed § 150.10(f) and § 150.11(e) for spread exemptions and enumerated anticipatory hedge exemptions, respectively.

Proposed § 150.9(f)(1)(i), § 150.10(f)(1)(i) and § 150.11(e)(1)(i) delegated the Commission's authority to the Division of Market Oversight to provide instructions regarding the submission of information required to be reported to the Commission by an exchange, and to specify the manner and determine the format, coding structure, and electronic data transmission procedures for submitting such information. Proposed § 150.9(f)(1)(v) and § 150.10(f)(1)(v) delegated the Commission's review authority under proposed § 150.9(e) and § 150.10(e), respectively, to DMO with respect to summaries of types of recognized non-enumerated bona fide hedging positions, and types of spread exemptions, that were required to be posted on an exchange's Web site pursuant to proposed § 150.9(a)(7) and § 150.10(a)(7), respectively.

Proposed § 150.9(f)(1)(i), § 150.10(f)(1)(i) and § 150.11(e)(1)(i) delegated the Commission's authority to the Division of Market Oversight to agree to or reject a request by an exchange to consider an application for recognition of an non-enumerated bona fide hedging position or enumerated anticipatory bona fide hedging position, or an application for a spread exemption. Proposed § 150.9(f)(1)(iii), § 150.10(f)(1)(iii) and § 150.11(e)(1)(iii) delegated the Commission's authority to review any application for recognition of a non-enumerated bona fide hedging position or enumerated anticipatory bona fide hedging position, or application for a spread exemption, and all records required to be maintained by an exchange in connection with such application. Proposed § 150.9(f)(1)(iii), § 150.10(f)(1)(iii) and § 150.11(e)(1)(iii) also delegated the Commission's authority to request such records, and to request additional information in connection with such application from the exchange or from the applicant.

Proposed § 150.9(f)(1)(iv) and § 150.10(f)(1)(iv) delegated the Commission's authority, under proposed § 150.9(d)(2) and § 150.10(d)(2), respectively, to determine that an application for recognition of an non-enumerated bona fide hedging position, or an application for a spread exemption, required additional analysis or review, and to provide notice to the exchange and the particular applicant that they had 10 days to supplement such application.

The Commission did not propose to delegate its authority under proposed § 150.9(d)(3) or § 150.10(d)(3) to make a final determination as to the exchange's disposition. The Commission stated that if an exchange's disposition raised concerns regarding consistency with the Act or presents novel or complex issues, then the Commission should make the final determination, after taking into consideration any supplemental information provided by the exchange or the applicant.[1111]

Comments Received

One commenter recommended that the Commission clarify the delegation provisions referenced in RFC 31 by expressly stating that "the Commission, not DMO, now and always will retain the ultimate authority to grant or deny Exemption applications."[1112]

Commission Reproposal

The Commission is reproposing the delegation provisions, as originally proposed. With regard to the comment received, the Commission notes that, as provided in both proposed and reproposed § 150.9(f)(3), it retains the authority to make the final determination to grant or deny hedge exemption applications submitted pursuant to this rulemaking. However, the Commission also points out that any decisions of an existing Commission under this rulemaking cannot effectively bind a future commission, since such future Commission could amend or revoke such a rule.

H. § 150.10—Process for Designated Contract Market or Swap Execution Facility Exemption From Position Limits for Certain Spread Positions

1. Background 150.10

In the 2016 Supplemental Position Limits Proposal, the Commission proposed to permit exchanges, by rule, to exempt from federal position limits certain spread transactions, as authorized by CEA section 4a(a)(1),[1113]

[1110] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38476.

[1111] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38482.

[1112] CL–Working Group–60947 at 22.

[1113] 7 U.S.C. 6a(a)(1) (authorizing the Commission to exempt transactions normally known to the trade as "spreads"). DCMs currently process applications and in light of the provisions of CEA section 4a(a)(3)(B) and CEA section 4a(c)(2)(B).[1114] In particular, CEA section 4a(a)(1) provides the Commission with authority to exempt from position limits transactions normally known to the trade as ''spreads'' or ''straddles'' or ''arbitrage'' or to fix limits for such transactions or positions different from limits fixed for other transactions or positions. The Commission noted that the Dodd-Frank Act amended the CEA by adding section 4a(a)(3)(B), which now directs the Commission, in establishing position limits, to ensure, to the maximum extent practicable and in its discretion, ''sufficient market liquidity for bona fide hedgers.'' [1115] The Commission also noted that the Dodd-Frank Act amendments to the CEA in section 4a(c)(2)(B) limited the definition of a bona fide hedging position regarding positions (in addition to those included under CEA section 4a(c)(2)(A)) [1116] resulting from a swap that was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction, in the event the party to the swap is not itself using the swap as a bona fide hedging transaction. In this regard, the Commission interpreted this statutory definition to preclude spread exemptions for a swap position that was executed opposite a counterparty for which the transaction would *not* qualify as a bona fide hedging transaction.

As noted in the 2016 Supplemental Position Limits Proposal, prior to the passage of the Dodd-Frank Act, the Commission exercised its exemptive authority pertaining to spread transactions in promulgating current § 150.3. Current § 150.3 provides that the position limits set in § 150.2 may be exceeded to the extent such positions are spread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2. In addition, the Commission has permitted DCMs, in setting their own position limits under the terms of current § 150.5(a), to exempt spread, straddle or arbitrage positions or to fix limits that apply to such positions that are different from limits fixed for other positions.[1117]

Under the December 2013 Position Limits Proposal, the exemption in current § 150.3(a)(3) for spread or arbitrage positions between single months of a futures contract or options thereon, outside the spot month would be deleted. As the Commission noted, the proposal would instead maintain the current practice in § 150.2 of setting single-month limits at the same levels as all-months limits, which would render the ''spread'' exemption unnecessary.[1118] In particular, the spread exemption set forth in current § 150.3(a)(3) permits a spread trader to exceed single month limits only to the extent of the all months limit. Because the Commission, in current § 150.2 and as proposed in the December 2013 Position Limits Proposal, sets single month limits at the same level as all months limits, the existing spread exemption would no longer provide useful relief.

The Commission also noted that the December 2013 Position Limits Proposal would codify guidance in proposed § 150.5(a)(2)(ii) to allow an exchange to grant exemptions from exchange-set position limits for intramarket and intermarket spread positions (as those terms were defined in proposed § 150.1) involving commodity derivative contracts subject to the federal limits. To be eligible for the exemption in proposed § 150.5(a)(2)(ii), intermarket and intramarket spread positions, under the December 2013 Position Limits Proposal, would have to be outside of the spot month for physical delivery contracts, and intramarket spread positions could not exceed the federal all-months limit when combined with any other net positions in the single month. As proposed in the December 2013 Position Limits Proposal, § 150.5(a)(2)(iii) would require traders to apply to the exchange for any exemption, including spread exemptions, from its speculative position limit rules.

Several commenters responding to the December 2013 Position Limits Proposal requested that the Commission provide a spread exemption to federal position limits.[1119] Most of these commenters urged the Commission to recognize spread exemptions in the spot month as well as non-spot months.[1120] Several of these commenters noted that the Commission's proposal would permit exchanges to grant spread exemptions for exchange-set limits in commodity derivative contracts subject to federal limits, and recommended that the Commission establish a process for granting such spread exemptions for purposes of Federal limits.[1121]

In response to these comments, the Commission proposed in its 2016 Supplemental Position Limits Proposal [1122] to permit exchanges to process and grant applications for spread exemptions from federal position limits. At that time, the Commission noted that most, if not all, DCMs already have rules in place to process and grant applications for spread exemptions from exchange-set position limits pursuant to part 38 of the Commission's regulations (in particular, current §§ 38.300 and 38.301) and current § 150.5. And, as noted above, the Commission pointed out that it has a long history of overseeing the performance of the DCMs in granting spread exemptions under current exchange rules regarding exchange-set position limits and believed that it would be efficient, and in the best interest of the markets, in light of current resource constraints, to rely on the exchanges to process applications for spread exemptions from federal position limits. In addition, the

for exemptions from exchange-set position limits for certain spread positions pursuant to CFMA-era regulatory parameters. *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38467, n. 101.

The Commission pointed out that, in current § 150.3(a)(3), the Commission exempts spread positions ''between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spread month, in the same crop year,'' subject to certain limitations. 17 CFR 150.3(a)(3).

[1114] 7 U.S.C. 6a(a)(3)(B) and 7 U.S.C. 6a(c)(2)(B), respectively.

[1115] CEA section 4a(a)(3)(B) also directs the Commission, in establishing position limits, to diminish, eliminate, or prevent excessive speculation; to deter and prevent market manipulation, squeezes, and corners; and to ensure that the price discovery function of the underlying market is not disrupted.

[1116] 7 U.S.C. 6a(c)(2)(A). As explained in the 2016 Supplemental Position Limits Proposal, 81 FR at 38464, n. 66, CEA section 4a(c)(2) generally requires the Commission to define a bona fide hedging position as a position that in CEA section 4a(c)(2)(A): Meets three tests (a position (1) is a substitute for activity in the physical marketing channel, (2) is economically appropriate to the reduction of risk, and (3) arises from the potential change in value of current or anticipated assets, liabilities or services); or, in CEA section 4a(c)(2)(B), reduces the risk of a swap that was executed opposite a counterparty for which such swap would meet the three tests.

[1117] Current § 150.5 applies as non-exclusive guidance and acceptable practices for compliance with DCM core principle 5. *See* December 2013 Position Limits Proposal, 78 FR at 75750–2; *see also* 2016 Supplemental Position Limits Proposal, 81 FR at 38477, n. 173.

[1118] *See* December 2013 Position Limits Proposal, 78 FR at 75736; *see also* 2016 Supplemental Position Limits Proposal, 81 FR at 38477.

[1119] *See, e.g.,* CL–CMC–59634 at 15; CL–Olam–59658 at 7; CL–CME–59718 at 69–71; CL–Citadel–59717 at 8, 9; CL–Armajaro–59729 at 2; and CL–ICEUS–59645 at 8–10.

[1120] *See* CL–CMC–59634 at 15; CL–Olam–59658 at 7; CL–CME–59718 at 71; CL–Armajaro–59729 at 2; and CL–ICEUS–59645 at 8–10.

[1121] *See* CL–Olam–59658 at 7; CL–CME–59718 at 71; CL–ICEUS–59645 at 10.

[1122] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38476–80.

Commission stated that, because many market participants may be familiar with current DCM practices regarding spread exemptions, permitting DCMs to build on current practice may lower the burden on market participants and reduce duplicative filings at the exchanges and the Commission. The 2016 Supplemental Position Limits Proposal noted that this plan would permit exchanges to provide market participants with spread exemptions, pursuant to exchange rules submitted to the Commission; however, the Commission also pointed out that it would retain the authority to review—and, if necessary, reverse—the exchanges' actions.[1123]

Proposed § 150.10 and the public comments relevant to each proposed subsection are discussed below.

2. Discussion

As discussed in greater detail below, the Commission is reproposing § 150.10, largely as originally proposed. Some changes were made in response to concerns raised by commenters; other changes conform to changes made in § 150.9 or § 150.11. Finally, several non-substantive changes were made in response to commenter questions to provide greater clarity.

a. Proposed § 150.10(a)(1)

Proposed Rule

The Commission contemplated in proposed § 150.10(a)(1) that exchanges could voluntarily elect to process spread exemption applications, by filing new rules or rule amendments with the Commission pursuant to part 40 of the Commission's regulations.[1124] The process proposed under § 150.10(a) was substantially similar to that described above for proposed § 150.9(a). For example, proposed § 150.10(a)(1) provided that, with respect to a commodity derivative position for which an exchange elected to process spread exemption applications, (i) the exchange must list for trading at least one component of the spread or must list for trading at least one contract that is a referenced contract included in at least one component of the spread; and (ii) any such exchange contract must be actively traded and subject to position limits for at least one year on that exchange. As noted with respect to the process outlined above for proposed § 150.9(a), the Commission expressed its belief that that an exchange should process spread exemptions only if it had at least one year of experience overseeing exchange-set position limits in an actively traded referenced contract that was in the same commodity as that of at least one component of the spread. The Commission stated that an exchange may not be familiar enough with the specific needs and differing practices of the participants in those markets for which an individual exchange did not list any actively traded referenced contract in a particular commodity. If a component of a spread was not actively traded on an exchange that elected to process spread exemption applications, such exchange might not be incentivized to protect or manage the relevant commodity market, and the interests of such exchange might not be aligned with the policy objectives of the Commission as expressed in CEA section 4a(a)(3)(B). The Commission expected that an individual exchange would describe how it would determine whether a particular component of a spread was actively traded in its rule submission, based on its familiarity with the specific needs and differing practices of the participants in the relevant market.

Consistent with the restrictions regarding the offset of risks arising from a swap position in CEA section 4a(c)(2)(B), proposed § 150.10(a)(1) would not permit an exchange to recognize a spread between a commodity index contract and one or more referenced contracts. That is, an exchange could not grant a spread exemption where a bona fide hedging position could not be recognized for a pass through swap offset of a commodity index contract.[1125]

The Commission noted that for inter-commodity spreads in which different components of the spread were traded on different exchanges, the exemption granted by one exchange would be recognized by the Commission as an exemption from federal limits for the applicable referenced contract(s), but would not bind the exchange(s) that listed the other components of the spread to recognize the exemption for purposes of that other exchange(s)' position limits. In such cases, a trader seeking such inter-commodity spread exemptions would need to apply separately for a spread exemption from each exchange-set position limit.

Comments Received

Two commenters recommended that the Commission should, to the greatest extent possible, allow the exchanges to administer exemptions for non-enumerated bona fide hedging positions, enumerated bona fide hedges, and spread positions in the same manner as they have been to date and allow exchanges to continue to independently evaluate exemption applications by relying on the exchange's extensive knowledge of the markets.[1126]

Five commenters recommended that the Commission not adopt the ''active trading'' and ''one year experience'' requirements as proposed in the supplement regarding a DCM's qualification to administer exemptions from federal position limits.[1127] For a more detailed discussion please see § 150.9(a)(1) above.

Alternatively, several commenters expressed views against the

[1123] 2016 Supplemental Position Limits Proposal, 81 FR at 38477.

[1124] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38464, n. 63, regarding Commission authority to recognize spreads under CEA section 4a(a)(1). Any action of the exchange to recognize a spread, pursuant to rules filed with the Commission, would be subject to review and revocation by the Commission.

[1125] The Commission's interprets CEA section 4a(c)(2)(b) is a mandate from Congress to narrow the scope of what constitutes a bona fide hedging position in the context of index trading activities. ''Financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks from financial products is inconsistent with the proposed definition of bona fide hedging for physical commodities.'' *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38471; *see also* December 2013 Position Limits Proposal, 78 FR at 75740. *See also* the discussion of the temporary substitute test. *Id.* at 75708–9.

[1126] CL–NCGA–NGSA–60919 at 9 and CL–IECAssn–60949 at 3–4.

[1127] *See, e.g.,* CL–CCI–60935 at 3–4; CL–FIA–60937 at 3; CL–Working Group–60947 at 10; CL–IECAssn–60949 at 12–13; and CL–CME–60926 at 13 (expressing that such qualification requirements could have the unintended consequences of (1) harming the ability of market participants to effectively manage their risk by preventing the Exchanges from recognizing an otherwise appropriate exemption from federal speculative position limits, and (2) stifling future innovation in the development of new commodity derivative products created to meet evolving market needs and demands). *See also* CL–FIA–60937 at 9 (citing the following example: ''For example, CME's New York Mercantile Exchange (''NYMEX'') recently listed the LOOP crude oil storage futures contract (LPS) and IFUS recently listed the world cotton futures contract (WCT). Assuming for purposes of illustration that both of these futures contracts were Referenced Contracts, under the Supplemental Proposal neither NYMEX nor IFUS would be permitted to grant non-enumerated hedge, spread, or anticipatory hedge exemptions during the first year of each contract's existence notwithstanding the extensive experience of these exchanges in administering limits on positions in a variety of similar contracts.''), CL–CME–60926 at 14 (arguing that one year of experience in administering position limits in similar contracts within a particular ''asset class'' would be a more reasonable requirement.), CL–FIA–60937 at 9 (expressing the view that ''the CEA precludes the Commission from establishing limits that apply to ''*bona fide* hedge positions,'' and the ''definition of *bona fide* hedging in CEA Section 4a(c)(2) does not include as relevant criteria whether an exchange contract is actively traded or an exchange has one year of prior experience administering limits on positions in that contract.'' Thus, the CEA does not permit the one year prerequisite.)

Commission authorizing exchanges to grant hedge and spread exemptions, and cited concerns with respect to what they believe to be a conflict of interest that could arise between for-profit exchanges and their exemption-seeking customers. The commenters proposed, instead, that the Commission make any final hedge and spread exemption determinations.[1128]

Commission Reproposal

The Commission is reproposing § 150.10(a)(1), as originally proposed with one clarification explained below. In reproposing § 150.10(a)(1), the Commission provides a basic application process for exchanges that elect to process spread exemption applications to federal limits. This process allows exchanges flexibility while also facilitating the Commission's review of exchange granted exemptions. The Commission notes that exchanges have authority to determine whether or not to apply the § 150.10(a)(1) process to spread exemptions from exchange-set limits that are lower than federal limits.

Regarding the comment that the one-year experience and active trading qualification requirements could harm the ability for market participants to effectively manage their risks because the qualification requirements would limit the number of exchanges that could grant exemptions,[1129] the Commission clarifies that the one-year experience and active trading requirement can be met by any referenced contract in the particular commodity.[1130] This feature allows a broader number of exchanges to grant spread exemptions. Furthermore, the Commission notes that an exchange with no active trading and or experience in any referenced contract in the particular commodity may not have their interests aligned with the CEA's policy objectives for position limits, such as those in CEA section 4a(a)(3)(B).[1131]

Finally, the Commission clarifies that an exchange can petition the Commission for a waiver of the one-year experience requirement pursuant to § 140.99 of the Commission's regulations if such exchange believes that their experience and interests are aligned with the Commission's interests with respect to recognizing spread positions.

Regarding comments that the Commission should be the sole authority to make a final hedge or spread exemption determination, or that the Exchange's one-year of experience administering position limits to its actively traded contract and the Commission's de novo review are inadequate, the Commission disagrees. The Commission believes the exchange's one year of experience administering position limits to its actively traded contract,[1132] and the Commission's de novo review of granted exemptions (afterwards) are adequate to guard against or remedy any conflicts of interest. Also, the Commission notes that § 150.10(a)(4)(vi) requires exchanges should take into account whether granting a spread exemption in a physical commodity derivative would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unduly reduce the effectiveness of position limits to: Diminish, eliminate, or prevent excessive speculation; deter and prevent market manipulation, squeezes, and corners; and ensure that the price discovery function of the underlying market is not disrupted.[1133]

b. Proposed § 150.10(a)(2)

Proposed Rule

Proposed § 150.10(a)(2) specifies a non-exclusive list of the type of spreads that an exchange might exempt from position limits, including calendar spreads; quality differential spreads; processing spreads (such as energy ''crack'' or soybean ''crush'' spreads); and product or by-product differential spreads. The Commission pointed out that this list was not exhaustive, but reflected common types of spread activity that might enhance liquidity in commodity derivative markets, thereby facilitating the ability of bona-fide hedgers to put on and offset positions in those markets. For example, trading activity in many commodity derivative markets is concentrated in the nearby contract month, but a hedger might need to offset risk in deferred months where derivative trading activity may be less active. A calendar spread trader could provide such liquidity without exposing himself or herself to the price risk inherent in an outright position in a deferred month. Processing spreads can serve a similar function. For example, a soybean processor might seek to hedge his or her processing costs by entering into a ''crush'' spread, *i.e.,* going long soybeans and short soybean meal and oil. A speculator could facilitate the hedger's ability to do such a transaction by entering into a ''reverse crush'' spread (*i.e.,* going short soybeans and long soybean meal and oil). Quality differential spreads, and product or by-product differential spreads, may serve similar liquidity-enhancing functions when spreading a position in an actively traded commodity derivatives market such as CBOT Wheat against a position in another actively traded market, such as MGEX Wheat.

The Commission anticipated that a spread exemption request might include spreads that were ''legged in,'' that is, carried out in two steps, or alternatively were ''combination trades,'' that is, all components of the spread were executed simultaneously.

This proposal, the Commission observed, would not limit the granting of spread exemptions to positions outside the spot month, unlike the existing spread exemption provisions in current § 150.3(a)(3), or in § 150.5(a)(2)(ii) as proposed in the December 2013 Position Limits Proposal. The proposal responded to specific requests of commenters to permit spread exemptions in the spot month. The Commission pointed out

[1128] *See, e.g.,* CL–Public Citizen–60940 at 3; CL–PMAA–NEFI–60952 at 2; CL–RER2–60962 at 1; CL–AFR–60953 at 2; CL–RER1–60961 at 1; CL–PMAA–NEFI–60952 at 2; CL–RER2–60962 at 1; CL–AFR–60953 at 2 and CL–Better Markets–60928 at 1–5.

[1129] As noted above, according to the commenter, the qualification requirements would limit the number of exchanges that could grant exemptions to those that list the relevant referenced contract and manage position limits in that referenced contract based on the exchanges experience and knowledge of the underlying commodity market that referenced contract.

[1130] As noted above, experience manifests in the people carrying out surveillance in a commodity rather than in an institutional structure. An exchange's experience would be provided through the appropriate experience of the surveillance staff regarding the particular commodity. In fact, the Commission has historically reviewed the experience and qualifications of exchange regulatory divisions when considering whether to designate a new exchange as a contract market or to recognize a facility as a SEF; as such exchanges are new, staff experience has clearly been gained at other exchanges.

[1131] CEA section 4a(a)(3)(B) provides that the Commission shall set limits ''to the maximum extent practicable, in its discretion—to diminish, eliminate, or prevent excessive speculation as described under this section; to deter and prevent market manipulation, squeezes, and corners; to ensure sufficient market liquidity for bona fide hedgers; and to ensure that the price discovery function of the underlying market is not disrupted.'' In addition, CEA section 4a(a)(7) authorizes the Commission to exempt any class of transaction from any requirement it may establish with respect to position limits.

[1132] To avoid confusion, the Commission reiterates that experience manifests in the people carrying out surveillance in a commodity rather than in an institutional structure. An exchange's experience would be provided through the appropriate experience of the surveillance staff regarding the particular commodity.

[1133] As noted in the 2016 Supplemental Position Limits Proposal, the guidance is consistent with the statutory policy objectives for position limits on physical commodity derivatives in CEA section 4a(a)(3)(B). *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38464. The Commission interprets the CEA as providing it with the statutory authority to exempt spreads that are consistent with the other policy objectives for position limits, such as those in CEA section 4a(a)(3)(B). *Id.*

that the CME, for example, recommended ''the Commission reaffirm in DCMs the discretion to apply their knowledge of individual commodity markets and their judgement, as to whether allowing intermarket spread exemptions in the spot month for physical-delivery contracts is appropriate.'' [1134]

The Commission proposed to revise the December 2013 Position Limits Proposal in the manner described above because, as it noted in the 2016 Supplemental Position Limits Proposal as well as in the examples above, permitting spread exemptions in the spot month may further one of the four policy objectives set forth in section 4a(a)(3)(b) of the Act: To ensure sufficient market liquidity for bona fide hedgers.[1135] This policy objective, the Commission observed, was incorporated into the proposal in its requirements that: (i) The applicant provide detailed information demonstrating why the spread position should be exempted from position limits, including how the exemption would further the purposes of CEA section 4a(a)(3)(B); [1136] and (ii) the exchange would determine whether the spread position (for which a market participant was seeking an exemption) would further the purposes of CEA section 4a(a)(3)(B).[1137] Moreover, the Commission pointed out that it was retaining the ability to review the exchange rules as well as to review how an exchange enforces those rules.[1138]

The Commission also discussed that it was concerned, among other things, about protecting the price discovery process in the core referenced futures contracts, particularly as those contracts approach expiration. Accordingly, as an alternative, the Commission considered whether to prohibit an exchange from granting spread exemptions that would be applicable during the lesser of the last five days of trading or the time period for the spot month.[1139]

Comments Received

Several commenters expressed the view that exchanges must be allowed to use their experience to determine whether to grant spread exemptions in the spot month—including within the last five days of trading. Commenters expressed the view that allowing exchanges to grant spread exemptions in the spot months/last five days would provide liquidity to the market and help convergence between cash and futures markets.[1140]

Eight commenters expressed the view that the Commission should not impose the five-day rule for spread positions in the expiring spot month contract.[1141] The commenters argued that to impose the five-day rule would adversely affect liquidity in the futures market and impair convergence between cash and futures markets and thus the price discovery function of the futures market. The commenters also expressed the view that the Commission's concerns about trading activity in the final days of an expiring futures contract can best be addressed by existing exchange and Commission surveillance programs and the Commission's ''special call'' authority to request information from market participants.

One commenter expressed the view that the Commission should not apply the five-day rule to certain enumerated bona fide hedging positions under proposed § 150.1(3)–(4), cross-commodity hedges under proposed § 150.1(5), or to non-enumerated bona fide hedge, or spread exemptions. Instead, the Commission should permit the Exchanges to determine the facts and circumstances where a market participant may be permitted to hold a physical-delivery referenced contract in the spot month as part of a position that is exempt from federal speculative position limits.[1142]

Another commenter expressed that it ''would support the applicability of the spread exemption through the end of the month, without limiting the exemption during the current month.'' In that regard, the commenter (an exchange) noted that its ''futures contracts on electricity settle to the independent, spot market overseen by the ISO/RTO markets.'' The commenter argued that ''since the settlement prices are determined in the ISO/RTO markets, trading during the last five days of the spot month has no impact on final settlement prices'' on either the exchange or the ISO/RTO spot markets. The commenter noted that ''bona fide hedgers rely on the ability to hold positions through the end of the current month, which has very low volume traded for monthly power contracts. Restrictions on spread exemptions during the last five days of trading may force market participants to exit their position during a period of lower liquidity—more than 99% of trading volume occurs outside the current (spot) month'' on its exchange.[1143]

One commenter expressed that it is concerned that the new Form 504 would impose a series of reporting requirements to track and distinguish between types of hedge exemptions and requires reporting of all cash market holdings for each day of the spot month that would be difficult given the portfolio nature of commenter's business and the fungibility of futures contracts and the underlying cash commodity. The commenter expressed the view that once a hedge exemption is granted under the supplemental, the reporting requirements should be similar to the reporting requirements for existing enumerated bona fide hedging position exemptions.[1144]

Another commenter expressed the view that it is not necessary to condition spread exemptions on additional filings to the exchange or the Commission.[1145]

Two commenters requested that the Commission clarify that the term ''spread position'' includes all types of spreads and the list of spreads referenced in proposed § 150.10 is simply illustrative and not exhaustive.[1146]

Three commenters requested that the Commission continue to permit cash and carry exemptions, stating, among other reasons, such exemptions serve an economic purpose by helping to maintain an appropriate economic relationship between the nearby and the next successive delivery month.[1147]

Commission Reproposal

The Commission is reproposing § 150.10(a)(2), as originally proposed, and clarifying that the five-day rule does not apply to spreads. Because the Commission did not propose in the 2016 Supplemental Position Limits Proposal to apply the five-day rule to ''spread positions'', exchanges would have discretion to recognize such spread positions without regard to the five-day rule. The Commission cautions exchanges to carefully consider whether

[1134] CL–CME–59718 at 71. *See also* 2016 Supplemental Position Limits Proposal, 81 FR at 38478.

[1135] CEA section 4a(a)(3)(B)(iii); 7 U.S.C. 6a(a)(3)(B)(iii). *See also* the discussion of proposed § 150.10(a)(3)(ii), below.

[1136] *See* proposed § 150.10(a)(3)(ii).

[1137] *See* proposed § 150.10(a)(4)(vi); *see also* 2016 Supplemental Position Limits Proposal, 81 FR at 38478.

[1138] The Commission pointed out that it could, for example, revoke or confirm exchange-granted exemptions.

[1139] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38478.

[1140] CL–ICE–60929 at 24; CL–IECAssn–60949 at 15; and CL–ADM–60934 at 6–7.

[1141] CL–NCGA–ASA–60917 at 1–2; CL–CME–60926 at 3; CL–ICE–60929 at 9; and CL–AFIA–60955 at 2; CL–NGFA–60941 at 5–7; CL–ISDA–60931 at 10; CL–NCFC–60930 at 3–4; and CL–Working Group–60947 at 7–9.

[1142] CL–CCI–60935 at 8–9.

[1143] CL–Nodal–60948 at 3.

[1144] CL–ADM–60934 at 8.

[1145] CL–ICE–60929 at 25.

[1146] CL–Working Group–60947 at 9–10 and CL–FIA–60937 at 14.

[1147] CL–ICE–60929 at 11–12; CL–NCC–ACSA–60972 at 2; and CL–CMC–60950 at 11–12.

to recognize a spread position in the last few days of trading in physical-delivery contracts. For a more detailed discussion please see § 150.9(a)(1) above.

The Commission reiterates, as proposed and discussed in the 2016 Supplemental Position Limit Proposal, that an exchange would not be permitted to recognize a spread between a commodity index contract and one or more referenced contracts. That is, an exchange may not grant a spread exemption where a bona fide hedging position could not be recognized for a pass-through swap offset of a commodity index contract. For a more detailed discussion please see § 150.9(a)(1) above.

In response to the comment regarding spread exemptions for electricity contracts, the Commission notes that electricity contracts are not referenced contracts that will be subject to federal limits at this time. Thus, exchanges may elect to process spread exemptions for exchange-set position limits for non-referenced contracts.

In response to the comments regarding the proposed spread exemption process imposing additional filing requirements on market participants relying on an exchange-granted spread exemption, the Commission clarifies that it is in the exchange's discretion to determine whether there are additional reporting requirements for a spread exemption. For a more detailed discussion please see § 150.9(a)(1) above.

In response to the comments received requesting clarification that the list of spreads in § 150.10(a)(2) [1148] is simply illustrative and not an exhaustive list of possible spread exemptions that may be granted by an exchange, the Commission acknowledges that the list of spreads in § 150.10(a)(2) is not an exhaustive list and that exchanges may grant other spread exemptions so long as they meet the requirements in § 150.10(a)(1), (3), and (4)(vi).

In response to the comments received that requested the Commission continue to permit ''cash and carry'' spread exemptions, the Commission has determined to allow exchanges to grant ''cash and carry'' spread exemptions to exchange and federal limits so long as an exchange has suitable safeguards in place to require a market participant relying on such an exemption to reduce their position below the speculative limit in a timely manner once current market prices no longer permit entry into a full carry transaction. The Commission notes that the condition noted above is more stringent than how ICE Futures U.S. has conditioned market participants relying on a cash-and–carry spread exemption. In that regard, ICE Futures U.S. has required a market participant to reduce their positions ''before the price of the nearby contract month rises to a premium to the second (2nd) contract month.''

c. Proposed § 150.10(a)(3)

Proposed Rule

Proposed § 150.10(a)(3) set forth a core set of information and materials that all applicants would be required to submit to enable an exchange to determine, and the Commission to verify, whether the facts and circumstances attendant to a spread position furthered the policy objectives of CEA section 4a(a)(3)(B). In particular, the applicant would be required to demonstrate, and the exchange to determine, that exempting the spread position from position limits would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, but not unduly reduce the effectiveness of position limits to: Diminish, eliminate or prevent excessive speculation; deter and prevent market manipulation, squeezes, and corners; and ensure that the price discovery function of the underlying market is not disrupted.[1149]

The proposal pointed out that one DCM, ICE Futures U.S., currently grants certain types of spread exemptions that the Commission was concerned may not be consistent with these policy objectives.[1150] ICE Futures U.S. allows ''cash-and-carry'' spread exemptions to exchange-set limits, which permit a market participant to hold a long position greater than the speculative limit in the spot month and an equivalent short position in the following month in order to guarantee a return that, at minimum, covers its carrying charges, *such as* the cost of financing, insuring, and storing the physical inventory until the next expiration.[1151] Market participants are able to take physical delivery in the nearby month and redeliver the same product in a deferred month, often at a profit. The Commission noted that while market participants are permitted to re-deliver the physical commodity, they are under no obligation to do so.[1152]

ICE Futures U.S.'s rules condition the cash-and-carry spread exemption upon the applicant's agreement that ''before the price of the nearby contract month rises to a premium to the second (2nd) contract month, it will liquidate all long positions in the nearby contract month.'' [1153] The Commission noted that it understood that ICE Futures U.S. required traders to provide information about their expected cost of carry, which was used by the exchange to determine the levels by which the trader has to reduce the position. Those exit points were then communicated to the applicant when the exchange responded to the trader's spread exemption request.

The 2016 Supplemental Position Limits Proposal considered whether to impose on the exchange a requirement to ensure that exit points in cash-and-carry spread exemptions would facilitate an orderly liquidation in the expiring futures contract. The Commission stated that it was concerned that a large demand for delivery on cash and carry positions might distort the price of the expiring futures upwards. This would particularly be a concern in those commodity markets where the cash spot price was discovered in the expiring futures contract.

As the Commission noted, ICE Futures U.S. opined in a recent rule enforcement review that such exemptions are ''beneficial for the market, particularly when there are plentiful warehouse stocks, which

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[1148] Proposed § 150.10(a)(2) included the following list of spreads that a designated contract market or swap execution facility may approve under this section include: (i) Calendar spreads; (ii) Quality differential spreads; (iii) Processing spreads; and (iv) Product or by-product differential spreads.

[1149] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38479, n. 192, and accompanying text (describing the DCM's responsibility under its application process to make this determination in a timely manner).

[1150] *See* ICE Futures U.S. Rule 6.29(e).

[1151] Carrying charges include insurance, storage fees, and financing costs, as well as other costs such as aging discounts that are specific to individual commodities. The ICE Futures U.S. rules require an applicant to provide: (i) Its cost of carry; (ii) the minimum spread at which the applicant will enter into a straddle position and which would result in an profit for the applicant; and (iii) the quantity of stocks in exchange-licensed warehouses that it already owns. The applicant's entire long position carried into the notice period must have been put on as a spread at a differential that covers the applicant's cost of carry. *See* Rule Enforcement Review of ICE Futures U.S., July 22, 2014 (''ICE Futures U.S. Rule Enforcement Review''), at 44–45, available at *http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/dcmruleenf. See also* 2016 Supplemental Position Limits Proposal, 81 FR at 38479, n. 189.

[1152] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38479.

[1153] ICE Futures U.S. Rule 6.29(e) (at the time of the target period of the ICE Futures U.S. Rule Enforcement Review (June 15, 2011 to June 15, 2012), the cash-and-carry provision currently found in ICE Futures U.S. Rule 6.29(e) was found in ICE Futures U.S. Rule 6.27(e)). Further, under the exchange's rules, additional conditions may also apply.

typically is the only time when the opportunity exists to utilize the exemption,'' maintaining that the exchange's rules and procedures are effective in ensuring orderly liquidations.[1154] The Commission observed that it remained concerned about these exemptions and their impact on the spot month price, and noted that it was still reviewing the effectiveness of the exchange's cash-and-carry spread exemptions and the procedure by which they were granted.

As an alternative to providing exchanges with discretion to consider granting cash-and-carry spread exemptions, the Commission considered, in the 2016 Supplemental Position Limits Proposal, prohibiting cash-and-carry spread exemptions to position limits. In this regard, the Commission pointed out that it does not grant such exemptions to current federal position limits. As another alternative, the Commission considered permitting exchanges to grant cash-and-carry spread exemptions, but would require suitable safeguards be placed on such exemptions. For example, the Commission considered requiring that cash-and-carry spread exemptions be conditioned on a market participant reducing positions below speculative limit levels in a timely manner once current market prices no longer permit entry into a full carry transaction, rather than the less stringent condition of ICE Futures U.S. that a trader reduce positions ''before the price of the nearby contract month rises to a premium to the second (2nd) contract month.'' [1155]

Comments Received

One commenter expressed the view that an ''exchange should not be required to determine whether liquidity will be increased if a particular Spread Exemption is granted before it is permitted to grant such Spread Exemption.'' According to the commenter, ''this requirement effectively would create an entirely new legal standard for spread exemptions and flip on its head the requirement under CEA section 4a(a)(3)(b)(iii), which states that, to the maximum extent practicable, in establishing speculative position limits the Commission in its discretion should ensure sufficient market liquidity for bona fide hedgers. CEA section 4a(a)(3)(b)(iii) does not require (and should not require) that, in granting an exemption from speculative position limits, the exemption must add to liquidity.'' [1156]

Two commenters requested that the proposed application requirements for market participants be revised to only require ''such information as the relevant exchange deems necessary to determine if the requested exemption is consistent with the purposes of hedging.'' Furthermore one commenter requested that the Commission confirm that the detailed procedures for exchange-granted exemptions for spread and anticipatory hedges are not applicable to exemptions granted by exchanges for positions below the federal level.[1157]

One commenter expressed the view that ''if proposed Regulations 150.9(a)(3)(iii) and 150.10(a)(3)(iii) indeed are intended to apply to an applicant's maximum size of all gross positions for each and every commodity derivative contract the applicant holds (as opposed to the maximum gross positions in the commodity derivative contract(s) for which the exemption is sought), such requirements are unnecessary and unduly burdensome.'' [1158]

Commission Reproposal

The Commission is reproposing § 150.10(a)(3), largely as originally proposed with one clarifying amendment to § 150.10(a)(3)(iii), as discussed further below. The Commission believes that exchanges should consider the policy objectives of CEA section 4a(a)(3)(B), which is the standard that the Commission would use to review a petition to exempt a spread position from position limits. Regarding the comment arguing that CEA section 4a(a)(3)(b)(iii) does not require that the granting of a spread exemption must increase liquidity, the Commission interprets the CEA as providing it with the statutory authority to exempt spreads that are consistent with the other policy objectives for position limits, such as those in CEA section 4a(a)(3)(B). CEA section 4a(a)(3)(B) provides that the Commission shall set limits to the maximum extent practicable, in its discretion—to diminish, eliminate, or prevent excessive speculation as described under this section; to deter and prevent market manipulation, squeezes, and corners; to ensure sufficient market liquidity for bona fide hedgers; and to ensure that the price discovery function of the underlying market is not disrupted. The Commission believes that exchanges who elect to grant spread exemptions to federal position limits should use the guidance in CEA section 4a(a)(3)(B) as the Commission would when reviewing de novo a spread exemption application.

Regarding the comment requesting change to the requirements of § 150.10(a)(3) to only require ''such information as the relevant exchange deems necessary to determine if the requested exemption is consistent with the purposes of hedging,'' the Commission believes that the proposal requires a minimum amount of information, and exchanges have discretion to require additional information. If (as one commenter represented) an exchange has market information that would supplement its analysis of a spread exemption application, nothing in the proposal would preclude an exchange from using that information in its analysis. However, the Commission notes that such information must be included in the records of that spread exemption application as required under § 150.10(b).

In response to the request for clarification regarding whether § 150.10 applies to both federal and exchange-set limits, the Commission clarifies that, as

[1154] ICE Futures U.S. Rule Enforcement Review, at 45.

[1155] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38479.

[1156] CL–Working Group–60947 at 22. *See also* CL–ISDA–60931 at 1 (expressing that under the 2016 Supplemental Position Limits Proposal, the exchange must certify that a spread exemption increases liquidity in order to grant it. The commenter expressed the view that the CEA requires limits that do not impair liquidity, as opposed to limits that specifically increase it. Furthermore, the commenter recommended that the Commission should remove this condition because the purpose of a spread exemption ''is not to increase liquidity but rather to recognize the more limited speculative opportunity created by such positions.'').

[1157] CL–ICE–60929 at 8. *See also* CL–Nodal–60948 at 2–3 (expressing the view that ''[t]he Proposed Rule is overly prescriptive as to the information that must be provided by the applicant, especially when the exchange may have superior information regarding intramarket spreads. Unlike intermarket spreads, the exchange, and not the applicant, is more likely to have direct information to determine whether an intramarket spread achieves the goals of CEA 4a(a)(3)(B). For example, [an exchange] has current deliverable supply analysis, spread and outright trading activity information, and market data from spot markets for the underlying physical commodities. In performing its pricing and surveillance functions, [an exchange] monitors position accumulation information that is not available to market participants as well as out-of-market pricing in real time.'' The commenter requested that it be allowed to determine its application process, and the information it needs to achieve the policy objectives of CEA 4a(a)(3)(B), ''for which the Commission has the authority to review the exchange's rules and conclusions.'')

[1158] CL–Working Group–60947 at 10. *See also* CL–ISDA–60931 at 10 (expressing the view that the proposed rule 150.10(a)(3)(iii) requiring maximum size of all gross positions in derivative contracts is too broad and practically impossible as no market participant can predict trading activity for a year).

explained above in connection with § 150.5, § 150.10 would not apply if an exchange grants exemptions from speculative position limits it sets under paragraph § 150.5(a)(1), provided that that any spread exemptions to exchange-set limits not conforming to § 150.3 and § 150.10 were capped at the level of the applicable federal limit in § 150.2. Further, § 150.10 would not apply to exchanges that grant spread exemptions to exchange-set limits, in commodity derivative contracts not subject to a federal limit.

Regarding the comment about whether the phrase ''maximum size of all gross positions'' applies to an applicant's entire book of derivative positions or just those positions pertaining to the exemption application, the Commission intended that the applicant only report its maximum size of all gross positions in the commodity related to the exemption application that it is submitting. In that regard, Commission is reproposing § 150.10(a)(3)(iii) to clarify as such. For a more detailed discussion, please see § 150.9(a)(2) above.

d. Proposed § 150.10(a)(4)

Proposed Rule

Proposed § 150.10(a)(4) set forth certain timing requirements that an exchange would be required to include in its rules for the spread application process. Those timing requirements would substantially mirror those provisions proposed in § 150.9(a)(4) [1159] for the non-enumerated bona fide hedging position application process. While these timing requirements are similar to those under proposed § 150.9(a)(4), the exchange, under proposed § 150.10(a)(4), must also determine in a timely manner whether the facts and circumstances attendant to a position further the policy objectives of CEA section 4a(a)(3)(B).[1160]

Comments Received

The Commission notes that it did not receive comments regarding § 150.10(a)(4).

Commission Determination

The Commission is reproposing § 150.10(a)(4), as originally proposed.

e. Proposed § 150.10(a)(5)

Proposed Rule

Proposed § 150.10(a)(5) clarified that an applicant's spread position would be deemed to be recognized as a spread position exempt from federal position limits at the time an exchange recognized it. The Commission noted that this was substantially similar to proposed § 150.9(a)(5) for non-enumerated bona fide hedging position exemptions.[1161]

Comments Received

One commenter expressed the view that it is concerned regarding how an exchange should coordinate the granting of exemptions with respect to contracts on the same underlying commodities that trade on different exchanges, and requests guidance from the Commission on that matter.[1162]

Commission Reproposal

The Commission is reproposing § 150.10(a)(5), as originally proposed. The Commission notes that the proposal allows each exchange to use its own expertise to decide what exemptions and limit levels to employ for their venue with the Commission serving in an oversight role to monitor exemptions and position limits across exchanges. The Commission also notes that although the proposal does not address coordination of granting of exemptions among exchanges, there is nothing in the proposal that would prohibit exchanges from coordinating.

f. Proposed § 150.10(a)(6)

Proposed Rule

Proposed § 150.10(a)(6) required exchanges that elect to process spread applications to promulgate reporting rules for applicants who owned, held or controlled positions recognized as spreads; the Commission noted that this is substantially similar to proposed § 150.9(a)(6) for non-enumerated bona fide hedge exemptions.[1163]

Comments Received

Several commenters [1164] recommended, ''that the Commission remove the proposed requirement that an exchange must adopt enhanced reporting rules for market participants that rely on non-enumerated hedge exemptions, spread exemptions, or anticipatory exemptions'' because the proposal ''would force exchanges to establish rules that require market participants to report all referenced contract positions that they hold or control in reliance upon a non-enumerated hedge, spread, or anticipatory hedge exemption along with the underlying cash market exposure (*e.g.,* cash positions or components of a spread) hedged by those positions.'' Many of these commenters expressed the view that such reporting requirements would be overly burdensome and/or confusing.

Commission Reproposal

The Commission is reproposing § 150.10(a)(6) with one modification to clarify in the regulation text that exchanges are authorized, but not required, to determine whether to require reporting by the spread exemption applicant. For a more detailed discussion, please see the discussion of § 150.9(a)(3) above.

g. Proposed § 150.10(a)(7)

Proposed Rule

Proposed § 150.10(a)(7) required an exchange to publish on its Web site, no less frequently than quarterly, a description of each new type of derivative position that it recognized as a spread; the Commission noted that this was substantially similar to proposed § 150.9(a)(7) for non-enumerated bona fide hedging position exemptions.[1165]

[1159] The Commission noted, for example, proposed § 150.9(a)(4) provided that: (i) A person intending to rely on a exchange's exemption from position limits would be required to submit an application in advance and to reapply at least on an annual basis; (ii) the exchange would be required to notify an applicant in a timely manner whether the position was exempted, and reasons for any rejection; and (iii) the exchange would be able to revoke, at any time, any recognition previously issued pursuant to proposed § 150.9 if the exchange determined the recognition was no longer in accord with section 4a(c) of the Act. *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38480, n. 192.

[1160] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38476, n. 171 and accompanying text.

[1161] For example, proposed § 150.9(a)(5) provided that the position will be deemed to be recognized as a non-enumerated bona fide hedging position when an exchange recognized it.

[1162] CL–ISDA–60931 at 6–7.

[1163] For example, proposed § 150.9(a)(6) provided that an exchange would promulgate enhanced reporting rules in order to obtain sufficient information to conduct an adequate surveillance program to detect and potentially deter excessively large positions that might disrupt the price discovery process.

[1164] *See, e.g.,* CL–FIA–60937 at 15; CL–CMC–60950 at 12–13; CL–CCI–60935 at 7–8; CL–NCGA–NGSA–60919 at 12–13; CL–MGEX–60936 at 6; CL–ISDA–60931 at 10; CL–NGFA–60941 at 4; CL–Working Group–60947 at 12 (footnotes omitted) and CL–AMG–60946 at 4–5.

[1165] For example, proposed § 150.9(a)(7) provided that an exchange would publish on its Web site, no less frequently than quarterly, a description of each new type of derivative position that it recognized as a non-enumerated bona fide hedge. The Commission noted that it envisioned that each description would be an executive summary. The description would be required to include a summary describing the type of derivative position and an explanation of why it qualified as a non-enumerated bona fide hedge. The Commission observed that the exchanges were in the best position when quickly crafting these descriptions to accommodate an applicant's desire for trading

Continued

Comments Received

One commenter expressed the view that proposed § 150.10 would have an anti-competitive effect on markets that rely on intramarket spread trading to enhance liquidity on less actively traded contracts. The commenter was concerned that the information that would be published in a fact pattern summary would provide details that could be used to identify market participants, especially in thinly traded specialized markets.[1166]

Another commenter expressed the view that exchanges should ''not be required to disclose any conditions of an exemption granted due to the potential for such information to compromise the exemption recipient's position.'' [1167]

Commission Reproposal

The Commission is reproposing § 150.10(a)(6), as originally proposed. The Commission reiterates that the purpose of each summary is to provide transparency to market participants by providing fair and open access for market participants to information regarding which positions might be recognized as spreads. The summary would be an executive summary that does not provide details of a market participant who received such an exemption, but rather, a general description of what the position is and why it qualifies for a spread exemption. The commenters did not provide any proposed alternatives to provide such transparency to market participants.

h. Proposed § 150.10(a)(8)

Proposed Rule

Proposed § 150.10(a)(8) provided options for an exchange to elect to request the Commission review a spread application that raised novel or complex issues, using the process set forth in proposed § 150.10(d), discussed below.[1168] This was substantially similar to those proposed under § 150.9(a)(8).[1169]

Comments Received

The Commission did not receive comments regarding § 150.10(a)(8).

Commission Reproposal

The Commission is reproposing § 150.10(a)(8), as originally proposed.

i. Proposed § 150.10(b)—Recordkeeping Requirements

Proposed Rule

Proposed § 150.10(b) outlined the recordkeeping requirements for exchanges that elected to process spread exemption applications submitted pursuant to § 150.10(a). As noted above, the proposed processes under this rule were substantially similar to the corresponding provisions in § 150.9(b). Hence, the Commission does not repeat the discussion here.

Commission Reproposal

The Commission did not receive comments on § 150.10(b), and is reproposing this rule, as originally proposed, for the same reasons as discussed in connection with § 150.9(b).

j. Proposed § 150.10(c) (Exchange Reporting) and Reproposal

Proposed Rule

Proposed § 150.10(c)(1) required designated contract markets and swap execution facilities that elected to process spread exemption applications to submit to the Commission a report for each week as of the close of business on Friday showing various information concerning the derivative positions that had been recognized by the designated contract market or swap execution facility as an exempt spread position, and for any revocation, modification or rejection of such recognition. Moreover, proposed § 150.10(c)(2) required a designated contract market or swap execution facility that elected to process applications for exempt spread positions to submit to the Commission (i) a summary of any exempt spread position newly published on the designated contract market or swap execution facility's Web site; and (ii) no less frequently than monthly, any report submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required under proposed § 150.10(a)(6).[1170]

As noted above, the proposed processes under this rule were substantially similar to the corresponding provisions in § 150.9(c). The Commission did not receive comments on this section that differed from those received on § 150.9(c).

Commission Reproposal

The Commission is reproposing this rule, largely as originally proposed, for the reasons previously provided in the discussion regarding § 150.9(c), with the same revision to the regulatory text included in reproposed § 150.9(c), to clarify that exchanges have the discretion to determine whether to incorporate additional reporting requirements for spread exemption applicants. In particular, the Commission is proposing to amend language in § 150.10(c)(2) to clarify that, unless otherwise instructed by the Commission, an exchange that elects to process applications to exempt spread positions from position limits shall submit to the Commission, no less frequently than monthly, ''any reports such [DCM or SEF] requires to be submitted by an applicant to such [DCM or SEF] pursuant to the rules required under paragraph (a)(6) of this section.''

k. Proposed § 150.10(d) (Review of applications by the Commission) and Reproposal

Proposed Rule

Proposed § 150.10(d) provided for Commission review of applications to ensure that the processes administered by the exchange, as well as the results of such processes, were consistent with the purposes of section 4a(a)(3)(B) of the Act and the Commission's regulations thereunder. As noted previously, under the proposal, the Commission was not diluting its ability to grant or not grant spread exemptions. The Commission reserved to itself the ability to review any exchange action, and to review any application by a market participant to an exchange, whether prior to or after disposition of such application by an exchange. An exchange could ask the Commission to consider a spread exemption application (proposed § 150.10(a)(8)). The Commission could also on its own initiative at any time—before or after action by an exchange—review any application submitted to an exchange for recognition of a spread exemption (proposed § 150.10(d)(1)). And, as noted above, market

anonymity while promoting fair and open access for market participants to information regarding which positions might be recognized as non-enumerated bona fide hedges.

[1166] CL–Nodal–60948 at 4.

[1167] CL–CME–60926 at 11.

[1168] If the exchange determined to request under proposed § 150.10(a)(8) that the Commission consider the application, the exchange must, under proposed § 150.10(a)(4)(v)(C), notify an applicant in a timely manner that the exchange had requested that the Commission review the application. This provision provided the exchanges with the ability to request Commission review early in the review process, rather than requiring the exchanges to process the request, make a determination and only then begin the process of Commission review provided for under proposed § 150.10(d). The Commission noted that although most of its reviews would occur after the exchange makes its determination, the Commission could, as provided for in proposed § 150.10(d)(1), initiate its review, in its discretion, at any time.

[1169] For example, proposed § 150.9(a)(8) provided that if an exchange makes a request pursuant to proposed § 150.9(a)(8), the Commission, as would be the case for an exchange, would not be bound by a time limitation.

[1170] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38480; *see also* discussion of 150.9(c) at 38474–75.

participants would still be able to request a staff interpretive letter under § 140.99 from the Commission or seek exemptive relief under CEA section 4a(a)(7) from the Commission, as an alternative to the three proposed exchange-administered processes.

As previously indicated, the processes under the proposed rule was substantially similar to the corresponding provisions in proposed § 150.9(d). Hence, the Commission does not repeat the discussion here.

Commission Reproposal

The Commission did not receive comments on this section that differed from those received on § 150.9(d), and is reproposing this rule, as originally proposed, for the reasons discussed above in connection with § 150.9(d).

l. Proposed § 150.10(e) (Review of summaries by the Commission) and Reproposal

Proposed Rule

The Commission proposed to rely on the expertise of the exchanges to summarize and post executive summaries of spread exemptions to their respective Web sites under proposed § 150.10(a)(7). The Commission also proposed, in § 150.10(e), to review such executive summaries to ensure they provided adequate disclosure to market participants of the potential availability of relief from speculative position limits.

Commission Reproposal

As noted above, the proposed processes under this rule are substantially similar to the corresponding provisions in § 150.9(e). The Commission did not receive comments on this section that differed from those received on § 150.9(e), and so does not repeat the discussion here. For all the reasons previously provided, the Commission is reproposing this rule, as originally proposed.

m. Proposed § 150.10(f) (Delegation of Authority) and Reproposal

Proposed Rule

The Commission proposed to delegate certain of its authorities under proposed § 150.10 to the Director of the Commission's Division of Market Oversight, or such other employee or employees as the Director designated from time to time. Proposed § 150.10(f)(1)(i) delegated the Commission's authority to the Division of Market Oversight to provide instructions regarding the submission of information required to be reported to the Commission by an exchange, and to specify the manner and determine the format, coding structure, and electronic data transmission procedures for submitting such information. Proposed § 150.10(f)(1)(v) delegated the Commission's review authority under proposed § 150.10(e) to DMO with respect to summaries of the types of spread exemptions that were required to be posted on an exchange's Web site pursuant to proposed § 150.10(a)(7).

Proposed § 150.10(f)(1)(i) delegated the Commission's authority to the Division of Market Oversight to agree to or reject a request by an exchange to consider an application for recognition of an application for a spread exemption. Proposed § 150.10(f)(1)(iii) delegated the Commission's authority to review any application for a spread exemption, and all records required to be maintained by an exchange in connection with such application. Proposed § 150.10(f)(1)(iii) also delegated the Commission's authority to request such records, and to request additional information in connection with such application from the exchange or from the applicant.

Proposed § 150.10(f)(1)(iv) delegated the Commission's authority, under proposed § 150.10(d)(2) to determine when an application for a spread exemption required additional analysis or review, and to provide notice to the exchange and the particular applicant that they had 10 days to supplement such application.

The Commission did not propose to delegate its authority under proposed § 150.10(d)(3) to make a final determination as to the exchange's disposition. The Commission stated that if an exchange's disposition raised concerns regarding consistency with the Act or presents novel or complex issues, then the Commission should make the final determination, after taking into consideration any supplemental information provided by the exchange or the applicant.[1171]

Commission Reproposal

As noted above, the proposed processes under this rule are substantially similar to the corresponding provisions in § 150.9(f); the Commission did not receive comments on this section that differed from those received on § 150.9(f), and so does not repeat the discussion here. For all the reasons previously provided, the Commission is reproposing § 150.9(f), as originally proposed.

I. § 150.11—Process for Recognition of Positions As Bona Fide Hedging Positions for Unfilled Anticipated Requirements, Unsold Anticipated Production, Anticipated Royalties, Anticipated Services Contract Payments or Receipts, or Anticipatory Cross-Commodity Hedge Positions

1. Overview of the Enumerated Anticipatory Bona Fide Hedging Position Exemption Proposal

After reviewing comments in response to the December 2013 Position Limits Proposal, the Commission proposed another method by which market participants may have enumerated anticipatory bona fide hedge positions recognized. As proposed in the December 2013 Position Limits Proposal, § 150.7 would require market participants to file statements with the Commission regarding certain anticipatory hedges which would become effective absent Commission action or inquiry ten days after submission. As the Commission explained in the 2016 Supplemental Position Limits Proposal, the method in proposed § 150.11 was an exchange-administered process to determine whether certain enumerated anticipatory bona fide hedge positions, such as unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges should be recognized as bona fide hedge positions.[1172]

The Commission noted that proposed § 150.11 worked in concert with the following three proposed rules:

- Proposed § 150.3(a)(1)(i), with the effect that recognized anticipatory enumerated bona fide hedging positions may exceed federal position limits;
- proposed § 150.5(a)(2), with the effect that recognized anticipatory enumerated bona fide hedging positions may exceed exchange-set position limits for contracts subject to federal position limits; and
- proposed § 150.5(b)(5), with the effect that recognized anticipatory enumerated bona fide hedging positions may exceed exchange-set position limits for contracts not subject to federal position limits.[1173]

The proposed § 150.11 process was somewhat analogous to the application process for recognition of non-enumerated bona fide hedging positions under proposed § 150.9. The process for recognition of enumerated anticipatory

[1171] *See* 2016 Supplemental Position Limits Proposal, 81 FR 38482, Jun. 13, 2016.

[1172] *Id.* at 38495.

[1173] *Id.*

bona fide hedging positions contained five paragraphs: (a) through (e). The first three paragraphs—§ 150.11(a), (b), and (c)—required exchanges that elected to have a process for recognizing enumerated anticipatory bona fide hedging positions, and market participants that sought position-limit relief for such positions, to carry out certain duties and obligations. The fourth and fifth paragraphs—§ 150.11(d), and (e)—delineated the Commission's role and obligations in reviewing requests for recognition of enumerated anticipatory bona fide hedging positions.[1174]

The Commission noted that there would be significant benefits related to the adoption of proposed § 150.11. Similar to the benefits for recognizing positions as non-enumerated bona fide hedging positions under § 150.9, recognizing anticipatory positions as bona fide hedging posiitons under § 150.11 would provide market participants with potentially a more expeditious recognition process than the Commission proposal for a 10-day Commission recognition process under proposed § 150.7. This could potentially enable commercial market participants to pursue trading strategies in a more timely fashion to advance their commercial and hedging needs to reduce risk. In addition, the Commission pointed out that exchanges would be able to use existing resources and knowledge in the administration and assessment of enumerated anticipatory bona fide hedging positions. The Commission and exchanges have evaluated these types of positions for years (as discussed in the December 2013 Position Limits Proposal).[1175]

The Commission also pointed out that proposed § 150.11, similar to proposed § 150.9 and § 150.10, also would provide the benefit of enhanced record-retention and reporting of positions recognized as enumerated anticipatory bona fide hedging positions. As previously discussed, records retained for specified periods would enable exchanges to develop consistent practices and afford the Commission accessible information for review, surveillance, and enforcement efforts. Likewise, weekly reporting under § 150.11 would facilitate the Commission's tracking of such exemptions.[1176]

[1174] *Id.*

[1175] *Id.* at 38496.

[1176] *Id.*

2. Proposed § 150.11(a)

Proposed Rule

As noted, proposed § 150.11(a) permitted exchanges to recognize certain enumerated anticipatory bona fide hedging positions, such as unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges. The proposed rule allowed market participants to work with exchanges to seek the exemption.

The process under proposed § 150.11(a) was similar to the process under proposed § 150.9(a), described above. For example, an exchange with at least one year of experience and expertise administering position limits could elect to adopt rules to recognize commodity derivative positions as enumerated anticipatory bona fide hedges. However, the § 150.11(a) process was different from the process under proposed § 150.9(a) in that the Commission did not propose to permit separate processes for applications based on novel versus non-novel facts and circumstances.[1177]

As the Commission noted in the 2016 Supplemental Position Limits Proposal, it determined to define certain anticipatory positions as enumerated bona fide hedging positions when it adopted current § 1.3(z)(2); the Commission did not change this determination in the December 2013 Position Limits Proposal.[1178] Consequently, the Commission did not anticipate that applications for recognition of enumerated anticipatory bona fide hedging positions would be based on novel facts and circumstances. For the same reason, proposed § 150.11(a) did not require exchanges to post summaries of any enumerated anticipatory bona fide hedging positions. As the Commission noted, other simplifications follow from this difference.[1179]

Comments Received

Several commenters recommended that the Commission specifically recognize the full scope of anticipatory hedging activities such as anticipatory merchandising and anticipatory processing hedges, utility sales and cross-commodity hedges as enumerated bona fide hedging position exemptions.[1180]

[1177] *Id.* at 38481.

[1178] *Id.*

[1179] *Id.*

[1180] CL- NCC–ACSA–60972 at 2; CL–AGA–60943 at 3; CL–ICE–60929 at 12; CL–CMC–60950 at 6–9; CL–FIA–60937 at 5, 21; CL–API–60939 at 3; and CL–EEI–EPSA–60925 at 13.

In addition, several commenters recommended that the Commission not adopt the ''active trading'' and ''one year experience'' requirements as proposed regarding a DCM's qualification to administer exemptions from federal position limits.[1181] These commenters stated that such qualification requirements could have the unintended consequences of: (i) harming the ability of market participants to effectively manage their risk by preventing the exchanges from recognizing an otherwise appropriate exemption from federal speculative position limits; and (ii) stifling future innovation in the development of new commodity derivative products created to meet evolving market needs and demands.

Certain commenters opposed the Commission delegating hedge exemption authority to exchanges entirely.[1182] These commenters believed that such delegated authority creates an inherent conflict of interest for exchanges because they are incentivized to increase trading volume. Among other concerns, these commenters fear that hedge exemption applicants may develop a preference for those exchanges more willing to grant exemptions. Further, the exchanges may not have a full picture of the entire market in which they are being asked to grant the exemption.

According to other commenters, the Commission should eliminate the five-day rule.[1183] Instead, these commenters stated, the Commission should specifically authorize exchanges to grant bona fide hedging position exemptions during the last five days of trading or less and allow exchanges to permit commercial hedging into the spot period where the facts and circumstances warrant.

Lastly, several commenters advocated for removal of the proposed requirement that exchanges adopt enhanced reporting requirements for market participants that rely on exchange-administered hedge exemptions.[1184] One argued that such a requirement is not authorized by the CEA and would have the unintended effect of preventing

[1181] CL–CCI–60935 at 3–4; CL–FIA–60937 at 3; CL–Working Group-60947 at 10; CL–IECAssn–60949 at 12–13 and CL–CME–60926 at 13.

[1182] CL–Public Citizen–60940 at 1–2; CL–RER1–60961 at 1; and CL–Better Markets–60928 at 3–5.

[1183] CL–IECAssn–60949 at 7–9; CL–NCGA–NGSA–60919 at 7; CL–ICE–60929 at 9; CL–CMC–60950 at 9–11; CL–API–60939 at 3; CL–NCC–ACSA–60972 at 2; and CL-Working Group–60947 at 7.

[1184] CL–FIA–60937 at 3; and CL–CMC–60950 at 12–13.

new entrants to the relevant market.[1185] Another further argues that these enhanced reporting requirements are unnecessary, impose undue cost burdens on commercial end-users, and the Commission can always request the information through its existing authority.[1186] And two suggest that the Commission allow exchanges flexibility to request satisfactory data, but not set a fixed prerequisite time period to obtaining exemptions.[1187]

Commission Reproposal

After carefully considering the comments received, the Commission is reproposing the rule, as originally proposed. At this time the Commission has already proposed several enumerated bona fide hedging position exemption categories. At this time, the Commission believes that additional fact patterns for bona fide hedging position exemptions will require consideration of the facts and circumstances on a case-by-case basis. The Commission is willing to explore further additions to the enumerated list at a later date. However, the Commission reiterates that, as previously discussed, an exchange can petition under § 13.2 for Commission recognition of a generic fact pattern as an enumerated bona fide hedging position, and that market participants have the flexibility of two processes for recognition of a position as an enumerated bona fide hedging position: (i) request an exemptive, no-action or interpretative letter under § 140.99; and/or (ii) petition under § 13.2 for changes to Appendix B to part 150.

Separately, as noted in the June 2016 Supplemental Position Limits Proposal and above, the Commission is not persuaded that an exchange with no active trading and no previous experience with a new product class would have their interests aligned with the Commission's policy objectives in CEA section 4a. In addition, as noted above, the Commission points out that the experience is manifested by the people carrying out surveillance rather than tied to a particular exchange.[1188] Further, the Commission believes that the active trading requirement can be satisfied by maintaining any referenced contract listed in the particular commodity at issue. For example, a DCM may immediately begin accepting hedge exemption requests for a new commodity contract pursuant to § 150.11(a) if the DCM already maintains contract(s) in the same underlying commodity class that satisfy the experience and active trading requirements.

The Commission clarifies, however, that an exchange can petition the Commission, pursuant to § 140.99, for a waiver of the one-year experience requirement if such exchange believes that their experience and interested are aligned with the Commission's interests with respect to recognizing enumerated anticipatory bona fide hedging positions.

The Commission appreciates commenter concerns regarding those opposed to delegating any hedge exemption authority to exchanges. However, the Commission reiterates that it retains full oversight authority over exchanges issuing hedge exemptions. Further, the Commission believes an exchange's required experience administering position limits for its actively traded contracts, and the Commission's de novo review of granted hedge exemptions are adequate to guard against or remedy any conflicts of interest that may arise. The Commission also notes that exchanges remain bound by the Commission's bona fide hedging position definition for all hedge exemption determinations conducted pursuant to part 150 of Commission Regulations.

The Commission believes the five-day rule should be applied to anticipatory bona fide hedging positions. If a market participant wishes to secure an exemption from the five-day rule, the participant should submit an exemption request, pursuant to § 150.9, for recognition of a non-enumerated bona fide hedging position.

Further, the Commission believes that reporting requirements applicable to market participants seeking an exemption pursuant to § 150.11 may remain as proposed. The Commission notes that § 150.11(a)(5) clarifies that applicants are bound by the reporting requirements found in § 150.7(e). As noted in § 150.7, understanding the recent history of a firm's production data is necessary to ensure the requested anticipated hedge exemption is reasonable. However, as discussed above, the Commission notes that it may permit a reasonable, supported estimate of, for example, anticipated production for less than three years of annual production data, in the Commission's discretion, if a market participant does not have three years of data. Further, the Commission is amending the applicable form instructions to clarify that Commission staff could determine that such an estimate is reasonable and would be accepted. The Commission is also proposing that exchange staff, on behalf of the Commission, also could permit a reasonable, supported estimate of, for example, anticipated production for less than three years of annual production data.

3. Proposed § 150.11(b) (Recordkeeping) and Reproposal

Proposed Rule

Proposed § 150.11(b) required electing designated contract markets and swap execution facilities to keep full, complete, and systematic records of all activities relating to the processing and disposition of enumerated anticipatory bona fide hedging exemption requests submitted pursuant to § 150.11(a). As previously stated, the Commission believes such recordkeeping requirements are essential to ensure adequate compliance and oversight.

Commission Reproposal

As noted, the proposed processes under this rule are substantially similar to the corresponding provisions in § 150.9(b) and § 150.10(b). Hence, the Commission does not repeat the discussion here. The Commission did not receive comments on § 150.11(b), and is reproposing this rule, as originally proposed, for the same reasons as § 150.9(b) and § 150.10(b).

4. Proposed § 150.11(c) (Exchange Reporting) and Reproposal

Proposed Rule

Proposed § 150.11(c) required designated contract markets and swap execution facilities that elected to process enumerated anticipatory bona fide hedging position applications to submit to the Commission a report for each week as of the close of business on Friday showing various information concerning the derivative positions that had been recognized by the designated contract market or swap execution facility as an enumerated anticipatory bona fide hedging position, and for any revocation, modification or rejection of such recognition. Similar to non-enumerated bona fide hedging positions

[1185] CL–FIA–60937 at 3.

[1186] CL–CMC–60950 at 12–13.

[1187] CL–AMG–60946 at 3–4; and CL–FIA–60937 at 3, 12.

[1188] As the Commission noted above when discussing the requirement for one year of experience in connection with § 150.9(a), experience manifests in the people carrying out surveillance in a commodity rather than in an institutional structure. An exchange's experience could be demonstrated through the relevant experience of the surveillance staff regarding the particular commodity. In fact, the Commission has historically reviewed the experience and qualifications of exchange regulatory divisions when considering whether to designate a new exchange as a contract market or to recognize a facility as a SEF; as such exchanges are new, staff experience has clearly been gained at other exchanges.

and spreads, this rule implemented a weekly reporting obligation for exchanges. Unlike the other hedge exemption application types, exchanges would have no monthly reporting or web-posting obligations related to accepting or granting enumerated anticipatory bona fide hedging position exemptions.

Commission Reproposal

In consideration of these reduced reporting requirements and the previous discussion of this subject regarding proposed §§ 150.9(c) and 150.10(c), the Commission is reproposing this rule, as originally proposed, for the reasons discussed therein.

5. Proposed § 150.11(d) (Review of applications by the Commission) and Reproposal

Proposed Rule

As set forth in proposed § 150.11(d), an exchange could ask the Commission to consider an enumerated anticipatory bona fide hedging position application directly. Further, the Commission could also, on its own initiative, at any time—before or after action by an exchange—review any application submitted to an exchange for recognition of an enumerated anticipatory bona fide hedging position. As noted, alternatives also remain available. Market participants would retain the ability to apply directly to the Commission under § 150.7, to separately request staff interpretive letters pursuant to § 140.99 or seek exemptive relief under CEA section 4a(a)(7).

The review process set forth in § 150.11(d) was simpler than other hedge exemption requests because such applications are not anticipated to be based on novel facts and circumstances. Rather, Commission review would focus on whether the hedge exemption application satisfied the filing requirements contained in § 150.11(a). If the filing was not complete, then proposed § 150.11(d) would provide an opportunity to supplement to the applicant and the exchange.

Commission Reproposal

Aside from this minor difference, the proposed processes under this rule were substantially similar to the corresponding provisions in § 150.9(d) and § 150.10(d). Hence, the Commission does not repeat the discussion here. The Commission believes the proposed *de novo* review of exchange-granted anticipatory bona fide hedging position exemptions is adequate to maintain proper exchange oversight. For all the reasons previously provided above in the discussion regarding § 150.9(d), the Commission is reproposing this rule, as originally proposed.

6. Proposed § 150.11(e) (Delegation of Authority) and Reproposal

Proposed Rule

As noted previously, the Commission proposed to delegate certain of its authorities under § 150.11 to the Director of DMO, or such other employee or employees as the Director may designate from time to time. In particular, proposed § 150.11(e)(1)(ii) delegated the Commission's authority to DMO to provide instructions regarding the submission of information required by an exchange, and to specify the manner and determine the format, coding structure, and electronic data transmission procedures for submitting such information. Proposed § 150.11(e)(1)(i) delegated the Commission's authority to DMO to agree to or reject a request by an exchange to consider an application for recognition of an enumerated anticipatory bona fide hedge. Proposed § 150.11(e)(1)(iii) delegated the Commission's authority to review any application for recognition of an enumerated anticipatory bona fide hedging position and delegate the authority to request related records or supporting information from the exchange or from the applicant.

Lastly, the Commission proposed in § 150.11(e)(iv), to delegate its authority to determine, under proposed § 150.11(d)(2), that it was not appropriate to recognize a commodity derivative position as an enumerated anticipatory bona fide hedging position, or that the disposition by an exchange of an application for such recognition is inconsistent with the filing requirements of proposed § 150.11(a)(2). The delegation also provided DMO with the authority, after any such determination was made, to grant the applicant a reasonable amount of time to liquidate its commodity derivative position or otherwise come into compliance.

This proposed delegation took into account that applications processed by an exchange under proposed § 150.11 would be for positions that should satisfy the requirements for enumerated bona fide hedging positions set forth in the Commission's rules, and should therefore be less likely to raise novel issues of interpretation, or novel issues with respect to consistency with the filing requirements of proposed § 150.11(a)(2), than applications processed under proposed § 150.9 or § 150.10. Such delegation is consistent with the Commission's longstanding delegation to DMO of its authority to review applications for recognition of enumerated bona fide hedging positions under current § 1.48, as well as consistent with the more streamlined approach to Commission review of enumerated anticipatory bona fide hedging position applications in proposed § 150.7.

Commission Reproposal

As noted above, the proposed processes under this rule are substantially similar to the corresponding provisions in § 150.9(f) and § 150.10(f). Hence, the Commission does not repeat the discussion of related comments here. The Commission is reproposing this rule, as originally proposed, for the reasons discussed above in connection with § 150.9(f), with the clarification that the Commission retains the authority to make the final determination to grant or deny hedge exemption applications.

J. Miscellaneous Regulatory Amendments

1. Part 150.6—Ongoing Application of the Act and Commission Regulations

Proposed Rule

The Commission proposed to amend existing § 150.6 to conform the provision with the general applicability of part 150 to SEFs that are trading facilities, and concurrently making non-substantive changes to clarify the provision. The provision, as amended and clarified, provides this part shall only be construed as having an effect on position limits and that nothing in part 150 shall affect any provision promulgated under the Act or Commission regulations including but not limited to those relating to manipulation, attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or prohibited transactions.[1189] For example, by requiring DCMs and SEFs that are trading facilities to impose and enforce exchange-set speculative position limits, the Commission does not intend for the fulfillment of such requirements alone to satisfy any other legal obligations under the Act and Commission regulations of DCMs and SEFs that are trading facilities to detect and deter market manipulation and corners. In another example, a market participant's compliance with position limits or an exemption does not confer any type of safe harbor or good faith defense to a claim that he had engaged in an

[1189] The Commission notes that amended § 150.6 matches vacated § 151.11(h).

attempted manipulation, a perfected manipulation or deceptive conduct.

Comments Received

The Commission received no comments on the proposed amendments to § 150.6.

Commission Reproposal

The Commission is reproposing § 150.6, with an amendment to clarify the application of part 150 to other provisions of the Act or Commission regulations. Specifically, in order to avoid any confusion regarding whether § 150.6 applies to position limits regulations found outside of part 150 of the Commission's regulations (*e.g.*, relevant sections of part 19), the amendment clarifies that recordkeeping and reporting regulations associated with speculative position limits are affected by part 150. The amendment also clarifies that regulations incorporated by reference to part 150 are also affected by the regulations promulgated under part 150. These changes, while not substantively different from the proposed rule, provide additional clarity regarding the application of part 150 to other provisions of the Act or Commission regulations.

The Commission also notes that § 150.6 applies despite the Commission's amendments to the appendices to parts 37 and 38 of the Commission's regulations regarding delayed implementation of exchange-set limits for swaps on exchanges without sufficient swaps position information.

2. Part 150.8—Severability

Proposed Rule

The Commission proposed to add § 150.8 to address the severability of individual provisions of part 150. Should any provision(s) of part 150 be declared invalid, including the application thereof to any person or circumstance, § 150.8 provides that all remaining provisions of part 150 shall not be affected to the extent that such remaining provisions, or the application thereof, can be given effect without the invalid provisions.[1190]

Comments Received

The Commission did not receive any comments regarding proposed § 150.8.

Commission Reproposal

The Commission is reproposing the severability clause in § 150.8. The Commission believes it is prudent to include a severability clause to avoid any further delay, as practicable, in carrying out Congress' mandate (underscored by the Commission's own preliminary finding of necessity) to impose position limits in a timely manner.

3. Part 15—Reports—General Provisions

Proposed Rule

The Commission proposed to amend the definition of the term ''reportable position'' in current § 15.00(p)(2) by clarifying that: (1) Such positions include swaps; (2) issued and stopped positions are not included in open interest against a position limit; and (3) special calls may be made for any day a person exceeds a limit. Additionally, the proposed amendments to § 15.01(d) added language to reference swaps positions and updated the list of reporting forms in current § 15.02 to account for new and updated series '04 reporting forms, as discussed above.[1191]

Comments Received

The Commission did not receive any comments regarding the proposed amendments to part 15.

Commission Reproposal

The Commission is reproposing amendments to part 15, as originally proposed, to update and clarify the definition of ''reportable position,'' add references to swaps positions, and add to the list of reporting forms.

4. Part 17—Reports by Reporting Markets, Futures Commission Merchants, Clearing Members, and Foreign Brokers

Proposed Rule

In the December 2013 Position Limits Proposal, the Commission proposed to amend current § 17.00(b) to delete provisions related to aggregation, since those provisions are duplicative of aggregation provisions in § 150.4.[1192] Instead, as proposed, § 17.00(b) provides that ''[e]xcept as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.'' In addition, proposed § 17.03(h) delegates to the Director of the Division of Market Oversight or his designee the authority to instruct persons pursuant to proposed § 17.03.[1193]

Comments Received

The Commission did not receive any comments regarding the proposed changes to part 17.

Commission Reproposal

The Commission is reproposing amendments to part 17, as originally proposed, to delete duplicative aggregation provisions and delegate to the Division of Market Oversight the authority to instruct persons pursuant to proposed § 17.03.

4. Removal of Commission Regulations 1.47 and 1.48, and Part 151—Position Limits for Futures and Swaps

Proposed Rule

As discussed above, the Commission intended, in a 2011 final rule, to amend several other sections as part of its then adoption on part 151. Among the sections the Commission was then affecting was the removal and reservation of §§ 1.47 and 1.48. Both sections permitted market participants to seek recognition of positions as bona fide hedges.[1194]

However, prior to the compliance date for that 2011 rulemaking, as noted above, a federal court vacated most provisions of that rulemaking, including the amendments to the definition of a bona fide hedging position in § 1.3(z), as well as to the removal and reservation of §§ 1.47 and 1.48.[1195] Because the Commission did not instruct the **Federal Register** to roll back the 2011 changes to the CFR, the current CFR still shows the versions adopted in 2011, which shows §§ 1.47 and 1.48 as ''reserved.'' As the Commission noted in the December 2013 Position Limits Proposal, in light of the proposed amendments to part 150, as well as the District Court vacatur of part 151, the

[1190] The Commission notes that proposed § 150.8 matches vacated § 151.13.

[1191] *See* discussion of new and amended series '04 reports above.

[1192] In a separate final rulemaking, the Commission is finalizing amendments to § 150.4 regarding the aggregation of positions. *See* 2016 Final Aggregation Rule.

[1193] Previously, in 2013, the Commission adopted amendments to § 17.03. Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (Nov. 18, 2013). The Commission is now proposing to amend § 17.03 further by adding § 17.03(h).

[1194] § 1.47 pertains to requirements for classification of purchases or sales of contracts for future delivery as bona fide hedging under § 1.3(z)(3 of the regulations, while § 1.48 addresses requirements for classification of sales or purchases for future delivery as bona fide hedging of unsold anticipated production or unfilled anticipated requirements under § 1.3(z)(2) (i)(B) or (i)(C) of the regulations.

[1195] *International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012).

amendments to the definition of a bona fide hedging position in 1.3(z), and the removal and reservation of §§ 1.47 and 1.48, the Commission again proposed to remove and reserve §§ 1.47 and 1.48.

Commission Reproposal

The Commission is reproposing to remove and reserve § 1.47 in light of the Commission's proposal of new provisions in § 150.9 addressing exchange recognitions of positions as non-enumerated bona fide hedging positions, subject to Commission review. Similarly, in connection with the reproposal of §§ 150.7 and 150.11, the Commission is proposing to remove and reserve, as originally proposed, § 1.48. Finally, the Commission is reproposing that part 151 be removed and reserved in response to the reproposed revisions to part 150 that conform it to the amendments made to the CEA section 4a by the Dodd-Frank Act.

IV. Related Matters

A. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

The baseline against which the Commission considers the benefits and costs of these reproposed rules is the statutory requirements of the CEA and the Commission regulations now in effect—in particular the Commission's Part 150 regulations and rules 1.47 and 1.48.[1196]

1. Necessity Finding

Out of an abundance of caution in light of the district court decision in *ISDA* v. *CFTC,*[1197] and without prejudice to any argument the Commission may advance in any forum, the Commission has preliminarily found, as a separate and independent basis for the Rule, that speculative position limits are necessary to achieve the purposes of the CEA.

a. Benefits of Speculative Position Limits Rules

The Commission expects that the speculative position limits in the reproposed Rule will promote market integrity. Willingness to participate in the futures and swaps markets may be reduced by perceptions that a participant with an unusually large speculative position could exert unreasonable market power. A lack of participation in these markets may harm liquidity, and consequently, may negatively impact price discovery and market efficiency as well.

Position limits may serve as a prophylactic measure that reduces market volatility due to large trades that impact prices. For example, a party who is holding large open interest may become unwilling or unable to meet a call for additional margin or take other steps that are necessary to maintain the position. In such an instance, the party may substantially reduce its open interest in a short time interval. In general, price impacts could arise from large positions as they are established or liquidated.

Exchanges and the Commission may gain insight into the markets as market participants seek exemptions from position limits. This may improve the exchanges' and the Commission's ability to supervise markets and to deter and prevent market manipulation. Further, the discipline of seeking exemptions that are tied to particular situations may improve a market participant's risk management practices, as it goes through the exercise of justifying the need for an exemption.

There are additional benefits to imposing position limits in the spot month. Spot month position limits are designed to deter and prevent corners and squeezes. Spot month position limits may also make it more difficult to mark the close of a futures contract to possibly benefit other contracts that settle on the closing futures price. Marking the close harms markets by spoiling convergence between futures prices and spot prices at expiration. Convergence is desirable, because it facilitates hedging of the spot price of a commodity at expiration. In addition, since many other contracts settle based on the futures price at expiration, mispricing could affect a larger scope of contracts.

b. Costs of Speculative Position Limits Rules

The Commission recognizes that position limits impose compliance costs on market participants. Under position limits, market participants must monitor their positions and have safeguards in place to remain under a federal position limit or an exemption level. Some market participants will have to incur the costs of seeking exemptions from federal positons limits. In this Reproposal, the Commission has sought to reduce these costs by setting the federal position limits at an appropriately high level and by relying on the experience and expertise of exchanges to administer exemptions.

Market participants who find position limits binding may have to transact in less effective instruments such as futures contracts that are similar but not the same as the core referenced futures contract. These instruments could include forward contracts, trade options, or futures on a foreign board of trade. Transacting in substitute instruments may raise transaction costs. Finally, if transactions shift to other instruments, futures prices might not reflect fully all the speculative demand to hold the futures contract, because substitute instruments may not influence prices in the same way that trading directly in the futures contract does. In these circumstances, futures market price discovery and efficiency might be harmed.

c. Summary of General Comments Regarding Speculative Position Limits Rules

i. Comments on General Aspects of the Rule

One commenter asserted that the proposed rules have the potential to increase systemic risk, impair market function, and increase the costs and volatility of wholesale energy commodities. Moreover, the commenter asserted that these adverse impacts are unrelated to any mandates placed upon the Commission by Congress.[1198]

Another commenter said that position limits that are not necessary or appropriate increase commercial parties' compliance costs and reduce market liquidity, which in turn increases the cost of hedging. The commenter believes the Commission did not adequately consider these costs and the lack of corresponding benefits.[1199]

[1196] *See* December 2013 Position Limits Proposal, Table 4, at 75712, for a list of existing regulations related to enumerated bona fide hedges.

[1197] *International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[1198] CL–IECAssn–59679 at 1–2.

[1199] CL–EEI–EPSA–59602 at 2 and 3, CL–EEI–Sup–60386 at 3.

One commenter requested that as the Commission enacts its final rule it should avoid imposing materially costly and complex rules and reporting requirements on hedgers unless they are manifestly necessary to prevent a meaningful threat to market integrity.[1200]

In response to 2016 Supplemental Position Limits Proposal RFC 37, a commenter stated that maintaining the status quo in which exchanges administer an established process for position limits and exemptions will provide legal certainty and maintain current costs instead of increasing them.[1201] In response to 2016 Supplemental Position Limits Proposal RFC 55, this commenter said that the Commission's Division of Enforcement has numerous tools at its disposal, and that the Exchanges have position step-down and exemption revocation authorization at their disposal, to enforce CEA market manipulation regulations.[1202]

Sen. Levin commented that the benefits of the proposed rules, while difficult to quantify, create a net benefit to the public and the markets by helping to ensure the markets' continued stability, fairness, and profitability.[1203]

ii. Response to Comments on General Aspects of the Rule

The Commission has interpreted the Dodd-Frank Act to mandate that the Commission impose federal position limits on physical-delivery futures contracts. In addition, the Commission is making a preliminary alternative finding that position limits are necessary to accomplish statutory objectives. The Commission believes that it has calibrated the levels of those limits so as to avoid harmful effects on the markets and, accordingly, does not believe the imposition of federal position limits at the reproposed levels will have the effects that concerned commenters. These commenter concerns are counterpoised by the desirable effects on markets that Sen. Levin ascribed to position limits.

iii. Comments on Cost Estimates

A commenter expressed concern that the CFTC has underestimated the costs of compliance with the position limits rules, and the number of affected parties, so that the potential unintended consequences of the rules will outweigh their benefits. The commenter believes this would result because the compliance costs associated with position limits are high and particularly burdensome for market participants who are unlikely ever to come close to reaching the limits.[1204]

Another commenter believes that the cost-benefit analysis in the 2016 supplemental proposal features unrealistically low estimates of the time and costs that will be required to implement and maintain compliance programs.[1205]

Another commenter asserted that the Commission did not adequately quantify the harm from position limits on liquidity for bona fide hedgers and the price discovery function, or the implementation and on-going reporting and monitoring costs for market participants. The commenter believes that costs will arise from altering speculative trading strategies in response to a limited definition of bona fide hedging; reassessing and modifying existing trading strategies to comply with limits; amending DCMs' current aggregation and bona fide hedging policies; and creating compliant application regimes for SEFs.[1206]

In response to 2016 Supplemental Position Limits Proposal RFC 56, another commenter asserted that unduly low position limits would reduce liquidity and discourage market participation, thereby not advancing regulatory goals that are already appropriately protected under the status quo. In response to 2016 Supplemental Position Limits Proposal RFC 66, this commenter said the Commission should consider public interest considerations relating to the particular interests of commercial end-users, which rely on mitigating price risk in order to remain in business. This commenter believes that commercial end-users are at risk of being squeezed out of the market, and potentially squeezed out of business, as a result of the difficulty of hedging commercial risks. The commenter urged the Commission to apply graduated regulatory requirements for bona fide hedging determinations that would account for differences between market participants.[1207]

iv. Response to Comments on Cost Estimates

As shown in the impact analysis, the Commission seeks to reduce market participants' compliance costs by setting the federal position limits at a level sufficiently high to only affect market participants with very large open interest. Thus, the Commission expects minimal compliance costs for those with positions below these high levels. Small traders would be required only to monitor their open interest and have safeguards in place to remain below position limits. The Commission finds the exemption process valuable because it requires participants with very large open interest to provide the information required by the exemption application to the relevant exchange(s) and to the Commission. Having this information helps exchanges and the Commission to better understand the markets they regulate.

As for the high costs that some commenters claimed to be required to implement and maintain compliance programs, the Commission presented and requested comment on its estimates of the costs associated with compliance programs. Commenters did not provide any specific cost estimates to support their assertions of the potential for high costs.

v. Comments on Cross-Border Aspects of the Rule

In response to 2016 Supplemental Position Limits Proposal RFC 67, a commenter noted that swaps and futures markets have become more global and suggested that restrictive position limit regulations and added reporting requirements would drive global companies to jurisdictions that have more friendly regulatory treatment.[1208] Another commenter urged the Commission to consider and assess the costs and benefits of applying the rules on an extraterritorial basis.[1209]

vi. Response to Comments on Cross-Border Aspects of the Rule

The Commission considers that market participants might use other means to engage in derivative activity besides domestic futures and swaps if federal position limits are set too low. For instance, price discovery for a futures contract might move to a foreign board of trade that lists a substitute contract. Further, foreign parties might elect to engage in foreign swaps instead of transacting in U.S. futures and swaps. To mitigate these risks, the Commission endeavors not to set the position limits at levels that are unduly low.

vii. Comments on Quantification of Costs of the Rule

A commenter criticized the Commission's consideration of the costs and benefits of the proposed rules for

[1200] CL–ASR–60933 at 5.

[1201] CL–IECAssn–60949 at 19.

[1202] CL–IECAssn–60949 at 23.

[1203] CL–Sen. Levin–59637 at 9–10.

[1204] CL–MFA–60385 at 12–13. *See also* CL–COPE–59622 at 5 and CL–CMC–59634 at 2.

[1205] CL–ISDA–60931 at 5.

[1206] CL–ISDA/SIFMA–59611 at 24–25.

[1207] CL–IECAssn–60949 at 23, 25–26.

[1208] CL–IECAssn–60949 at 26.

[1209] CL–ISDA/SIFMA–59611 at 23.

failing to consider both direct and indirect costs on commodities markets, market participants, and the economy generally.[1210] The Commenter believes that legal precedents require that in order to adopt a position limit rule, the Commission must find a reasonable likelihood that excessive speculation will pose a problem in a particular market, and that position limits are likely to curtail the excessive speculation without imposing undue costs.[1211] To the contrary, this commenter said it had not observed excessive speculation in the years since the financial crisis and, thus, position limits would only increase regulatory burdens with no corresponding benefit.[1212] Moreover, the commenter thinks the Commission did not adequately quantify the harm that market experts predict position limits will impose on liquidity for bona fide hedgers, the disruption to the price discovery function, or the shifting of price discovery offshore. The commenter also pointed to a lack of quantification of implementation costs, initial compliance and monitoring costs, and on-going reporting and monitoring costs for market participants, and the lack of quantified costs of a limited definition of bona fide hedging which would require alterations to speculative trading strategies to meet the definition; the amendments to DCMs' current aggregation and bona fide hedging policies; or the creation of compliant application regimes for SEFs.[1213]

The commenter cited papers by Craig Pirrong and Philip Verleger as proper evaluations of the costs and benefits of position limits for derivatives,[1214] and asserted that if quantitative information is lacking the Commission must make guesses, even if imprecise, and conduct an economic analysis of the likely impact of the proposed rules.[1215] In the paper cited by the commenter, Craig Pirrong suggested that the Commission could provide ''valuable evidence'' about costs and benefits by documenting for each commodity subject to limits, using a long period of historical data, how often limits would have been binding and how much large speculators would have had to reduce their positions in order to comply with limits.[1216] He believes it would be useful to see how often sudden and unreasonable price changes occurred during the period the limits would have been binding, in comparison to costs during periods when limits have been binding and not associated with sudden and unreasonable price changes.[1217] He said that a proper cost-benefit analysis should quantify net benefits relative to the status quo and identify which categories of market participants benefit, the sources of those benefits, and their magnitude, and also identify which types of participants are more likely to incur the costs associated with the limits, identify the sources of those costs, and quantify them, while providing the data and information necessary for replication of the analysis.[1218] Last, Mr. Pirrong believes the Commission should address potential costs raised by commenters on the position limit rules proposed in 2011.[1219]

Another commenter also thought that the Commission should perform a cost-benefit analysis to determine whether non-spot month position limits are justified. The commenter said that the Commission's statements that ''few'' participants would exceed the limits is not a sufficient analysis and that the Commission is obligated to do a more rigorous analysis before declaring 5, 7, or 11 persons as ''few.'' Further, the commenter pointed out that the Commission has not specifically stated how often those market participants would have exceeded those levels, how much over the limit they were, how the position exceedances were distributed along the price curve, or whether the positions were calendar spreads, and claimed that the lack of this information means there is no way to know whether the removal of those positions would have led to a significant reduction in liquidity and therefore market participants must assume that such a reduction in liquidity would have been significant.[1220]

Sen. Levin commented that the Commission correctly identified the prevention and reduction of artificial price disruptions to commodity markets as a positive benefit that would protect both market participants and the public, and that would outweigh the cost imposed on certain speculative traders. Sen. Levin commented that the Commission correctly observed that the sound risk management practices required by the proposed rules would benefit speculators, end users, and consumers.[1221] Sen. Levin believes these benefits would include: The promotion of prudent risk management (with Amaranth illustrating the dangers of poor risk management), and broader economic efficiency, public welfare, and political security attributable to the availability and price stability of commodities such as wheat.[1222]

viii. Response to Comments on Quantification of Costs of the Rule

The Commission does not believe that the consideration of costs and benefits under CEA section 15(a) requires a quantification of all costs and benefits. Nor does the statute require the Commission to hazard a guess when the available information is imprecise. The statute requires the Commission to consider the costs and benefits of its rulemaking, which contemplates a qualitative discussion when quantification is difficult.

The Commission addresses most of the commenter's cost and benefit concerns later in this consideration of costs and benefits. As for the identification and quantification of costs and benefits suggested by Mr. Pirrong, the Commission believes it would be of limited usefulness. For instance, the quantification would be highly uncertain and require many subjective interpretations and judgements on the part of investigators. Further, due to statutory restrictions on its release of confidential data, the Commission would be unable to provide data and other information necessary for the public to conduct an independent replication of the Commission's analysis.

The Commission considered proceeding in stages by first imposing

[1210] CL–ISDA/SIFMA–59611 at 3–4 and 22. *See also* CL–ISDA–60370 at 2.

[1211] CL–ISDA/SIFMA–59611 at 2, 3, *citing ISDA,* 887 F. Supp. 2d at 273. The commenter said the Commission should identify marginal benefits of the rule and evaluate the costs and benefits appropriately (given limitations on available data). *See also* CL–ISDA/SIFMA–59611 at 22, n. 83, *citing Inv. Co. Inst.* v. *CFTC,* 720 F.3d 370, 378–79 (D.C. Cir. 2013). Another commenter believed that the Commission must find there is a problem in market pricing as a result of positions exceeding non-spot month position limits, or a benefit from prohibiting such excess positions, before adopting position limits. CL–Working Group–59693 at 61. The commenter is concerned that, as a result of non-spot month position limits, parties carrying positions above the limit will lose the market opportunity experienced in holding the positions, there could be an immediate reduction in liquidity if those parties must liquidate those positions, and a reduction in the positions of the market participants would reduce open interest, reducing subsequent non-spot month limits and beginning a continuous downward cycle that eventually would draw liquidity from markets and impact hedgers. *Id.*

[1212] CL–ISDA/SIFMA–59611 at 30

[1213] CL–ISDA/SIFMA–59611 at 24–25

[1214] CL–ISDA/SIFMA–59611 at 22 fn 83

[1215] CL–ISDA/SIFMA–59611 at 23–24.

[1216] CL–ISDA/SIFMA–59611 at Annex B at 5.

[1217] CL–ISDA/SIFMA–59611 at Annex B at 5.

[1218] CL–ISDA/SIFMA–59611 at Annex B at 5–6.

[1219] CL–ISDA/SIFMA–59611 at Annex B at 6.

[1220] CL–Working Group–59693 at 61. The commenter also believes that non-spot month position limits would create a restraint on non-spot month liquidity due to strip positions along the curve, and this would create an unnecessary impact on hedgers. *Id.* at 61–62.

[1221] CL–Sen. Levin–59637 at 9.

[1222] CL–OSEC–59972 at 2.

position limits in the spot month before imposing then in the single month and all months combined. The Commission is preliminarily rejecting this alternative based on the impact analysis, because the single month and all months combined positon limits are set sufficiently high to impact only very few market participants. Further, the Commission believes that most of these participants would qualify for various exemptions to positions limits.

Another commenter asserted that the CEA directs the Commission to balance the four factors listed in CEA section 4a(a)(3)(B) and, thus, the Commission should present rigorous analysis to meet this requirement.[1223] In particular, the commenter pointed out that the Commission has not published an analysis of how the proposed position limits promote sound risk management and ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits so that position limits do not cause price discovery to shift to the foreign boards of trade.[1224]

In response to this commenter, the Commission interprets CEA section 4a(a)(3)(B) as a direction to the Commission to set limits ''to the maximum extent practicable'' to further the four policy objectives in that section. The Commission believes this is a Congressional recognition of the impossibility of achieving an actual ''maximum'' for each of the four policy objectives. In any case, as part of this consideration of costs and benefits, the Commission considers the promotion of sound risk management practices and whether price discovery in a commodity will shift to a foreign board of trade.[1225]

ix. Comments on Liquidity Effects

Commenters addressed the effects of position limits on liquidity. One expressed concern that the proposed position limits may constrain effective risk transfer by unduly restricting hedging or limiting the risk-bearing capacity of large speculators, thereby causing reduced liquidity, wider bid-offer spreads and higher transaction costs.[1226] Another thought the Commission did not consider that liquidity and price discovery may be diminished if speculative traders' activities are restricted.[1227] In response to 2016 Supplemental Position Limits Proposal RFC 62, another commenter said that price discovery will improve if market participants are allowed to innovate and grow without excessive governmental interference and regulatory reporting costs.[1228] And in response to 2016 Supplemental Position Limits Proposal RFC 59, this commenter suggested that position limits should be imposed in a manner that will foster innovation and growth for the betterment of the markets.

x. Response to Comments on Liquidity Effects

Liquidity is not a factor that the Commission is required to consider under section 15(a) of the CEA; nevertheless, the Commission did consider how liquidity concerns implicate the 15(a) factors. For instance, the Commission's regulatory goals generally include protecting market liquidity, and enhancing market efficiency and improving price discovery through increased liquidity. The Commission has sought to reduce market participant burdens with the understanding that regulatory compliance costs increase transaction costs, which might reduce liquidity, all else being equal. The Commission has considered that liquidity, including the risk-bearing capacity of markets, and price discovery may be harmed if position limits are set too low and so has sought to avoid these adverse effects.

The Commission preliminarily declines to treat general goals such as fostering innovation and growth for the betterment of markets as a specific public interest consideration under CEA section 15(a). While these are of course laudable objectives, the Commission believes they are difficult to accomplish through position limits. The Commission has not cited these general benefits as a reason for position limits. Last, the Commission notes that exchanges have proper incentives and a variety of tools with which to increase liquidity on their exchanges and, as a general matter, make their exchanges useful to the market.[1229]

xi. Comments Referring to Position Accountability

A commenter requested that the Commission compare the costs and benefits of the proposed position limits regime with those of a position accountability regime, because the commenter believed that position accountability levels would serve as a less costly and disruptive alternative to position limits.[1230] Another commenter compared a position accountability process to position limits, and argued that if the Commission imposes position limits for non-spot month contracts, the commenter would need to expend significant resources to ensure that its information technology systems could identify, gather and report bona fide hedging positions. But under position accountability, the commenter would be able to reply to a specific request for additional information using its own internal reports that have been designed to meet its specific commercial and risk-management needs. The position accountability approach would substantially reduce, if not eliminate, the burden of having to conform information technology systems to the Commission's reporting requirements.[1231]

A third commenter also suggested that while administering position accountability levels, the Commission could conduct a comprehensive cost-benefit analysis of the impact of spot month position limits on market liquidity for commercial hedgers and price discovery before determining whether to extend position limits outside of the spot months, and use the information collected to understand the trading activity of market participants with large speculative positions and determine if non-spot month

1223 CL–CMC–59634 at 2.

1224 *See*,CL–CMC–59634 at 3. *Cf.*CEA section 15(a)(2)(D) (titled ''Costs and Benefits''): ''The costs and benefits of the proposed Commission action shall be evaluated in light of . . . considerations of sound risk management practices;'' CEA section 4a(a)(2)(C) (titled ''Goal''): ''In establishing the limits required under [CEA section 4a(a)(2)(A)], the Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will note cause price discovery in the commodity to shift to trading on the foreign boards of trade.''

1225 *See* the discussion of factors 3 (risk management) and 4 (price discovery) under section 15(a), below.

1226 CL–MFA–60385 at 4.

1227 *See* CL–ISDA/SIFMA–59611 at 25. Another commenter asserted that the Commission determined in 1993 that all-months-combined position limits are unnecessary and that the benefits of such limits did not outweigh the likely costs of eroding speculative volume and liquidity and the disruption in the efficient functioning of the non-storable commodity futures markets. CL–Working Group–59693 at 61 or CL–CMC. The commenter provided no citations to Commission actions in 1993. Commission staff believes that the commenter may be referring to a proposal from CME to eliminate the all-months-combined limits in the live cattle, live hogs, and feeder cattle futures and options markets in a March 4, 1993, submission. The Commission approved the proposal in an August 2, 1993, letter to the CME.

1228 *See* CL–IECAssn–60949 at 24. Another commenter suggested that non-spot month position limits operate as a barrier to market entry for longer dated activities in the name of preventing ''a shallow threat'' of excessive speculation, and that costs resulting from position limits would be ultimately passed to the consumer, harming the American economy. CL–EDF–60398 at 4–5.

1229 CL–Working Group–59693 at 61–62.

1230 CL–MFA–60385 at 13.

1231 CL–Calpine–59663 at 4.

speculative position limits are necessary.[1232]

xii. Response to Comments Referring to Position Accountability

The Commission considered administering position accountability levels in the non-spot month, but has preliminarily determined that the adoption of position limits with an exemption process is the better approach, because it benefits the supervisory functions of the exchanges and the Commission by providing better insight into the markets. In addition, the Commission notes it has a lack of statutory authority for the Commission itself to administer position accountability levels. Rather, the CEA authorizes exchanges to administer position accountability levels. In contrast, the Commission's emergency authority under the CEA is limited. Further, the Commission notes it interprets CEA section 4a(a)(3) as a direction to impose, at an appropriate level, position limits on the spot month, each other month (*i.e.,* single month), and the aggregate of all months.

2. DCM Core Principle 5(B) and SEF Core Principle 6(B), and new Appendix E to Part 150

a. Summary of Changes

The Commission is reproposing to amend its guidance regarding DCM core principle 5(B) and SEF core principle 6(B), and adopting a new Appendix E to Part 150. The amendments have the effect of delaying the implementation of exchanges' obligation to adopt swap position limits until there is sufficient access to swap position information regarding market participants' swap positions.

b. Baseline

The baselines for these changes are the Commission's current guidance on DCM Core Principle 5, SEF Core Principle 6, and the current Part 150.

c. Benefits and Costs

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions with respect to rules and orders. The Commission believes it is also appropriate to consider the costs and benefits of changes to the appendices to parts 37, 38, and 150 of the Commission's regulations, even though these appendices constitute guidance. The Commission appreciates that the changes to this guidance will delay the point in time when exchanges will become obligated to monitor and enforce federal position limits for swaps (although exchanges could take voluntary steps in this regard at any appropriate time). As a result, this change in guidance will likely confer benefits and reduce costs, although it is difficult to identify the benefits and costs that result directly from the change in guidance because the exact time at which exchanges will become obligated to monitor and enforce federal position limits for swaps is not currently specified but will instead depend on the future availability of information. Also, given the interrelationship between the exchanges' enforcement of federal position limits for swaps with the exchanges' other actions with respect to position limits and the Commission's enforcement of federal position limits, it is difficult to identify the incremental effect that will occur when exchanges become obligated to enforce federal position limits for swaps.

However, the Commission believes that because of the change in the Commission's guidance, exchanges and market participants will benefit because the delay will result in a lower requirement to invest in technology and personnel to assess federal position limits. In terms of costs, the Commission believes that there might be a cost to the market associated with this change in guidance because the delay may result in exchanges' reducing their monitoring of excessive positions in real-time.[1233]

d. Summary of Comments

The Commission requested comment on its consideration of the benefits and costs associated with the proposed amendments to guidance, and asked if there are additional alternatives that the Commission has not identified. Two commenters requested that the Commission formulate a plan to address the lack of data access by DCMs and SEFs.[1234] These commenters did not provide a detailed alternative, however. On the other hand, one commenter asserted that there should be no delay in implementing position limits for swaps because, according to the commenter, the Commission has access to sufficient swap data it needs to implement position limits.[1235] The Commission is considering various alternatives, but has not made a determination on which direction to take.

3. Section 150.1—Definitions

The Commission is reproposing new definitions of, or amendments to the definitions of, several terms: Basis contract, bona fide hedge, calendar spread contract, commodity derivative contract, commodity index contract, core referenced futures contract, eligible affiliate, entity, excluded commodity, futures-equivalent, intercommodity spread, long position, short position, spot month, intermarket spread, physical commodity, pre-enactment swap, pre-existing position, referenced contract, spread contract, speculative position limit, swap, swap dealer, and transition period. These new definitions and amendments are discussed above.

a. Benefits and Costs

A general benefit of including definitions in the regulation is greater clarity. In particular, having specific definitions of terms set out as a separate part of the regulations helps users of the regulation to understand how the position limit rulemaking relates, in general, to the concepts and terminology of CEA as amended by the Dodd-Frank Act. Although market participants and other users of the regulations must take time and effort to understand and adapt to new definitions in the context of the rulemaking, the Commission believes these costs are reduced by setting out the definitions as a separate part of the regulations rather than incorporating the definitions in the substantive provisions of the rules.

Specific benefits and costs of definitions are discussed within the context of specific rules where the definitions are directly applicable. In addition, the Commission believes that several definitions merit a specific consideration of costs and benefits, because the adoption of these definitions would represent the exercise of substantive discretion on the part of the Commission.

b. Bona Fide Hedging Position

i. Summary of Changes

The Commission is reproposing a definition of bona fide hedging position in § 150.1. The Commission believes this definition of bona fide hedging position is consistent with CEA section 4a(c) regarding physical commodities and otherwise closely conforms to the status quo. Commercial cash market activities are covered by the part of the definition that sets out an economically appropriate test. The Commission also notes that since CEA 4c(a)(5) separately states that intentional or reckless

[1232] CL–FIA–60303 at 3–4.

[1233] As stated in Section IIA, the Commission foresees various possibilities in remediating this current inability to monitor position limits in real-time in the future.

[1234] CL–AFR–60953 at 2; CL–RER2–60962 at 1.

[1235] CL–Better Markets–60928 at 6.

disregard for orderly trading execution is unlawful and because it is unclear how a market participant would comply with an orderly trading requirement in the context of OTC transactions, the Commission is proposing to delete the orderly trading requirement in the definition of bona fide hedging position. The Commission's addition of sub-paragraph (2)(iii)(C) to the definition of bona fide hedging position in § 150.1 reiterates the Commission's authority to permit exchanges to recognize bona fide hedging positions in accordance with § 150.9(a). Those positions are subject to CEA section 4a(c) standards as well as Commission review.

ii. Baseline

The baseline for this amendment to the rule is the definition for ''bona fide hedging transactions and positions,'' set forth in current § 1.3(z).[1236]

iii. Benefits and Costs

Futures contracts function to hedge price risk because they allow a party to fix a price for a specified quantity of a particular commodity at a designated point in time. Futures contracts, thereby, can be used by market participants to create price certainty for physically-settled transactions. Thus, the Commission believes that to qualify as a bona fide hedging position for a physical commodity, the position must ultimately result in hedging against some form of price risk in the physical marketing channel.

The Commission is amending the five day/spot month rule so that it will allow exchanges to grant spread exemptions that are valid in the five day/spot month period. The Commission anticipates that allowing spread exemptions to be recognized in the spot month might improve liquidity and, thereby, lower costs for market participants.

Also, the rule amendments will allow bona fide hedge exemptions to cover a period of more than one year of cash market exposure. The current definition limits to one year the hedging of anticipated production of, or requirements for, an agricultural commodity. Removing this current restriction is desirable because many commercial enterprises may prefer to hedge cash market exposure for more than one year.

The Commission understands that some activity that may have been recognized by exchanges as bona fide hedging in the past may not satisfy the definition in the reproposed rule. The Commission has sought to mitigate costs arising from this transition by setting position limits at levels that are appropriately high (so as to limit the extent of positions that may require an exemption) and by not including any requirement that exchanges use the reproposed rule's definition of bona fide hedging position other than with respect to the federal position limits in the referenced contracts listed in 150.2(d).

The Commission notes that an exchange is permitted to recognize exemptions for non-enumerated bona fide hedging positions, certain spread positions, and anticipatory bona fide hedging positions, under the processes of § 150.9, 150.10 and 150.11, respectively, subject to assessment of the particular facts and circumstances, where price risk arises as a result of other fact patterns than those of the enumerated positions. The Commission expects to review with an open mind any hedging activity that exchanges choose to exempt as bona fide hedging positions with respect to federal position limits. The Commission believes, however, that it would be inappropriate to allow the exchanges to act with unbounded discretion in interpreting the meaning of the term ''economically appropriate'' when the exchanges determine whether to recognize an exemption for bona fide hedging. Such a broad delegation is not authorized by the CEA and, in the Commission's view, would be contrary to the reasonably certain statutory standards in CEA section 4a(c), such as the ''economically appropriate'' test. That is, if the statutory standards are reasonable certain, then the Commission may delegate authority to exchanges. If the statutory standards were not reasonably certain, then the Commission would be precluded from delegating authority to the exchanges. Further, as explained in the discussion of § 150.9, 150.10 and 150.11, exchange determinations in this regard will be subject to the Commission's *de novo* review.

iv. Summary of Comments

Several commenters said that the rule's definition of bona fide hedging position should be expanded in various ways that would extend the scope of the definition to include the hedging of a wider variety of risks, in addition to price risk. For example, one commenter claimed that hedging some of the risks and costs associated with building energy infrastructure may not satisfy the bona fide hedging position definition, and that as a result some of these costs would likely be passed onto consumers.[1237] A commenter representing asset managers said that the final rule should include a risk management exemption, including for commodity index contract positions, because the availability of such an exemption would reduce compliance costs and reduce negative consequences for liquidity and price discovery, while providing the same benefit in terms of preventing excessive speculation.[1238] A third commenter asserted that the ''specifically enumerated'' criterion in the proposed definition would constrain risk management activities by effectively reclassifying large risk reducing positions as excessive speculation.[1239] On the other hand, a fourth commenter believed that the definition of bona fide hedging position in the supplemental proposal will benefit consumers through lower prices enabled by an efficient hedging mechanism as existing strategies remain readily available.[1240]

Another commenter asserted that the correlation standards in the proposed rule would make the bona fide hedging position exemption unavailable for hedges related to illiquid delivery locations and result in higher risks for market participants and higher costs for consumers.[1241] Along similar lines, another commenter said the Commission had not sufficiently considered the commonly accepted accounting practice of entering into economic hedges or sufficiently analyzed the costs and burdens to companies that engage in economic hedging of applying the 0.80 correlation for cross-commodity hedging required in the final rule.[1242]

The Commission believes that the definition of bona fide hedging position and the related exemption process in the reproposed rule will accommodate many existing hedging strategies that market participants use. As it would be impossible to enumerate every acceptable bona fide hedging activity, the Commission has preliminarily determined that it is appropriate to rely on the experience and expertise of exchanges to process these exemptions. The Commission believes that the exchanges will be better placed to

[1236] 17 CFR 1.3(z) (2010). As discussed above, a district court generally vacated the Commission's part 151 rulemaking, that would have amended § 1.3(z) to apply only to excluded commodities. However, the Commission has not instructed the **Federal Register** to roll back those vacated amendments. Thus, the current version of § 1.3(z) is found in the 2010 or earlier version of the CFR.

[1237] CL–Working Group–59693at 23–26.

[1238] CL–AMG–60946 at 2–3.

[1239] CL–CME–59718 at 47.

[1240] CL–NGFA–60941 at 2–3

[1241] *See, e.g.,* CL–EEI–EPSA–59602 at 14. The commenter believes that the Commission evaluated only correlation during the spot month, but not the closer correlation that typically exists in the non-spot months. *Id.*

[1242] CL–NRG at 5

determine which activities qualify for bona fide hedging position exemptions based on the applicable facts and circumstances. The Commission anticipates that the exchanges' role in administering bona fide hedging position exemptions will help to mitigate the potential adverse effects that commenters attributed to an overly narrow application of such exemptions.[1243]

Regarding commenters' suggestions that the definition of bona fide hedging position be expanded to encompass hedges of risks other than risks related to prices in physical marketing channels, the Commission notes that many risks come into play outside the physical marketing channel to which referenced contracts relate. The Commission has preliminarily determined that hedging of these other risks should not be covered by the bona fide hedging position definition, because the Commission views the statutory standards in CEA section 4a(c)(2), largely mirroring those of the general definition of a bona fide hedging position in § 1.3(z)(1), to be reasonably certain as limited to hedges of price risks. Further, as explained above, the statutory standard of CEA section 4a(c) requires bona fide hedging positions to be a substitute for a transaction taken or to be taken in the cash market. Generally, this precludes application of the bona fide hedging exemption to hedging of purely financial risks that are not price risks related to the physical marketing channel. For example, commodity index contracts are not eligible for recognition as the basis of a bona fide hedging position exemption because these contracts are not used to hedge price risks in physical marketing channels, as required in CEA section 4a(c)(2)(A)(i), and, as well, would not meet the requirements for a bona fide hedging position as a pass-through swap offset under CEA section 4a(c)(2)(B).

Commenters also addressed the element of the bona fide hedging position definition that generally requires that hedges be considered on a net basis in determining whether the definition is satisfied. One commenter argued that hedging on a net basis would be unworkable and require costly new technology systems to be built around more rigid, commercially impractical hedging protocols that prevent dynamic risk management in response to rapidly changing market conditions.[1244] Another commenter asserted that hedging on a gross basis is economically appropriate in a variety of circumstances and the Commission's proposal would limit market participants' ability to hedge the risks associated with their commercial activities, potentially resulting in increased costs and volatility that could detrimentally impact the market participants and lead to higher prices for consumers.[1245]

The Commission believes that it is fundamental to the definition of bona fide hedging position to require that such hedging reduce the overall risk of the commercial enterprise. Consistent with that focus on overall risk, it should be noted that the Commission does recognize certain gross hedges, *e.g.,* the use of a calendar month spread position to hedge the price risk of a soybean crush processor, because those gross hedges reduce overall risk. That is, in applying the definition one must consider whether a hedge reduces the overall risk of the commercial enterprise, and overall risks must be determined on a net basis.[1246] In this aspect, too, the Commission believes that the involvement of exchanges in the bona fide hedge exemption process will be valuable, and the Commission would expect to consider the determinations of exchanges in this regard with an open mind.

Four commenters expressed opposition to an aspect of the proposal in the supplemental notice that would not allow hedge exemptions for spread transactions to be applied during the last five days of trading of a futures contract, saying that spread exemptions should be allowed into the spot month to avoid negative effects on liquidity and potential disruptions of convergence, potentially resulting in additional risk for market participants which ultimately gets passed to consumers.[1247]

The Commission agrees with commenters that allowing spread exemptions to be applied in the spot month might improve liquidity and lower risks for market participants. Thus, the Reproposal would permit exchanges to grant § 150.10 spread exemptions into the five day/spot period. The costs and benefits of the forms are considered in the discussion of Part 19 and rule 150.7.

c. Core Referenced Futures Contract and Referenced Contract

i. Summary of Changes

The Commission proposes to define the term ''core referenced futures contract'' and amend the list of contracts in § 150.2. The effect of this is that the federal positon limits in § 150.2(d) will apply to the following additional contracts: Rough Rice, Live Cattle, Cocoa, Coffee, Frozen Orange Juice, U.S. Sugar No. 11, U.S. Sugar No. 16, Light Sweet Crude Oil, NY Harbor ULSD, RBOB Gasoline, Henry Hub Natural Gas, Gold, Silver, Copper, Palladium, and Platinum.

ii. Baseline

The baseline for the definition of the term ''core referenced futures contract'' is that the term encompasses the legacy agricultural futures contracts that are subject to existing federal position limits, namely: Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (Mini-Wheat), Soybean Oil, Hard Winter Wheat, Hard Red Spring Wheat, and Cotton No. 2. The baseline for the definition of the term ''referenced contract'' is the same as that of the term ''core referenced futures contract.''

iii. Benefits and Costs

The definitions of the terms ''core referenced futures contract'' and ''referenced contract'' set the scope of contracts to which federal position limits apply. As noted above, the Commission has preliminarily decided to proceed in stages when imposing federal position limits. Among other things, this will allow the Commission to observe how futures markets respond to an initial set of position limits before applying position limits more widely, including to contracts with less liquidity. All other things being equal, markets for contracts that are more illiquid tend to be more concentrated, so that a position limit on such contracts might significantly reduce trading interest on one side of the market, because a large trader would face the potential of being capped out by a position limit. For this reason, among others, the contracts to which the position limits in § 150.2(d) apply include some of the most liquid physical-delivery futures contracts. Following the application of position limits to these contracts, the Commission would be able to study the effects of position limits more readily and, it is anticipated, consider how to apply position limits more broadly in a

[1243] For example, the Commission believes that the exchanges' involvement in this process is more flexible and far superior to setting out regulatory safe harbors for factors such as a linear correlation in the spot month that may demonstrate a position qualifies for the exemption.

[1244] *See, e.g.,* CL–EEI–EPSA–59602 at 15, CL–EEI–Sup–60386 at 7. *See also* CL–Calpine–59663 at 7.

[1245] CL–Olam–59946 at 1.

[1246] *See* the Commission determination regarding comments on specific, identifiable risks, above, for an explanation of why it would be inappropriate to apply the bona fide hedging definition on an item by item basis.

[1247] *See* CL–NCGA–ASA–60917 at 7; CL–IECAssn–60949 at 25; and CL–FIA–60937 at 18–19.

way that would not unduly restrain liquidity in less liquid markets.

The Commission has also preliminarily determined not to apply position limits to cash-settled core referenced futures contracts (that are not linked to physical-delivery futures contracts) at this time. For these contracts, the possibility of corners and squeezes is reduced, because there is no link to a physical-delivery futures contract that may be distorted, and therefore there is less of a need for position limits. Of course, there may be other concerns about manipulation of cash-settled futures contracts that are not linked to physical-delivery futures contracts, however. For instance, there may be an incentive to manipulate a commodity price index in a manner that would benefit particular cash-settled futures or swap positions. Such manipulative conduct includes cornering or squeezing the underlying cash market on which a cash-settlement index is based. The Commission notes that these manipulation concerns may be addressed, in part, through the Commission's authority to regulate futures and swaps (including the terms of these contracts set by exchanges) and take enforcement actions, until such time as the Commission adopts position limits on cash-settled core referenced futures contracts. Further, exchanges in their SRO function may also constrain and discipline traders who are trading in a disruptive fashion. Indeed, it is reasonable to expect that, given the exchanges' deep familiarity with their own markets and their ability to tailor a response to a particular market disruption, such exchange action is likely to be more effective than a position limit in such circumstances. However, the Commission notes the exchanges do not have authority over those persons who only transact in OTC swaps.

The Commission has preliminarily determined to exclude trade options from the rule's definition of ''referenced contract,'' for several reasons. The Commission believes that many trade options would qualify for bona fide hedging position exemptions, since trade options are generally used to hedge risks. The Commission also believes that not including trade options in the scope of position limits will relieve many market participants of significant compliance costs that would be required to apply position limits to trade options. Last, this approach will allow the market to continue to innovate in the use of trade options to hedge a variety of risks.

The rule's definition of the term ''referenced contract'' includes a swap or futures contract that is ''indirectly linked'' to a physical-delivery futures contract. The ''indirectly linked'' contract could be a cash-settled swap or cash-settled futures contract that settles to the price of another cash-settled derivative that, in turn settles to the price of a physical-delivery futures contract. A contract that settles based on the level of a commodity price index, comprised of commodities that are not the same or substantially the same, would not be an ''indirectly linked'' contract, even if the index uses futures prices as components. A contract based on such a commodity price index is excluded because the index represents a blend of the prices of various commodities.

The Reproposal's definition of the term ''referenced contract'' does not include a swap or futures contract that fixes its closing price on the prices of the same commodity at different delivery locations than specified in the core referenced futures contract, or on the prices of commodities with different commodity specifications than those of the core referenced futures contract. This approach is also in accord with market practice, in that a core referenced futures contract specifies location(s) and grade(s) of a commodity in the relevant contract specification. Thus, a contract on one grade of commodity is treated by the market as different from a contract on a different grade of the same commodity.

A location basis contract—a contract which reflects the difference between two delivery locations of the same commodity—is also excluded from the definition of referenced contract.[1248] A location basis contract may be used to hedge price risks relating to delivery at a location other than that of the core referenced futures contract. For instance, a location basis contract can be used in combination with a referenced contract to create a synthetic derivative contract on a commodity at a different delivery location, with a resulting zero net position in the referenced contract. However, a location basis contract that had a relatively small difference in location with that of the core referenced futures contract likely would not expose a speculator to significant price risk. Absent the exclusion of location basis contracts from the definition of referenced contract, such a speculator could increase exposure to a referenced contract by netting down, using such a location basis contract, the position that would otherwise be restricted by a position limit on the referenced contract.

iv. Summary of Comments

Commenters said that trade options should not be included in the definition of ''referenced contract.'' One commenter said there is significant uncertainty about the distinction between forward contracts and trade options, so costs associated with imposing position limits on trade options would greatly exceed any benefits.[1249] Another argued that because trade options have never been subject to position limits, commercial parties do not have any systems in place to: Distinguish between trade options that are referenced contracts and those that are not; monitor the number and quantity of referenced-contract trade option positions across delivery points and trading venues; and integrate them with other position tracking systems.[1250]

The Commission took the difficulties explained by commenters in complying with position limits on trade options into account when preliminarily determining not to include trade options in the definition of referenced contract. To provide flexibility, the reproposed rule permits trade options to be taken into consideration as a cash position, on a futures-equivalent basis, as the basis of a bona fide hedging position.

Another commenter discussed the exclusion of commodity index swaps from the definition of swaps that are economically equivalent to core referenced futures contracts. This commenter said this disparate treatment will shift trading activity to index swaps, drain liquidity from exchange-listed products, harm pre-trade transparency and the price discovery process, and further depress open interest (as volumes shift to index swap positions that do not count toward open interest calculations).[1251]

[1248] The defined term ''location basis contract'' generally means a derivative that is cash-settled based on the difference in price, directly or indirectly, of (1) a core referenced future contract; and (2) the same commodity underlying a particular core referenced futures contract at a different delivery location than that of the core referenced futures contract.

[1249] CL–FIA–59595 at 20.

[1250] *See, e.g.,* CL–NGSA–59674 at 33; CL–NGSA–59900 at 9. Another commenter made a more general assertion that the costs of monitoring positions subject to a limit, including reporting costs, would drive commercial market participants to the spot markets and cause them to restrict the variability provided to customers, if trade options or forward contracts with optionality were subject to position limits. CL–Calpine–59663 at 5.

[1251] CL–Citadel–59933 at 1–3. The commenter also made two recommendations relevant to the definition of core referenced futures contract: That position limits for cash-settled contracts are not warranted and that commodity index swaps should

Continued

The Commission acknowledges uncertainty about whether there will be a loss in liquidity due to the imposition of federal position limits. The Commission will monitor this issue going forward.

Another commenter suggested that the definition of bona fide hedging position should include the hedging of a binding and irrevocable bid, because a failure to do so could increase the costs incurred by utilities and special entities to provide power or gas by forcing bidders to incorporate into their bids or offers the cost associated with the risk that no exemption for such a hedge would be permitted.[1252] In response, the Commission points out that, under reproposed § 150.9, a bidder may seek recognition of a non-enumerated bona fide hedging position, under which an exchange may consider the facts and circumstances on a case-by-case basis.

d. Futures Equivalent

i. Summary of Changes

The Commission is reproposing two further revisions to the definition of ''futures-equivalent'' in the rule. The first revision clarifies that the term ''futures-equivalent'' includes a futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract. Second, the Commission clarifies that, for purposes of calculating futures equivalents, the size of an open position represented by an option contract must be determined as the economically-equivalent amount of an open position in a core referenced futures contract.

ii. Baseline

The baseline for this change to the rule's definition of ''futures equivalent'' is the current § 150.1(f) definition of ''futures-equivalent''.

iii. Benefits and Costs

The Commission has preliminarily determined that the definition of ''futures-equivalent'' in current § 150.1(f) is too narrow in light of the Dodd-Frank Act amendments to CEA section 4a. To conform to the statutory changes and to make the definition more amenable to application within the broader position limits regime, the Commission is reproposing a more descriptive definition of the term ''futures-equivalent'' by adding more explanatory text. The Commission continues to believe that, as it stated in the proposal, there are no cost or benefit implications to these further clarifications.

iv. Summary of Comments

The Commission requested comment on the revisions to the definition of the term ''futures equivalent,'' but did not receive any substantive comments. Consequently, the Commission is reproposing the definition in the Supplemental 2016 position limit proposal.

e. Intermarket Spread Position and Intramarket Spread Position

i. Summary of Changes

Current part 150 does not contain definitions for the terms ''intermarket spread position'' or ''intramarket spread position.'' In the Supplemental 2016 Position Limits Proposal the Commission proposed to expand the scope of definitions of these terms that had been included in the December 2013 Position Limits Proposal. The expanded definitions of ''intermarket spread position'' or ''intramarket spread position'' include positions in multiple commodity derivative contracts. This expansion would allow market participants to establish an intermarket spread position or an intramarket spread position that would be taken into account under the position limits regime and exemption processes. The expanded definitions also cover spread positions established by taking positions in derivative contracts in the same commodity, in similar commodities, or in the products or by-products of the same or similar commodities.

ii. Baseline

Current § 150.1 does not include definitions for the terms ''intermarket spread position'' and ''intramarket spread position.'' Therefore, the baseline is a market where ''intermarket'' and ''intramarket'' spread positions are not explicitly included in the definition of contracts that are exempt from federal position limits.

iii. Benefits and Costs

The changes to the definitions of the terms ''intermarket spread position'' and ''intermarket spread positions'' broaden the scope of the two terms in comparison to the definitions proposed in the December 2013 Position Limits Proposal. In the Commission's view, the changes are only operative in the application of §§ 150.3, 150.5 and 150.10, which address exemptions from position limits for certain spread positions. The two definitions operate in conjunction with § 150.10, which sets forth a process for exchanges to administer spread exemptions. The definitions and § 150.10, together, will enable market participants to obtain relief from position limits for these types of spreads, among others.

iv. Summary of Comments

Citadel recommended that cross-commodity netting should be permitted.[1253] The Commission preliminarily declines to permit cross-commodity netting within a particular referenced contract. However, the Commission addresses cross-commodity netting in the context of authorizing exchanges to recognize spread exemptions under reproposed § 150.10.

4. Section 150.2—Speculative Position Limits

a. Rule Summary

As previously discussed, the Commission interprets CEA section 4a(a)(2) to mandate that it establish speculative position limits for all agricultural and exempt physical commodity derivative contracts and, as a separate and independent basis for this rulemaking, has made a preliminary finding that position limits are necessary as a prophylactic measure to carry out the purposes of section 4a(a).[1254] The Commission currently sets and enforces speculative position limits for futures and futures-equivalent options contracts on nine agricultural products. Specifically, current § 150.2 provides ''[n]o person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of [enumerated spot, single-month, and all-month levels for nine specified contracts].'' [1255] The Commission proposed to amend § 150.2 to expand the scope of federal position limits regulation in three chief ways: (1) Specify limits on 16 contracts in addition to the nine existing legacy contracts (*i.e.,* a total of 25); (2) extend the application of these limits beyond futures and futures-equivalent options to all commodity derivative interests, including swaps; and (3) extend the application of these limits across trading venues to all economically equivalent contracts that are based on the same

not be treated differently than other cash-settled contracts: *Id.*

[1252] *See, e.g.,* CL–EEI–EPSA–59602 at 18.

[1253] CL–Citadel–59933 at 4.

[1254] *See supra* discussion of the Commission's interpretation of this mandate and the alternative necessity finding.

[1255] These contracts are Chicago Board of Trade corn and mini-corn, oats, soybeans and mini-soybeans, wheat and mini-wheat, soybean oil, and soybean meal; Minneapolis Grain Exchange hard red spring wheat; ICE Futures U.S. cotton No. 2; and Kansas City Board of Trade hard winter wheat.

underlying commodity. In addition, the Commission's proposed rule included methods and procedures for implementing and applying the expanded limits.

The Commission is reproposing amendments to § 150.2 to impose speculative position limits as mandated by Congress in accordance with the statutory bounds that define the Commission's discretion in doing so and, as a separate and independent basis for the Reproposal, because the speculative position limits are necessary to achieve their statutory purposes.[1256] First, pursuant to CEA section 4a(a)(5) the Commission must concurrently impose position limits on swaps that are economically equivalent to the agricultural and exempt commodity derivatives for which position limits are mandated in CEA section 4a(a)(2), and for which the Commission separately finds position limits are necessary. Second, CEA section 4a(a)(3) requires that the Commission appropriately set limit levels mandated and/or found necessary under section 4a(a)(2) that ''to the maximum extent practicable, in its discretion,'' accomplish four specific objectives.[1257] Third, CEA section 4a(a)(2)(C) requires that in setting limits mandated (or adopted as necessary) under section 4a(a)(2)(A), the ''Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits. . . imposed. . .will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.'' Key elements of the reproposed rule are summarized below.[1258]

Generally, § 150.2 will limit the size of speculative positions,[1259] *i.e.,* prohibit any person from holding or controlling net long/short positions above certain specified spot month, single month, and all-months-combined position limits. These position limits will reach: (1) 25 ''core referenced futures contracts,''[1260] representing an expansion of 16 contracts beyond the 9 legacy agricultural contracts identified currently in § 150.2;[1261] (2) a newly defined category of ''referenced contracts'' (as defined in § 150.1);[1262] and (3) across all trading venues to all economically equivalent contracts that are based on the same underlying commodity.

b. § 150.2(a) Spot-Month Speculative Position Limits

i. Summary of Changes

In order to implement CEA section 4a(a)(3)(A), reproposed rule § 150.2(a) prohibits any person from holding or controlling positions in referenced contracts in the spot month in excess of the level specified by the Commission for referenced contracts.[1263] Additionally, § 150.2(a) requires that a trader's positions, net long or net short, in the physical-delivery referenced contract and linked cash-settled referenced contract be calculated separately under the spot month position limits fixed by the Commission for each. As a result, a trader could hold positions up to the applicable spot month limit in the physical-delivery contracts, as well as positions up to the applicable spot month limit in linked cash-settled contracts (*i.e.,* cash-settled futures and swaps), but would not be able to net across physical-delivery and cash-settled contracts in the spot month.

ii. Baseline

To the extent the Commission has correctly interpreted that CEA section 4a(a)(2) mandates position limits, the costs and benefits of whether to require position limits have been balanced by Congress and the Commission is not tasked with revisiting those costs and benefits on that specific question.[1264] To the extent the Reproposal rests on the preliminary alternative necessity finding, the baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

As discussed above, CEA section 4a(a)(3)(A) directs the Commission, each time it establishes limits, to set limits on speculative positions during the spot-month.[1265] It is during the spot-month period that concerns regarding certain manipulative behaviors, such as corners and squeezes, become most urgent.[1266] The Commission has for decades applied guidance that spot-month position limits for physical-delivery futures contracts should be equal to no more than one-quarter of the estimated deliverable supply for that commodity. Spot-month position limits provide benefits to the market by restricting speculators' ability to amass market power, regardless of whether there is intent to manipulate or distort the market. In so doing, spot-month position limits restrict the ability of speculators to engage in corners and squeezes and other forms of manipulation. They also prevent the potential adverse impacts of unduly large positions even in the absence of manipulation, thereby promoting a more orderly liquidation process for each contract and fostering convergence between the expiring core referenced futures contract and its underlying cash market. This makes the core referenced futures contract more useful for hedging cash market positions.

For example, as discussed above, the absence of manipulative intent behind excessive speculation does not preclude the risk that accumulation of very large positions will cause the negative

[1256] *See supra* discussion of the Commission's necessity finding.

[1257] These objectives are to: (1) ''diminish, eliminate, or prevent excessive speculation;'' (2) ''deter and prevent market manipulation, squeezes, and corners;'' (3) ''ensure sufficient market liquidity for bona fide hedgers;'' and (4) ''ensure that the price discovery function of the underlying market is not disrupted.'' 7 U.S.C. 6a(a)(3).

[1258] For a more detailed description, *see* discussion above.

[1259] § 150.1 includes a definition of the term ''speculative position limits.''

[1260] § 150.1 defines the term ''core referenced futures contract'' by reference to ''a futures contract that is listed in § 150.2(d).''

[1261] Specifically, in addition to the existing 9 legacy agricultural contracts now within § 150.2—*i.e.,* Chicago Board of Trade corn (C), oats (O), soybeans (S), soybean oil (SO), soybean meal (SM), and wheat (W); Minneapolis Grain Exchange hard red spring wheat (MWE); ICE Futures U.S. cotton No. 2 (CT); and Kansas City Board of Trade hard winter wheat (KW)—proposed § 150.2 would expand the list of core referenced futures contracts to capture the following additional agricultural, energy, and metal contracts: Chicago Board of Trade Rough Rice (RR); ICE Futures U.S. Cocoa (CC), Coffee C (KC), FCOJ–A (OJ), Sugar No. 11 (SB) and Sugar No. 16 (SF); Chicago Mercantile Exchange Live Cattle (LC); Commodity Exchange, Inc., Gold (GC), Silver (SI) and Copper (HG); and New York Mercantile Exchange Palladium (PA), Platinum (PL), Light Sweet Crude Oil (CL), NY Harbor ULSD (HO), RBOB Gasoline (RB) and Henry Hub Natural Gas (NG). The Commission originally proposed in its 2013 to set position limits on 28 core referenced contracts, including the 25 contracts noted above plus CME Feeder Cattle, Lean Hog and Class III Milk. Those three contracts will not be included in the Reproposal for the reasons discussed above.

[1262] This would result in the application of prescribed position limits to a number of contract types with prices that are or should be closely correlated to the prices of the 25 core referenced futures contracts—*i.e.,* economically equivalent contracts—including: (1) ''look-alike'' contracts (*i.e.,* those that settle off of the core referenced futures contract and contracts that are based on the same commodity for the same delivery location as the core referenced futures contract); (2) contracts based on an index comprised of one or more prices for the same delivery location and in the same or substantially the same commodity underlying a core referenced futures contract; and (3) inter-commodity spreads with two components, one or both of which are referenced contracts.

[1263] As discussed *supra,* the Commission is reproposing to adopt a streamlined, amended definition of ''spot month'' in § 150.1. The term is defined as the trading period immediately preceding the delivery period for a physical-delivery futures contract and cash-settled swaps and futures contracts that are linked to the physical-delivery contract. The definition provides that the spot month for cash-settled contracts is that same period as that of the core referenced futures contract. For more details, *see* discussion above.

[1264] *See Nat'l Ass'n of Mfrs.* v. *SEC,* 748 F.3d 359, 369–70 (D.C. Cir. 2014).

[1265] 7 U.S.C. 6a(a)(3)(A).

[1266] *See* discussion above.

consequences of the types observed in the Hunt and Amaranth incidents. Moreover, it is often difficult to discern manipulative intent. That is one reason position limits are valuable as a prophylactic measure for, in the language of Section 4a(a)(1), ''preventing'' burdens on interstate commerce. The Hunt brothers and Amaranth examples illustrate the burdens on interstate commerce of excessive speculation that occurred in the absence of position limits, and position limits would have restricted those traders' ability to cause unwarranted price movement and market volatility. This would be so even had their motivations been innocent. Both episodes involved extraordinarily large speculative positions, which the Commission has historically associated with excessive speculation.[1267]

Exchanges and market participants also benefit from spot-month position limits because market participants who seek exemptions to the spot-month limit will have to justify why their positions qualify for the exemption, which fosters visibility into the market for the exchanges and fosters better risk management practices for the market participant seeking the exemption.

In its determination of the appropriate spot month levels for the core referenced futures contracts, the Commission took into account exchange estimates of deliverable supply, which were verified by the Commission staff, and exchange spot-month limit level recommendations. A more detailed discussion of the costs and benefits for the actual limits can be found below in the discussion of 150.2(d). However, more generally, the Commission recognizes federal spot month position limits do impose costs to exchanges and market participants. Federal spot month limits will require hedgers to apply for exemptions if they hold positions in excess of the federal limits. These costs are considered in the discussion of 150.3. In addition, speculators who want exposure beyond the federal limit for a referenced contract will incur costs to trade in instruments that are not subject to federal limits, such as trade options and bespoke swaps, which typically incur more expensive transactions costs than exchange traded futures and swaps.

Furthermore, as discussed above, exchanges may choose to adopt spot-month limits below the federal limit. Market participants who are hedging their cash market positions would incur costs of having to apply for an exemption from the exchange if their hedging positons are above the lower limit set by the exchange. Otherwise, a market participant who wants speculative exposure above the lower limit, but who does not qualify for an exemption, would have to take speculative positions in other instruments not subject to exchange or Federal position limits, which as noted above may involve higher transaction costs.

The Commission also recognizes that there are costs to setting federal spot-month limits too high or too low. If the Federal spot-month limit is too high, the exchanges and the Commission lose visibility into market activity because the number of exemption applications from market participants will be reduced because of the higher limit. In addition, if limits are too high, market participants could obtain positions that would impact the price of the commodity, possibly manipulating or distorting the futures price, thus impairing the price discovery process of the core referenced futures contract. Furthermore, if a market participant establishes a very large position and then has to unwind its position, there could be an adverse impact on the price of the core referenced futures contract (*e.g.,* as occurred with Amaranth).

Conversely, if the Federal spot-month limit is too low, market participants and exchanges would incur larger costs to apply for and process, respectively, more exemption applications. In addition, as noted above, transactions costs for market participants who are near or above the limit would rise as they transact in other instruments with higher transaction costs to obtain their desired level of speculative positions. Additionally, limits that are too low could incentivize speculators to leave the market and not be available to provide liquidity for hedgers, resulting in ''choppy'' prices and reduced market efficiency.[1268] Further, option premiums would likely increase to account for the more volatile prices of the underlying core referenced futures contract. Moreover, if confidence in the price of the core referenced futures contract erodes, market participants may move to another DCM or FBOT.

The Commission proposes to use its discretion in the manner in which it implements the statutorily-required spot-month position limits so as to achieve Congress's objectives in CEA section 4a(a)(3)(B)(ii); that is, to prevent or deter market manipulation, including corners and squeezes. For example, the Commission proposes to use its discretion under CEA section 4a(a)(1) to set limits that are equal in the spot-month for physical-delivery and linked cash-settled referenced contracts respectively. By setting separate limits for physical-delivery and cash-settled referenced contracts, the Reproposal restricts the size of the position a trader may hold or control in cash-settled referenced contracts, thus reducing the incentive of a trader to manipulate the settlement of the physical-delivery contract in order to benefit positions in the cash-settled referenced contract. Thus, the separate limits further enhance the prevention of market manipulation provided by spot-month position limits by reducing the potential for incentives to engage in manipulative action.

iv. Summary of Comments

One commenter urged the Commission to ensure that a final rule does not compromise predictable convergence in the market, or risk threatening the utility of contracts for risk management purposes, noting the importance of risk management to the general health of the economy.[1269] Another commenter noted the requirement that the Commission consider alternatives and said that the Commission should consider not adopting non-spot-month limits, limits that are set arbitrarily, or limits on financially settled contracts; consider recognizing cross-commodity netting; consider a plan for cross-border application of position limits; and consider new data sources, including SDRs (although such data's reliability is still in development).[1270]

The Commission agrees that the federal position limit regime should not unnecessarily impede convergence between the futures and cash markets, which would impede the price discovery process of the core referenced contract. As discussed below, the Commission endeavors to take into account how the position limit levels would impact the number of market participants in all of the referenced contracts to reduce undesirable impact on those markets.

The Commission has preliminarily exercised its discretion in determining how to adopt position limits and has chosen to start with the 25 core referenced futures contracts which were selected on the basis that such contracts:

[1267] December 2013 Position Limits Proposal, 78 FR 75685 n. 60.

[1268] ''Choppy'' prices often refers to illiquidity in a market where transacted prices bounce between the bid and the ask prices. Market efficiency may be harmed in the sense that transacted prices might need to be adjusted for bid-ask bounce to determine the fundamental value of the underlying contract.

[1269] CL–ADM–60300 at 3.

[1270] CL–ISDA/SIFMA–59611 at 26.

(1) Have high levels of open interest and significant notional value; or (2) serve as a reference price for a significant number of cash market transactions. The specific levels are not set arbitrarily. Rather, as discussed more below, the Commission takes into account the expertise of the exchanges that list the core referenced futures contracts. In that regard, the Commission received and verified estimates of deliverable supplies for core referenced futures contracts and considered spot-month limit levels those exchanges suggested. Regarding the data considered in setting the levels of non-spot month limits, Commission staff has worked with industry to improve the reliability of swap data collected pursuant to part 20 of Commission regulations. As discussed below in more detail, the Commission's confidence in the data has improved such that it relied on part 20 swap position data, to propose initial levels of federal non-spot month limits on futures and swaps in the Reproposal. The Commission addresses cross-commodity netting in the spread exemptions covered in reproposed § 150.10.

A commenter was concerned that the proposed position limits will cause market participants to transact in less-transparent and non-cleared markets due to a lack of liquidity on futures markets, and undermine efforts to encourage market transparency and reduce systemic risks through centralized clearing.[1271] Another commenter pointed out that constraining speculation would constrain hedging, and that more financial involvement in commodity markets has lowered risk premia and made hedging cheaper, making it economical to hold larger inventories that help reduce the frequency and severity of large price increases.[1272] A third commenter questioned whether the Supplemental Proposal's cost-benefit analysis includes the costs of processing bona fide hedging and spread exemptions for contracts subject only to exchange-set speculative position limits and not federal speculative position limits.[1273]

The Commission has preliminarily considered how the limits would impact traders. In that regard the Commission sought not to impede the liquidity of the markets for both hedgers and speculators by setting the spot month position limit at a level that would not deter hedgers or speculators from participating in the market. The Commission is mindful of the beneficial effects that speculators have on the commodity markets. As a consequence, the Commission takes into consideration the risk of deterring appropriate speculation when setting the federal limits. The Commission also preliminarily considered the exchange-suggested spot-month limits when setting the federal spot-month limit. As discussed below, in most cases the exchange-suggested limit levels reproposed by the Commission are the federal spot-month limit. Therefore, the Commission preliminarily believes that the federal limits are in line with the exchanges' expectations and therefore the exchanges would be unlikely, at least initially, to adopt a smaller exchange-set spot-month limit for the core referenced futures contracts. The Commission will also review the federal limits in the future to determine if they are effective and not unduly restrictive.

c. § 150.2(b) Single-Month and All-Months-Combined Speculative Position Limits

i. Summary of Changes

Reproposed § 150.2(b) provides that no person may hold or control positions, net long or net short, in referenced contracts in a single-month or in all-months-combined in excess of the levels specified by the Commission. In that regard, § 150.2(b) would require netting all positions in referenced contracts (regardless of whether such referenced contracts are physical-delivery or cash-settled) when calculating a person's positions for purposes of the proposed single-month or all-months-combined position limits (collectively ''non-spot-month'' position limits).[1274]

ii. Baseline

The baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

CEA section 4a(a)(3)(A) directs the Commission, each time it establishes limits, to set limits on speculative positions for months other than the spot-month.[1275] While market disruptions arising from the concentration of positions remain a possibility outside the spot month, the above-mentioned concerns about corners and squeezes and other forms of manipulation are reduced outside the spot-month. Accordingly, the Reproposal requires netting of physical-delivery and cash-settled referenced contracts for purposes of determining compliance with non-spot-month limits. The Commission has preliminarily determined it is appropriate to permit the additional flexibility in complying with the non-spot-months limits that netting allows, given the decreased risk of corners and squeezes outside the spot-month. Because this additional flexibility means market participants are able to retain offsetting positions outside of the spot-month, liquidity should not be significantly impaired and disruptions to price discovery should be reduced.

However, more generally, the Commission recognizes that federal non-spot month position limits do impose costs to exchanges and market participants. These costs are generally the same as discussed above with respect to § 150.2(a). The consideration of the costs to exchanges and market participants of § 150.2(a) is also applicable to § 150.2(b).

iv. Summary of Comments

Comments on this section are addressed in the discussion of 150.2(e) below.

d. § 150.2(c) Purpose of This Part

i. Summary of Changes

Reproposed § 150.2(c)(1) and (2) specify that for purposes of part 150, the spot month and any single month shall be those of the core referenced futures contract and that an eligible affiliate is not required to comply separately with speculative position limits.

ii. Baseline

The baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

The Commission believes these are conforming amendments to effectuate the rule and do not have cost or benefit implications.

[1271] *See* CL–MFA–60385 at 4. Citing testimony of Erik Haas (Director of Market Regulation, ICE Futures U.S.) at the EEMAC public meeting on February 26, 2105, the commenter asserted that the volume of over-the-counter transactions is already increasing because futures contracts have become too costly the further out the curve one goes. *Id.*

[1272] *See* CL–ISDA/SIFMA–59611 at Annex B at 5. This commenter referenced, but did not include, two papers as follows. James Hamilton and Jing Wu, Risk Premia in Crude Oil Futures Prices, NBER Working Paper (2013). Peter Christoffersen, Kris Jacobs, and Bingxin Li, Dynamic Jump Intensities and Risk Premiums in Crude Oil Futures and Options Markets, working paper (2013).

[1273] CL–Working Group–60947 at 14.

[1274] The Commission is reproposing to adopt the same level for single-month and all-months-combined limits, and refers to those limits as the ''non-spot-month limits.'' The spot month and any single month refer to those periods of the core referenced futures contract.

[1275] 7 U.S.C. 6a(a)(3)(A).

iv. Summary of Comments

No commenter addressed any cost or benefit considerations relating to proposed rules § 150.2(c)(1) or (2).

e. § 150.2(d) Core Referenced Futures Contracts

i. Summary of Changes

As defined in proposed § 150.1, referenced contracts are futures, options, or swaps contracts that are directly or indirectly linked to a core referenced futures contract or the commodity underlying a core referenced futures contract.[1276]

New rule § 150.2(d) lists the 25 core referenced futures contracts on which the Commission has preliminarily determined to establish federal speculative position limits. The list reflects a significant expansion of federal speculative position limits from the list of nine agricultural contracts under current part 150.[1277] The Commission has selected these important food, energy, and metals contracts on the basis that such contracts (i) have high levels of open interest and significant notional value and/or (ii) serve as a reference price for a significant number of cash market transactions. Thus, the Commission is reproposing position limits on these contracts in order to commence the expansion of its federal position limit regime with those commodity derivative contracts that it believes have the greatest impact on interstate commerce. The Commission will be reviewing other contracts going forward.

As discussed in the 2013 Position Limit Proposal,[1278] the Commission calculated the notional value of open interest (delta-adjusted) and open interest (delta-adjusted) for all futures, futures options, and significant price discovery contracts as of December 31, 2012 in all agricultural and exempt commodities as part of its selection of the 25 core referenced futures contracts in § 150.2(d). The Commission selected commodities in which the derivative contracts had largest notional value of open interest and open interest for three categories: Agricultural, energy, and metals. The Commission then designated the benchmark futures contracts for each commodity as the core referenced futures contract for which position limits would be established. Reproposed § 150.2(d) lists 16 core referenced futures contracts for agricultural commodities, four core referenced futures contracts for energy commodities, and five core referenced futures contracts for metals commodities.[1279]

ii. Baseline

The baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

The benefits and costs are considered in the discussion of the definition of core referenced futures contract and referenced contract in § 150.1.

iv. Summary of Comments

Comments on this section are considered in the discussion of the definition of core referenced futures contract and referenced contract in § 150.1.

f. § 150.2(e) Levels of Speculative Position Limits

i. Summary of Changes

The list of initial spot month, single month and all-months combined position limit levels adopted by the Commission for referenced contracts can be found in Appendix D to this part. Under reproposed § 150.2(e)(3), the Commission will recalibrate spot month position limit levels no less frequently than every two calendar years, with any such recalibration to result in limits no greater than one-quarter (25 percent) of the estimated spot-month deliverable supply [1280] in the relevant core referenced futures contract. This formula is consistent with the acceptable practices in current § 150.5, as well as the Commission's longstanding practice of using this measure of deliverable supply to evaluate whether DCM-set spot-month limits are in compliance with DCM core principles 3 and 5. The Reproposal separately restricts the size of positions in cash-settled referenced contracts that would potentially benefit from a trader's potential distortion of the price of the underlying core referenced futures contract.

Accordingly, each DCM is required to supply the Commission with an estimated spot-month deliverable supply figure that the Commission will use to recalibrate spot-month position limits unless the Commission decides to rely on its own estimate of deliverable supply instead.[1281]

In contrast to spot-month limits, which will be set as a function of deliverable supply, the formula for the non-spot-month position limits is based on total open interest for all referenced contracts that are aggregated with a particular core referenced futures contract. In that regard, § 150.2(e)(4) explains that the Commission will calculate non-spot-month position limit levels based on the following formula: 10 percent of the largest annual average open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter.[1282] As is the case with spot month limits, the Commission will adjust single month and all-months-combined limits no less frequently than every two calendar years.

The Commission's average open interest calculation will be computed for each of the past two calendar years, using either month-end open contracts or open contracts for each business day in the time period, as practical and in the Commission's discretion. Initially, the Commission is reproposing initial non-spot-month limits using the larger open interest level from two 12-month periods (July 1, 2104 to June 30, 2015; and July 1, 2015 to June 30, 2016), for futures contracts and options thereon reported under part 16, and for swaps reported under part 20.

In the future, the Commission expects to use the data reported pursuant to parts 16, 20, and/or 45 of the Commission's regulations to estimate average open interest in referenced contracts.[1283]

[1276] As discussed *above,* the definition of referenced contract excludes any guarantee of a swap, location basis contracts, commodity index contracts and trade option that meets the requirements of § 32.3 of this chapter.

[1277] 17 CFR 150.2.

[1278] December 2013 Position Limits Proposal, 78 FR 75725.

[1279] The Commission originally proposed in its 2013 to set position limits on 28 core referenced contracts, including the 25 contracts noted above plus CME Feeder Cattle, Lean Hog and Class III Milk. Those three contracts will not be included in the Reproposal for the reasons discussed above.

[1280] The guidance for meeting DCM core principle 3 (as listed in 17 CFR part 38 app. C) specifies that, ''[t]he specified terms and conditions [of a futures contract], considered as a whole, should result in a 'deliverable supply' that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion. In general, the term 'deliverable supply' means the quantity of the commodity meeting the contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels . . .'' *See* Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36722 (Jun. 19, 2012).

[1281] § 150.2(e)(3)(ii)(A) would require DCMs to submit estimates of deliverable supply. DCM estimates of deliverable supplies (and the supporting data and analysis) would continue to be subject to Commission review. § 150.2(e)(3)(ii)(A) would allow a DCM to petition the Commission no less than two calendar months before the due date for submission of an estimate of deliverable supply to recommend that the Commission not change the spot-month limit.

[1282] Since 1999, the same 10 percent/2.5 percent methodology, now incorporated in current § 150.5(c)(2), has been used to determine futures all-months position limits for referenced contracts.

[1283] Options listed on DCMs would be adjusted using an option delta reported to the Commission pursuant to 17 CFR part 16; swaps would be

ii. Baseline

The baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

Method for Setting Spot-Month Position Limit Levels

The method for determining the levels at which the limits are set is consistent with the Commission's longstanding acceptable practices for DCM-set speculative position limits. In the December 2013 Position Limits Proposal, the Commission proposed to set the initial spot month speculative position limit levels for referenced contracts at the existing DCM-set levels for the core referenced futures contracts.[1284] As an alternative, the Commission stated that it was considering using 25 percent of an exchange's estimate of deliverable supply if the Commission verified the estimate as reasonable.[1285] As a further alternative, the Commission stated that it was considering setting initial spot month position limit levels at a recommended level, if any, submitted by a DCM (if lower than 25 percent of estimated deliverable supply).[1286]

In preliminarily determining the levels at which to set the initial speculative position limits, the Commission considered, among other things, the recommendations of the exchanges as well as data to which the exchanges do not have access. In considering these and other factors, a significant concern of the Commission became the effect of alternative limit levels on traders in the cash-settled referenced contracts. A DCM has reasonable discretion in establishing the manner in which it complies with core principle 5 regarding position limits.[1287] As the Commission observed in the December 2013 Position Limits Proposal, ''there may be a range of spot month limits, including limits set below 25 percent of deliverable supply, which may serve as practicable to maximize . . . [the] policy objectives [set forth in section 4a(a)(3)(B) of the CEA].'' [1288] The Commission must also consider the competitiveness of futures markets.[1289] Thus, the Commission preliminarily determined to accept the recommendations of the exchanges to set federal limits below 25 percent of deliverable supply, where setting a limit level at less than 25 percent of deliverable supply did not appear to restrict unduly positions in the cash-settled referenced contracts. The exchanges retain the ability to adopt lower exchange-set limit levels than the initial speculative position limit levels set by the Commission in this rulemaking.

As discussed in more detail above, the process of determining appropriate spot-month limit levels included the Commission receiving updated estimates of deliverable supply from the DCMs listing the 25 core referenced contracts, which Commission staff verified as reasonable after conducting its own independent review of estimated deliverable supply for the subject core referenced contracts. Furthermore, the DCMs provided recommended spot-month limit levels for some of the 25 core referenced contracts which the Commission considered while determining the appropriate level of spot-month limits for the 25 core referenced futures contracts.[1290] In addition, the Commission then conducted an impact analysis of different spot-month limit levels to discern how many market participants would be affected by the different limit levels.

As part of reproposing § 150.2(e)(3)(i), the Commission has considered scenarios where exchanges may or may not update deliverable supply. This may result in the Commission reviewing and re-establishing position limits in the spot month. Exchanges may elect not to undertake this expense of re-estimating the deliverable supply of the underlying

counted on a futures equivalent basis, equal to the economically equivalent amount of core referenced futures contracts reported pursuant to 17 CFR part 20 or as calculated by the Commission using swap data collected pursuant to 17 CFR part 45.

[1284] December 2013 Position Limit Proposal, 78 FR 75727. One commenter urged the Commission to retain the legacy speculative limits for enumerated agricultural products. The ''enumerated'' agricultural products refer to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. This list of agricultural contracts includes nine currently traded contracts: Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (and Mini-wheat), Soybean Oil, Soybean Meal, Hard Red Spring Wheat, Hard Winter Wheat, and Cotton No. 2. *See* 17 CFR 150.2. The position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts on agricultural commodities have been subject to federal positions limits for decades. This commenter stated, ''There is no appreciable support within our industry or, as far as we know, from the relevant exchanges to move beyond current levels. . . . Changing current limits, as proposed in the rule, will have a negative impact on futures-cash market convergence and will compromise contract performance.'' CL–American Farm Bureau Federation–59730 at 3). *Contra* CL–ISDA and SIFMA–59611 at 32 (setting initial spot-month limits at the existing exchange-set levels would be arbitrary because the exchange-set levels have not been calibrated to apply as ''a ceiling on the spot-month positions that a trader can hold across *all* exchanges for futures, options and swaps''); CL–ICE–59966 at 6 (''the Proposed Rule . . . effectively halves the present position limit in the spot month by aggregating across trading venues and uncleared OTC swaps''). *See also* CL–ISDA and SIFMA–59611 at 3 (the spot month limit methodology is ''both arbitrary and unjustified'').

[1285] December 2013 Position Limit Proposal, 78 FR 75727. The Commission also stated that if the Commission could not verify an exchange's estimate of deliverable supply for any commodity as reasonable, the Commission might adopt the existing DCM-set level or a higher level based on the Commission's own estimate, but not greater than would result from the exchange's estimated deliverable supply for a commodity.

One commenter was unconvinced that estimated deliverable supply is ''the appropriate metric for determining spot month position limits'' and opined that the ''real test'' should be whether limits ''allow convergence of cash and futures so that futures markets can still perform their price discovery and risk management functions.'' CL–NGFA–60941 at 2. Another commenter stated, ''While 25% may be a reasonable threshold, it is based on historical practice rather than contemporary analysis, and it should only be used as a guideline, rather than formally adopted as a hard rule. Deliverable supply is subject to numerous environmental and economic factors, and is inherently not susceptible to formulaic calculation on a yearly basis.'' CL–MGEX–60301 at 1. Another commenter expressed the view that the 25 percent formula is not ''appropriately calibrated to achieve the statutory objective'' set forth in section 4a(a)(3)(B)(i) of the CEA, 7 U.S.C. 6a(a)(3)(B)(i). CL–CME–60926 at 3. Another commenter opined that because the Commission ''has not established a relationship between 'estimated deliverable supply' and spot-month potential for manipulation or excessive speculation,'' the 25 percent formula is arbitrary. CL–ISDA and SIFMA–59611 at 31.

Several commenters opined that a limit at 25 percent of deliverable supply is too high. *E.g.,* CL–Americans for Financial Reform–59685 at 2; CL–Tri–State Coalition for Responsible Investment–59682 at 1; CL–CMOC–59720 at 3; CL–WEED–59628 (''Only a lower limit would ensure market stability and prevent market manipulation.''); CL-Public Citizen-60313 at 1 (''There is no good reason for a single firm to take 25% of a market.''); CL–IECA–59964 at 3 (25 percent of deliverable supply ''is a lot of market power in the hands of speculators''). One commenter stated that ''position limits should be set low enough to restore a commercial hedger majority in open interest in each core referenced contract,'' CL–Institute for Agriculture and Trade Policy (''IATP'')–60323 at 5, suggesting in a later submission that position limits at 5–10 percent of estimated deliverable supply in each covered contract applied on an aggregated basis might ''enable commercial hedgers to regain for all covered contracts their pre-2000 average share of 70 percent of agricultural contracts,'' CL–IATP–60394 at 2. One commenter supported expanding position limits ''to ensure rough or approximate convergence of futures and underlying cash at expiration.'' CL–Pamela D. Thornton (''Thornton'')–59702 at 1.

Several commenters supported setting limits based on updated estimates of deliverable supply which reflect current market conditions. *E.g.,* CL–ICE–59966 at 5; CL–FIA–59595 at 8; CL–EEI–EPSA–59602 at 9; CL–MFA–59606 at 5; CL–CMC–59634 at 14; CL–Olam–59658 at 3; CL–CCMC–59684 at 6–7.

[1286] December 2013 Position Limits Proposal, 78 FR at 75728.

[1287] CEA section 5(d)(1)(B), 7 U.S.C. 7(d)(1)(B).

[1288] December 2013 Position Limits Proposal, 78 FR at 75729.

[1289] CEA section 15(a)(2)(B), 7 U.S.C. 19(a)(2)(B).

[1290] The Commission notes that the CME did not provide a recommended spot month limit for its Live Cattle Contract. The Commission ultimately kept the current spot month limit of 450 contracts in place for the Live Cattle contract.

commodity. Among many reasons, this might be because the deliverable supply has not changed much during the time that the last estimate was made. In these cases, the Commission has the option to maintain the current spot month position limit level or use the formula based on the outdated deliverable supply estimate if different, or use the exchange's recommendation for the level of the spot month position limit. Sparing the exchanges of the cost of re-estimating the deliverable supply may be beneficial if the estimation costs are high or if the anticipated difference in the estimates is small. The Commission must also be mindful that exchanges might want the federal position limit to be set lower, because a lower limit might prevent liquidity in the exchange's core reference contract from developing on another exchange. Exchanges may elect to re-estimate deliverable supply. This would allow the Commission to maintain the current spot month level, replace it with the formula based on 25% of updated deliverable supply, or accept the exchange's recommendation for a different level. It is prudent to revise the spot month position limit if the deliverable supply has changed appreciably, because setting the limit too low might harm liquidity or setting it too high might make it easier for someone to engage in market manipulation such as perfecting a corner and squeeze.

iv. Summary of Comments

One commenter cautioned the Commission not to rely on inaccurate or unreliable data or apply a one-size-fits-all approach in setting the levels of position limits, in order to avoid potential harms to market liquidity and increased costs.[1291] Another commenter suggested that, in light of the complexities and costs of implementing federal and exchange-set limits, the Commission should not implement final rules until at least nine months after the final rule is issued.[1292]

The Commission has preliminarily determined to ease the transition to the initial speculative position limits by setting a compliance date of January 3, 2018 in § 150.3(e)(1). As for the process of determining appropriate spot-month position limit levels, the Commission endeavored to use accurate and reliable data. For example, the Commission looked to updated estimates of deliverable supply from the DCMs listing the 25 core referenced contracts, which Commission staff verified as reasonable after conducting its own independent review of estimated deliverable supply for the subject core referenced futures contracts.[1293] In addition, the Commission then conducted an impact analysis of different spot-month limit levels to discern how many market participants would be affected by the different limit levels. To determine the non-spot month position limits, the Commission used futures daily open interest data. In addition, it worked with market participants to improve the swap data collected pursuant to part 20 of the Commission's regulations, so that data could be used in determining open interest levels in the swap markets for referenced contracts. The Commission deems both the estimated deliverable supply data and exchange recommended spot-month limits along with the open interest data to be current and reliable for basing federal spot month and non-spot month limits, respectively.

g. Initial Speculative Spot Month Position Limit Levels

i. CME and MGEX Agricultural Contracts

For the CME and MGEX Agricultural (Legacy) contracts, which were previously subject to federal position limits, the Commission has preliminarily determined to set the initial speculative spot month position limit levels for C, O, RR, S, SM, SO, W and KW at the recommended levels submitted by CME,[1294] all of which are lower than 25 percent of estimated deliverable supply.[1295] As is evident from the table set forth in the discussion above, this also means that the Commission is reproposing the initial speculative position limit levels for these eight contracts as proposed. These initial levels track the existing DCM-set levels for the core referenced futures contracts; [1296] therefore, as noted in the December 2013 Position Limits Proposal, many market participants are already used to these levels and conform their practices accordingly.[1297] The Commission continues to believe this approach is consistent with the regulatory objectives of the Dodd-Frank Act amendments to the CEA.

The Commission has also preliminarily determined to set the initial speculative spot month position limit level for MWE at 1,000 contracts, which is the level requested by MGEX [1298] and approximately equal to 25 percent of estimated deliverable supply. This is an increase from the proposed level of 600 contracts and is greater than the initial speculative spot month position limit levels for W and KW.[1299] As stated in the December 2013 Position Limits Proposal, the 25 percent formula is consistent with the longstanding acceptable practices for DCM core principle 5.[1300] The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is a reasonable "prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity." [1301]

The Commission's impact analysis reveals no traders in cash settled contracts in any of C, O, S, SM, SO, W, MWE, KW, or RR, and no traders in physical delivery contracts for O and RR, above the initial speculative limit levels for those contracts. The Commission found varying numbers of traders in the C, S, SM, SO, W, MWE, KW physical delivery contracts over the initial levels, but the numbers were very small for MWE and KW. Because the levels that the Commission is adopting for C, O, S, SM, SO, W, KW, and RR maintain the status quo for those contracts, the Commission assumes that some or possibly all of such traders over the initial levels are hedgers. Hedgers may have to file for an applicable exemption, but hedgers with bona fide hedging positions should not have to reduce their positions as a result of speculative position limits per se. Thus, the number of traders in the C, S, SM, SO, W and KW physical delivery contracts who would need to reduce speculative positions below the initial limit levels should be lower than the numbers indicated by the impact

[1291] CL–Chamber–59684 at 4 and 5–6.

[1292] CL–FIA at 6 and 44.

[1293] The Commission notes that the CME did not provide a recommended spot month limit for its Live Cattle Contract. The Commission ultimately kept the current spot month limit of 450 contracts in place for the Live Cattle contract.

[1294] CL–CME–61007 at 5.

[1295] The Commission noted in the December 2013 Position Limits Proposal "that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply." December 2013 Position Limits Proposal, 78 FR 75729.

[1296] *See* CL–CME–61007 (specifying lower exchange-set limit levels for W and RR in certain circumstances).

[1297] December 2013 Position Limit Proposal, 78 FR 75727.

[1298] CL–MGEX–60938 at 2.

[1299] Most commenters who supported establishing the same level of speculative limits for each of the three wheat core referenced futures contracts focused on parity in the non-spot months. However, some commenters did support wheat party in the spot month, *e.g.,* CL–CMC–59634 at 15; CL–NCFC–59942 at 6.

[1300] December 2013 Position Limits Proposal, 78 FR 75729.

[1301] *Id.*

analysis. And, while setting initial speculative levels at 25 percent of deliverable supply would, based upon logic and the Commission's impact analysis, affect fewer traders in the C, S, SM, SO, W and KW physical delivery contracts, consistent with its statement in the December 2013 Position Limits Proposal, the Commission believes that setting these lower levels of initial spot month limits will serve the objectives of preventing excessive speculation, manipulation, squeezes and corners,[1302] while ensuring sufficient (in the view of the listing DCM) market liquidity for bona fide hedgers and ensuring that the price discovery function of the market is not disrupted.[1303]

Summary of Comments

MGEX contended that the proposed wheat position limit disparity (particularly in non-spot months) may inject significant instability into the market, as market participants will be unable to utilize time-tested risk management practices equally across the three contracts and have unintended negative market consequences resulting from hedgers and speculators limiting their activity (particularly spread trading) in markets with the lowest limits—or ceasing to trade in the lower-limit markets altogether.[1304]

MGEX was concerned that the proposed method inhibits growth in rapidly changing and expanding derivatives markets and will limit growth in the HRSW contract at a time when participation is increasing.[1305] MGEX asserted that the Proposed Rule has a disproportionate impact on HRSW market participants, given that MGEX HRSW has more large traders approaching the single month and all months combined limits than CBOT Wheat and KCBT Hard Winter Wheat despite the fact that the number of large traders approaching the Proposed Rule single month and all months combined limit levels stayed relatively constant among the three U.S. wheat contracts; MGEX also contended that price volatility or concentration in one contract may unduly affect the price of the others.[1306]

The Commission took concerns about wheat contract parity into account when preliminarily setting the spot month and non-spot month levels for the CBOT Wheat, KCBT Hard Winter Wheat and MGEX Hard Red Spring Wheat contracts. In that regard, as discussed below, the Commission is reproposing to maintaining the status quo for the non-spot month position limit levels for the KW and MWE core referenced futures contracts so that there will be partial wheat parity.[1307] The Commission has preliminarily determined not to raise the limit levels for KW and MWE to the limit level for W, as 32,800 contracts appears to be extraordinarily large in comparison to open interest in the KW and MWE markets, and the limit level for KW and MWE is already larger than a limit level based on the ''10, 2.5 percent'' formula. Even when relying on a single criterion, such as percentage of open interest, the Commission has historically recognized that there can ''result . . . a range of acceptable position limit levels.'' [1308]

ii. Softs

For the ''Softs''—agricultural contracts on cocoa, coffee, cotton, orange juice, sugar and live cattle—the Commission has preliminarily determined to set the initial speculative spot month position limit levels for the CC, KC, CT, OJ, SB, and SF [1309] core referenced futures contracts, based on the estimates of deliverable supply submitted by ICE,[1310] at 25 percent of estimated deliverable supply.[1311] As is evident from the table set forth in the discussion above, this also means that the Commission is reproposing initial speculative position limit levels that are significantly higher than the levels for these six contracts as proposed. As stated in the December 2013 Position Limits Proposal, the 25 percent formula is consistent with the longstanding acceptable practices for DCM core principle 5.[1312] The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is a reasonable ''prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity.'' [1313]

The Commission did not receive any estimate of deliverable supply for the CME (LC) core referenced futures contract from CME, nor did CME recommend any change in the limit level for LC. In the absence of any such update, the Commission is reproposing the initial speculative position limit level of 450 contracts as proposed. Of 616 reportable persons, the Commission's impact analysis did not reveal any unique person trading cash settled or physical delivery spot month contracts who would have held positions above this level for LC.

With respect to the IFUS CC, KC, CT, OJ, SB, and SF core referenced futures contracts, the Commission's impact analysis did not reveal any unique person trading cash settled spot month contracts who would have held positions above the initial levels that the Commission is adopting; as illustrated above. Rather, adopting lower levels would mostly have affected small numbers of traders in physical delivery contracts. Therefore, the Commission has preliminarily determined to accept ICE's recommendations.

iii. Metals

For the metals contracts, the Commission has preliminarily determined to set the initial speculative spot month position limit levels for GC, SI, and HG at the recommended levels submitted by CME,[1314] all of which are lower than 25 percent of estimated deliverable supply.[1315] In the case of GC and SI, this is a doubling of the current exchange-set limit levels.[1316] In the case

[1302] *Contra* CL–ISDA and SIFMA–59611 at 55 (proposed spot month limits ''are almost certainly far smaller than necessary to prevent corners or squeezes'').

[1303] December 2013 Position Limits Proposal, 78 FR 75729, Dec. 12, 2013.

[1304] CL–MGEX–59932 at 2.

[1305] CL–MGEX–60380 at 5.

[1306] CL–MGEX–59932 at 2. MGEX asserted that ''[w]ithout wheat contract parity—proven historically effective and efficient—inequities would be introduced into the marketplace that could well result in artificial market disruption through a lack of convergence, distorting the market and bringing no value to the price discovery process.'' Id.

[1307] Several commenters supported adopting equivalent non-spot month position limits for the three existing wheat referenced contracts traders. *E.g.,* CL–FIA–59595 at 4, 15; CL–CMC–60391 at 8; CL–CMC–60950 at 11; CL–CME–59718 at 44; CL–American Farm Bureau–59730 at 4; CL–MGEX–59932 at 2; CL–MGEX–60301 at 1; CL–MGEX–59610 at 2–3; CL–MGEX–60936 at 2–3; CL–NCFC–59942 at 6; CL–NGFA–59956 at 3.

[1308] Revision of Speculative Position Limits, 57 FR 12766, 12770 (Apr. 13, 1992). *See also* Revision of Speculative Position Limits and Associated Rules, 63 FR 38525, 38527 (July 17, 1998). *Cf.* December 2013 Position Limits Proposal, 78 FR 75729, Dec. 12, 2013 (there may be range of spot month limits that maximize policy objectives).

[1309] One commenter supported considering ''tropicals (sugar/coffee/cocoa) . . . separately from those agricultural crops produced in the US domestic market.'' CL–Thornton–59702 at 1; *see also* CL–Armajaro Asset Management–59729 at 1.

[1310] CL–CME–61007 at 5.

[1311] The Commission noted in the December 2013 Position Limits Proposal ''that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply.'' December 2013 Position Limits Proposal, 78 FR 75729, Dec. 12, 2013.

[1312] *Id.*

[1313] *Id.*

[1314] CL–CME–61007 at 5.

[1315] The Commission noted in the December 2013 Position Limits Proposal ''that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply.'' December 2013 Position Limits Proposal, 78 FR 75729, Dec. 12, 2013.

[1316] One commenter cautioned against raising limit levels for GC to 25 percent of deliverable supply, and expressed concern that higher federal

Continued

of HG, the initial level is the same as the existing DCM-set level for the core referenced futures contract, and lower than the level proposed. The Commission has also preliminarily determined to set the initial speculative spot month position limit level for PL at 100 contracts and PA at 500 contracts, which are the levels recommended by CME. In the case of PL and PA, the initial level is the same as the existing DCM-set level for the core referenced futures contract, and a decrease from the proposed levels of 500 and 650 contracts, respectively.

The Commission found varying numbers of traders in the GC, SI, PL, PA, and HG physical delivery contracts over the initial levels, but the numbers were very small except for PA. Because the levels that the Commission is adopting for PL, PA, and HG maintain the status quo for those contracts, the Commission assumes that some or possibly all of such traders over the initial levels are hedgers. The Commission reiterates the discussion above regarding agricultural contracts: hedgers may have to file for an applicable exemption, but hedgers with bona fide hedging positions should not have to reduce their positions as a result of speculative position limits per se. Thus, the number of traders in the metals physical delivery contracts who would need to reduce speculative positions below the initial limit levels should be lower than the numbers indicated by the impact analysis. And, while setting initial speculative levels at 25 percent of deliverable supply would, based upon logic and the Commission's impact analysis, affect fewer traders in the metals physical delivery contracts, consistent with its statement in the December 2013 Position Limits Proposal, the Commission believes that setting these lower levels of initial spot month limits will serve the objectives of preventing excessive speculation, manipulation, squeezes and corners,[1317] while ensuring sufficient market liquidity for bona fide hedgers in the view of the listing DCM and ensuring that the price discovery function of the market is not disrupted.

The Commission's impact analysis reveals no unique persons in the SI and HG cash settled referenced contracts, and very few unique persons in the cash settled GC referenced contract, whose positions would have exceeded the initial limit levels for those contracts. Based on the Commission's impact analysis, preliminarily setting the initial federal spot month limit levels for PL and PA at the lower levels recommended by CME impact a few traders in PL and PA cash settled contracts.

The Commission has considered the numbers of unique persons that would have been impacted by each of the cash-settled and physical-delivery spot month limits in the PL and PA referenced contracts. The Commission notes those limits would have impacted more traders in the physical-delivery PA contract than in the cash-settled PA contract, while fewer traders would have been impacted in the physical-delivery PL contract than in the cash-settled PL contract, albeit in any event few traders would have been impacted.[1318] The Commission also considered the distribution of those cash-settled traders over time; as reflected in the open interest table discussed above regarding setting non-spot month limits, it can be readily observed that open interest in each of the cash-settled PL and PA referenced contracts was markedly lower in the second 12-month period (year 2) than in the prior 12-month period (year 1). Accordingly, the Commission preliminarily concludes that the CME recommended levels in PL and PA referenced contracts are acceptable.

iv. Energy

For the energy contracts, the Commission has preliminarily determined to set the initial speculative spot month position limit levels for the NG, CL, HO, and RB core referenced futures contracts at 25 percent of estimated deliverable supply which, in the case of CL, HO, and RB is higher than the levels recommended by CME.[1319] As is evident from the table set forth above, this also means that the Commission is adopting initial speculative position limit levels that are significantly higher than the proposed levels for these four contracts. As stated in the December 2013 Position Limits Proposal, the 25 percent formula is consistent with the longstanding acceptable practices for DCM core principle 5.[1320] The Commission continues to believe, based on its experience and expertise, that the 25 percent formula is a reasonable "prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity."[1321]

The levels that CME recommended for NG, CL, HO, and RB are twice the existing exchange-set spot month limit levels. Nevertheless, the Commission is proposing to set the initial speculative spot month limit levels at 25 percent of deliverable supply for CL, HO, and RB because the higher levels will lessen the impact on a number of traders in both cash settled and physical delivery contracts. For NG, the Commission is proposing to set the physical delivery limit at 25 percent of deliverable supply, as recommended by CME; the Commission is also proposing to set a conditional spot month limit exemption of 10,000 for NG only.[1322] This exemption would to some degree maintain the status quo in natural gas because each of the NYMEX and ICE cash settled natural gas contracts, which settle to the final settlement price of the physical delivery contract, include a conditional spot month limit exemption of 5,000 contracts (for a total of 10,000 contracts).[1323] However, neither

limits would incentivize exchanges to raise their own limits. CL–WGC–59558 at 2–4.

[1317] *Contra* CL–ISDA and SIFMA–59611 at 55 (proposed spot month limits "are almost certainly far smaller than necessary to prevent corners or squeezes").

[1318] In this regard, the Commission notes that CME did not have access to the Commission's impact analysis when CME recommended levels for its physical-delivery core referenced futures contracts.

[1319] CL–CME–61007 at 5. One commenter opined that 25 percent of deliverable supply would result in a limit level that is too high for natural gas, and suggest 5 percent as an alternative that "would provide ample liquidity and significantly reduce the potential for excessive speculation." CL–IECA–59964 at 3.

[1320] December 2013 Position Limits Proposal, 78 FR at 75729.

[1321] *Id.*

[1322] This exemption for up to 10,000 contracts would be five times the spot month limit of 2,000 contracts, consistent with the December 2013 Position Limits Proposal. *See* December 2013 Position Limits Proposal, 78 FR at 75736–8. Under vacated § 151.4, the Commission would have applied a spot-month position limit for cash-settled contracts in natural gas at a level of five times the level of the limit for the physical delivery core referenced futures contract. *See* Position Limits for Futures and Swaps, 76 FR 71626, 71687 (Nov. 18, 2011).

[1323] Some commenters supported retaining a conditional spot month limit in natural gas. *E.g.,* CL–ICE–60929 at 12 ("Any changes to the current terms of the Conditional Limit would disrupt present market practice for no apparent reason. Furthermore, changing the limits for cash-settled contracts would be a significant departure from current rules, which have wide support from the broader market as evidenced by multiple public comments supporting no or higher cash-settled limits."). *Contra* CL–Levin–59637 at 7 ("The proposed higher limit for cash settled contracts is ill-advised. It would not only raise the affected position limits to levels where they would be effectively meaningless, it would also introduce market distortions favoring certain contracts and certain exchanges over others, and potentially disrupt important markets, including the U.S. natural gas market that is key to U.S. manufacturing."); CL–Public Citizen–59648 at 5 ("Congress, in allowing an exemption for bona fide hedgers but not pure speculators, could not possibly have intended for the Commission to implement position limits that allow market speculators to hold 125 percent of the estimated deliverable supply. Once again, while this

NYMEX and ICE penultimate contracts, which settle to the daily settlement price on the next to last trading day of the physical delivery contract, nor OTC swaps, are currently subject to any spot month position limit. In addition, the Commission's impact analysis suggests that a conditional spot month limit exemption greater than 25 percent of deliverable supply for cash settled contracts in CL, HO, and RB would potentially benefit only a few traders, while a conditional spot month limit exemption for cash settled contracts in NG would potentially benefit many traders.

Summary of Comments

One economist estimated, using various stated assumptions but not an empirical model, that position limits at the proposed level would cost American consumers roughly $100 billion, based on an increase of $15 per barrel of oil in 2013.[1324] This economist also asserted that position limits (or the mere possibility that such limits may be tightened) would discourage passive investors from the commodity derivative sector and, thus, would adversely affect investment in the oil and gas industry by raising the cost of hedging for exploration firms.[1325] This economist believes that position limits would increase costs whether or not the position limits actually restrict a market participant's trading, because compliance costs such as recordkeeping and reporting would modestly increase the costs of drilling associated with the regulations and discourage market entry.[1326]

The Commission believes that positon limits are unlikely to deter passive investors because they have the opportunity to invest in commodities through collective investment vehicles such as exchange traded funds (ETFs) or commodity pools. For example, if a position limit would become binding on a particular ETF, market demand would be expected to encourage another party to create a new ETF that could replicate a similar strategy to the previous one, which would allow the passive investment to continue.

Regarding the forms and application process to obtain a § 150.11 exemption, the Commission believes that the requirements are not as onerous as the commenter fears. In this regard, an oil exploration firm would likely be able to qualify for an anticipatory hedge exemption. The Commission believes the costs of this process will have a negligible impact on the oil exploration firm's costs of hedging.

Another commenter was concerned that position limits set so low as to diminish speculative capacity in U.S. energy markets will distort prices, increase volatility, increase option premiums and increase the cost of hedging.[1327]

The Commission agrees with the commenter that setting position limits too low could distort prices, increase volatility, increase option premiums and increase the cost of hedging. The Commission believes it has preliminarily set the limit levels sufficiently high so that they will not have a significant adverse impact on the efficiency and price discovery functions of the core referenced futures contracts.

In response to 2016 Supplemental Position Limits Proposal RFC 55, a commenter pointed out that the Commission's Division of Enforcement has numerous tools at its disposal, and the exchanges have position step-down and exemption revocation authorization at their disposal, to enforce market manipulation prohibitions.[1328]

The Commission agrees with the commenter, but notes that the Division of Enforcement's tools can be used only after market manipulation or other adverse consequences have already occurred. As for the tools at the disposal of the exchanges to reduce a market participant's position or deter it from attempting to manipulate the market, the Commission considered these points when preliminarily setting the federal position limits at levels that may be higher than the Commission would otherwise consider, and in some cases higher than the levels suggested by the exchanges.

h. Method for Setting Single-Month and All-Months Combined Position Limit Levels

As discussed in more detail above, the Commission has preliminarily determined to use the futures position limits formula, 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter (*i.e.,* the ''10, 2.5 percent'' formula), to set non-spot month speculative position limits for referenced contracts. This was the method proposed in the December 2013 Position Limits Proposal. The Commission used a combination of data on open interest in physical commodity futures and options from the relevant exchanges and adjusted part 20 swaps data covering a total of 24 months, rather than two calendar years of data in setting the initial non-spot month position limit levels.[1329] The Commission continues to believe that ''the non-spot month position limits would restrict the market power of a speculator that could otherwise be used to cause unwarranted price movements.'' [1330] In preliminarily determining the appropriate non-spot month limit levels the Commission considered the results of its impact analysis of different non-spot month limit levels to discern how many market participants would be affected by different limit levels.

In addition, the Commission believes that it is beneficial to update the non-spot month position limits based on recent position data, such as Part 20 data. The Commission also proposes to retain the option to maintain the existing position limit levels if it believes there is good reason to deviate from the formulas. This could be the case if, for example, the Commission has experience at a level higher the amount given in the formula and believes that the higher level is appropriate, because the Commission has not observed any problems at the higher level. Furthermore, the

exception for cash-settled contracts would avoid market manipulations such as corners and squeezes (since cash-settled contracts give no direct control over a commodity), it does not address the problem of undue speculative influence on futures prices.''). One commenter urged the Commission ''to eliminate the requirement that traders hold no physical-delivery position in order to qualify for the conditional spot-month limit exemption'' in order to maintain liquidity in the NYMEX natural gas futures contract. CL–BG–59656 at 6–7. *See also* CL–APGA at 8 (the Commission should condition the spot month limit exemption for cash settled natural gas contracts by precluding a trader from holding more than one quarter of the deliverable supply in physical inventory). *Cf.* CL–CME–59971 at 3 (eliminate the five times natural gas limit because it ''encourages participants to depart from, or refrain from establishing positions in, the primary physical delivery contract market and instead opt for the cash-settled derivative contract market, especially during the last three trading days when the five times limit applies. By encouraging departure from the primary contract market, the five times limit encourages a process of de-liquefying the benchmark physically delivered futures market and directly affects the determination of the final settlement price for the NYMEX NG contract- the very same price that a position representing five times the physical limit will settle against.'').

[1324] CL–ISDA/SIFMA–59611 at Annex A at 3. The economist noted that he used a ''methodology for predicting changes in crude oil prices linked to global inventory levels.'' *Id.*

[1325] *Id.* at 9.

[1326] *Id.* at 10.

[1327] CL–Vectra–60369 at 1–2. The commenter was particularly concerned that given the ''dearth of speculative capacity'' in many energy contracts, hedging costs would increase and be passed on to consumers. *Id.*

[1328] CL–IECAssn–60949 at 23.

[1329] Commission staff analyzed and evaluated the quality of part 20 data for the period from July 1, 2014 through June 30, 2015 (''Year 1''), and the period from July 1, 2015 through June 30, 2016 (''Year 2'').

[1330] December 2013 Position Limits Proposal, 78 FR 75730, Dec. 12, 2013.

Commission has preliminarily determined that it will fix subsequent levels no less frequently than every two calendar years. This conclusion is reproposed in § 150.2(e)(2).

i. CME and MGEX Agricultural Contracts

The Commission is reproposing non-spot month speculative position limit levels for the Corn (C), Oats (O), Rough Rice (RR), Soybeans (S), Soybean Meal (SM), Soybean Oil (SO), and Wheat (W) core referenced futures contracts based on the 10, 2.5 percent open interest formula.[1331] Based on the Commission's experience since 2011 with non-spot month speculative position limit levels for the Hard Red Winter Wheat (KW) and Hard Red Spring Wheat (MWE) core referenced futures contracts, the Commission is proposing to maintain the limit levels for those two commodities at the current level of 12,000 contracts rather than reducing them to the lower levels that would result from applying the 10, 2.5 percent formula.[1332]

Maintaining the status quo for the non-spot month limit levels for the KW and MWE core referenced futures contracts means there will be partial wheat parity.[1333] The Commission has preliminarily determined not to raise the limit levels for KW and MWE to the limit level for W, as 32,800 contracts appears to be extraordinarily large in comparison to open interest in the KW and MWE markets, and the limit level for KW and MWE is already larger than a limit level based on the 10, 2.5 percent formula. Even when relying on a single criterion, such as percentage of open interest, the Commission has historically recognized that there can ''result . . . a range of acceptable position limit levels.'' [1334]

ii. Softs

The Commission is reproposing non-spot month speculative position limit levels for the CC, KC, CT, OJ, SB, SF and LC [1335] core referenced futures contracts based on the 10, 2.5 percent open interest formula.

iii. Metals

The Commission is reproposing non-spot month speculative position limit levels for the GC, SI, PL, PA, and HG core referenced futures contracts based on the 10, 2.5 percent open interest formula.[1336]

iv. Energy

The Commission is reproposing non-spot month speculative position limit levels for the NG, CL, HO, and RB core referenced futures contracts based on the 10, 2.5 percent open interest formula.[1337]

Summary of Comments

A commenter claimed that the proposed rule did not address the price impact of speculative money flows into commodities, and that if the Commission is concerned with the types of manipulative activities shown by the Hunt Brothers and Amaranth cases, there are ''targeted and less burdensome and complex ways to prevent such a manipulative harm'' and the inclusion of position limits on swaps is invalid because swaps cannot be used to cause this detrimental impact.[1338]

The Commission disagrees, and notes that swaps can be used to cause detrimental impact, as occurred in the Amaranth case. Amaranth entered into swaps on an exempt commercial market that were directly linked to a core reference futures contract. So to ignore swaps would not adequately address the issue that position limits are intended to address.

i. § 150.2(f)–(g) Pre-Existing Positions and Positions on Foreign Boards of Trade

i. Summary of Changes

The Commission is reproposing new § 150.2(f)(2) to exempt from federal non-spot-month speculative position limits any referenced contract position acquired by a person in good faith prior to the effective date of such limit, provided that the pre-existing position is attributed to the person if such person's position is increased after the effective date of such limit.[1339]

Finally, reproposed § 150.2(g) will apply position limits to positions on FBOTs provided that positions are held in referenced contracts that settle to a referenced contract and the FBOT allows direct access to its trading system for participants located in the United States.

[1331] One commenter expressed concern ''that proposed all-months-combined speculative position limits based on open interest levels is not necessarily the appropriate methodology and could lead to contract performance problems.'' This commenter urged ''that all-months-combined limits be structured to 'telescope' smoothly down to legacy spot-month limits in order to ensure continued convergence.'' CL–National Grain and Feed Association–60312 at 4.

[1332] One commenter supported a higher limit for KW than proposed to promote growth and to enable liquidity for Kansas City hedgers who often use the Chicago market. CL–Citadel–59717 at 8. Another commenter supported setting ''a non-spot month and combined position limit of no less than 12,000 for all three wheat contracts.'' CL–MGEX–60301 at 1. *Contra* CL–Occupy the SEC–59972 at 7–8 (commending ''the somewhat more restrictive limitations . . . on wheat trading'').

[1333] Several commenters supported adopting equivalent non-spot month position limits for the three existing wheat referenced contracts traders. *See, e.g.,* CL–FIA–59595 at 4, 15; CL–CMC–60391 at 8; CL–CMC–60950 at 11; CL–CME–59718 at 44; CL–American Farm Bureau–59730 at 4; CL–MGEX–59932 at 2; CL–MGEX–60301 at 1; CL–MGEX–59610 at 2–3; CL–MGEX–60936 at 2–3; CL–NCFC–59942 at 6; CL–NGFA–59956 at 3.

[1334] Revision of Speculative Position Limits, 57 FR 12770, 12766, Apr. 13, 1992. *See also* Revision of Speculative Position Limits and Associated Rules, 63 FR 38525, 38527, Jul. 17, 1998. *Cf.* December 2013 Position Limits Proposal (there may be range of spot month limits that maximize policy objectives), 78 FR 75729, Dec. 12, 2013.

[1335] One commenter expressed concern that too high non-spot month limit levels could lead to a repeat of convergence problems experienced by certain contracts and that ''the imposition of all months combined limits in continuously produced non-storable commodities such as livestock . . . will reduce the liquidity needed by hedgers in deferred months who often manage their risk using strips comprised of multiple contract months.'' CL–American Farm Bureau Federation–59730 at 3–4. One commenter requested that the Commission withdraw its proposal regarding non-spot month limits, citing, among other things, the Commission's previous approval of exchange rules lifting all-months-combined limits for live cattle contracts ''to ensure necessary deferred month liquidity.'' CL–CME–59718 at 4. Another commenter expressed concern that non-spot month limits would have a negative impact on live cattle market liquidity. CL–''CMC'')–59634 at 12–13. *See also* CL–CME–59718 at 41.

[1336] One commenter was concerned that applying the 10, 2.5 percent formula to open interest for gold would result in a lower non-spot month limit level than the spot month limit level, and urged the Commission to ''apply a consistent methodology to both spot and non-spot months.'' CL–WGC–59558 at 5.

[1337] One commenter suggested deriving non-spot month limit levels for the CL, HO, and RB referenced contracts from the usage ratios for US crude oil and oil products rather than open interest and expressed concern that ''unnecessarily low limits will hamper legitimate hedging activity.'' CL–Citadel–59717 at 7–8. Another commenter suggested setting limit levels based on customary position size. CL–APGA–59722 at 6. This commenter also supported setting the single month limit at two-thirds of the all months combined limit in order to relieve market congestion as traders exit or roll out of the next to expire month into the spot month. CL–APGA–59722 at 7.

[1338] CL–COPE–59662 at 5. The commenter asserted that the Commission's position limits proposal was based solely on concerns about attempts to manipulate the price discovery contract or hoard physical inventory because the Commission highlighted only the Amaranth and Hunt Brothers cases. *Id.*

[1339] *See also* the definition of the term ''Pre-existing position'' adopted in § 150.1. Such pre-existing positions that are in excess of the position limits will not cause the trader to be in violation based solely on those positions. To the extent a trader's pre-existing positions would cause the trader to exceed the non-spot-month limit, the trader could not increase the directional position that caused the positions to exceed the limit until the trader reduces the positions to below the position limit. As such, persons who established a net position below the speculative limit prior to the enactment of a regulation would be permitted to acquire new positions, but the total size of the pre-existing and new positions may not exceed the applicable limit.

ii. Baseline

The baseline is the current § 150.2 of the Commission's regulations.

iii. Benefits and Costs

The Commission exempted certain pre-existing positions from position limits under new § 150.2(f) as part of its grandfathering provisions.[1340] Essentially, this means only futures contracts initially will be subject to non-spot month position limits, as well as swaps entered after the compliance date. The Commission notes that a pre-existing position in a futures contract also would not be a violation of a non-spot month limit, but, rather, would be grandfathered, as discussed under § 150.2(f)(2). Therefore, market participants can more easily adjust their existing positions to the new federal position limit regime. Market participants will however incur costs for newly established positions in the relevant swaps after the compliance date, such as those discussed above such as the costs of monitoring their positions with respect to any applicable federal position limit and applying for exemptions should they need to exceed those limits.

New § 150.2(g), extends the federal position limits to a person who holds positions in referenced contracts on an FBOT that settle against any price of one or more contracts listed for trading on a DCM or SEF that is a trading facility, if the FBOT makes available such referenced contracts to its members or other participants located in the United States through direct access to its electronic trading and ordering matching system. In that regard, § 150.2(g) is consistent with CEA section 4a(a)(6)(B), which directs the Commission to apply aggregate position limits to FBOT linked, direct-access contracts.[1341]

Regulations 150.2(f) and (g) implement statutory directives in CEA section 4a(b)(2) and CEA section 4a(a)(6)(B), respectively, and are not acts of the Commission's discretion. Thus, a consideration of costs and benefits of these provisions is not required under CEA section 15(a).

iv. Summary of Comments

No commenter addressed the costs or benefits of § 150.2(f) and (g).

5. Section 150.3—Exemptions From Federal Position Limits

As discussed above, the Commission has provided a general discussion of reproposed § 150.3 and highlighted the rule-text changes that it has made after several rounds of proposed rulemakings and responsive comments. In this release, the Commission has reproposed paragraphs (a), (b), (d), (e), (g) and (h) as proposed in December 2013.[1342] The Commission has amended the text in proposed § 150.3(c) and (f). In the December 2013 proposal, the Commission also discussed the costs and benefits of these two paragraphs, as well as, paragraphs (a), (b), (d), (e), (g) and (h).[1343]

In the June 2016 Supplemental Position Limits Proposal, the Commission changed proposed paragraph (a). The Commission also explained in the 2016 cost-benefit section that the changes it was making to proposed § 150.3(a)(1) should be read in conjunction with proposed §§ 150.9, 150.10, and 150.11.[1344] Between the June 2016 changes to §§ 150.9, 150.10, and 150.11 and now, the Commission has not made additional changes to § 150.3(a)(1). In general, the proposed changes made in the June 2016 Supplemental Position Limits Proposal detailed processes that exchanges could offer to market participants who seek exemptions for positions to exchange-set and federal position limits.

In this section, the Commission summarizes reproposed § 150.3, and, thereafter, discusses the related benefits and costs of the final rules.

a. Section 150.3 Rule Summaries

i. Section 150.3(a)—Bona Fide Hedging Exemption

Among other things, reproposed § 150.3(a)(1)(i) codifies the statutory requirement that bona fide hedging positions be exempt from federal position limits. Reproposed § 150.3(a)(2) authorizes other exemptions from position limits for financial-distress positions, conditional spot-month limit positions, spread positions, and other risk-reduction practices.

ii. Section 150.3(b)—Financial Distress Exemption

Reproposed § 150.3(b) provides the means for market participants to request relief from applicable position limits during certain financial distress circumstances, including the default of a customer, affiliate, or acquisition target of the requesting entity, that may require an entity to assume in short order the positions of another entity.

iii. Section 150.3(c)—Conditional Spot-Month Position Limit Exemption

Reproposed § 150.3(c) provides a conditional spot-month limit exemption that permits traders to acquire positions for natural gas up to 10,000 contracts if such positions are exclusively in cash-settled contracts. The natural-gas conditional exemption would not be available to traders who hold or control positions in the spot-month physical-delivery referenced contract in order to reduce the risk that traders with large positions in cash-settled contracts would attempt to distort the physical-delivery price to benefit such positions.

iv. Section 150.3(d)—Pre-Enactment and Transition Period Swaps Exemption

Reproposed § 150.3(d) provides an exemption from federal position limits for swaps entered into before July 21, 2010 (the date of the enactment of the Dodd-Frank Act), the terms of which have not expired as of that date, and for swaps entered into during the period commencing July 22, 2010, the terms of which have not expired as of that date, and ending 60 days after the publication of final rule § 150.3—that is, its effective date.

v. Section 150.3(e)—Other Exemptions

Reproposed § 150.3(e) explains that a market participant engaged in risk-reducing practices that are not enumerated in the revised definition of bona fide hedging in reproposed § 150.1 may use two different methods to apply to the Commission for relief from federal position limits. The market participant may request an interpretative letter from Commission staff pursuant to § 140.9 concerning the applicability of the bona fide hedging position exemption, or may seek exemptive relief from the Commission under CEA section 4a(a)(7) of the Act.

vi. Section 150.3(f)—Previously Granted Exemptions

After reviewing comments, the Commission has preliminarily determined it is best to change the § 150.3(f) text proposed in December 2013. The amended text broadens exemption relief to pre-existing financial instruments that are within current § 1.47's scope, and to exchange-granted non-enumerated exemptions in non-legacy commodity derivatives

[1340] The Commission excluded from position limits ''pre-enactment swaps'' and ''transition period swaps,'' in its grandfathering provisions, as discussed above.

[1341] *See supra* discussion of CEA section 4a(a)(6) concerning aggregate position limits and the treatment of FBOT contracts.

[1342] December 2013 Proposal, 78 FR 75828, Dec. 12, 2013.

[1343] Reproposed § 150.3 has ten paragraphs: (a) through (j). Reproposed § 150.3(i) (aggregation of accounts) and (j) (delegation of authority to DMO Director) do not have cost-benefit implications, and are not discussed in this section.

[1344] For a fuller discussion of all the changes to reproposed § 150.3, *see* Section III.C., above.

outside of the spot month with other conditions.

vii. Section 150.3(g) and (h)—Recordkeeping

Reproposed § 150.3(g)(1) specifies recordkeeping requirements for market participants who claim any exemption in final § 150.3. Market participants claiming exemptions under reproposed § 150.3 would need to maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions. Reproposed § 150.3(g)(2) requires market participants seeking to rely upon the pass-through swap offset exemption to obtain a representation from its counterparty and keep that representation on file. Similarly, reproposed § 150.3(g)(3) requires a market participant who makes such a representation to maintain records supporting the representation. Under reproposed § 150.3(h), all market participants would need to make such books and records available to the Commission upon request, which would preserve the ''call for information'' rule set forth in current § 150.3(b).

b. Baseline

The baseline is the current § 150.3 of the Commission's regulations.

c. Benefits and Discussion of Comments

i. Section 150.3(a)—Positions Which May Exceed Limits

As explained in the December 2013 Supplemental Position Limits Proposal, § 150.3 works with §§ 150.9, 150.10, and § 150.11. All of these rules operate together within the broader position-limits regulatory regime and provide significant benefits, such as regulatory certainty, consistency, and transparency. As such, the benefits of reproposed § 150.3 are discussed in the cost-benefit sections related to reproposed §§ 150.9, 150.10, and 150.11.

ii. Section 150.3(b)—Financial Distress Exemption

The Commission continues to believe that by codifying historical practices of temporarily lifting position limit restrictions several benefits will ensue. Reproposed § 150.3 ensures the orderly transfers of positions from financially distressed firms to financially secure firms or facilitating other necessary remediation measures during times of market stress. Because of this Reproposal, the Commission believes it is less likely that positions will be prematurely or unnecessarily liquidated, and it is less likely that the price-discovery function of markets will be harmed.

iii. Section 150.3(c)—Conditional Spot Month Limit Exemption

In the December 2013 proposal, the Commission proposed § 150.3(c) that provided speculators with an opportunity to maintain relatively large positions in cash-settled contracts up to but no greater than 125 percent of the spot-month limit. The Commission explained that by prohibiting speculators using the exemption in the cash-settled contract from trading in the spot-month of the physical-delivery contract, the final rules should further protect the delivery and settlement process, and reduce the ability for a trader with a large cash settled contract position to attempt to manipulate the physical-delivery contract price in order to benefit his position. The Commission invited comment on this general exemption. Upon review of the comment letters, the Commission has preliminarily determined to restrict the conditional-spot-month-limit exemption to natural gas cash-settled referenced contracts. The reasons for this change are explained above.

iv. Section 150.3(d)—Pre-Enactment and Transition Period Swaps Exemption

The pre-existing swaps exemption in reproposed§ 150.3(d) is consistent with CEA section 4a(b)(2). The exemption promotes the smooth transition for previously unregulated swaps markets to swaps markets that will be subjected to position limits compliance. In addition, allowing netting with pre-enactment and transition swaps provides flexibility where possible in order to lessen the impact of the regime on entities with swap positions.

v. Section 150.3(e)—Other Exemptions

Reproposed § 150.3(e) is essentially clarifying and organizational in nature. For the most part, the Reproposal provides the benefit of regulatory certainty for those granted exemptions.

vi. Section 150.3(f)—Other Exemptions and Previously Granted Exemptions

As explained above, the Commission has expanded the scope of reproposed § 150.3(f) exemptive relief. In December 2013, the Commission discussed the benefits of proposed § 150.3(f), and believed that the benefits centered on regulatory certainty. Now that the Commission has increased the types of financial instruments that may be exempted from position limits under this rule, the Commission believes that it has reduced the likelihood of market disruption because of forced and unexpected liquidations. In other words, the Commission believes that reproposed § 150.3(f) will support market stability.

vii. Section 150.3(g) and (h)—Recordkeeping and Special Calls

The Commission believes that the reproposed § 150.3(g)'s recordkeeping requirements are critical to the Commission's ability to effectively monitor compliance with exemption eligibility standards. Because the Commission will have access to records under § 150.3(h), it will be able to assess whether exemptions are susceptible to abuse and to support the position-limits regime, which, among other things, aims to prevent excessive speculation and/or market manipulation.

d. Costs and Discussion of Comments

As the Commission expressed in the December 2013 Supplemental Position Limits Proposal, the exemptions under reproposed § 150.3 do not increase the costs of complying with position limits. The Commission continues to believe that many costs will likely decrease by the Commission providing for relief from position limits in certain situations. The reproposed § 150.3 exemptions are elective, so no entity is required to assert an exemption if it determines the costs of doing so do not justify the potential benefit resulting from the exemption. While the Commission appreciates that there will be compliance duties connected to the reproposed § 150.3, the Commission does not anticipate the costs of obtaining any of the exemptions to be overly burdensome.[1345]

i. Section 150.3(a)—Positions Which May Exceed Limits

Because of the proposed changes in the June 2016 Supplemental Position Limits Proposal, reproposed § 150.3(a) must be read with reproposed §§ 150.9, 150.10, and § 150.11. Moreover, the costs of reproposed § 150.3 are linked to reproposed §§ 150.9, 150.10, and § 150.11, and are discussed more fully below.

ii. Section 150.3(b)—Financial Distress Exemption

The Commission's view on the costs related to the financial distress exemption under reproposed § 150.3(b) remains unchanged. The costs are likely to be minimal. Market participants who voluntarily employ these exemptions will incur filing and recordkeeping

[1345] *See, e.g.,* the discussion of costs related to non-enumerated bona fide hedging position determinations, anticipatory bona fide hedge filings, and spread exemptions below.

costs. As explained in the 2013 proposal, the Commission cannot accurately estimate how often this exemption may be invoked because emergency or distressed market situations are unpredictable and dependent on a variety of firm- and market-specific factors as well as general macroeconomic indicators. The Commission, nevertheless, believes that emergency or distressed market situations that might trigger the need for this exemption will be infrequent. The Commission continues to assume that reproposed § 150.3(b) will add transparency to the process. Finally, the Commission believes that in the case that one firm is assuming the positions of a financially distressed firm, the costs of claiming the exemption would be incidental to the costs of assuming the position.

iii. Section 150.3(c)—Conditional Spot Month Limit Exemption

A natural gas market participant that elects to exercise this exemption will incur certain direct costs to do so. The natural gas market participant must file Form 504 in accordance with requirements listed in reproposed § 19.01. The Commission does not believe that there will be additional costs, or at least not significant costs, because exchanges already have the exemption. Given that there has been experience with this type of exemption for natural gas market participants,[1346] the Commission does not believe that liquidity, in the aggregate (across the core referenced futures contract and referenced contracts) will be adversely impacted.[1347] By retaining the exemption for natural gas contracts, the Commission has heeded commenters concerns about disrupting market practices and harming liquidity in the cash market, thus increasing the cost of hedging and possibly preventing convergence between the physical-delivery futures and cash markets.

iv. Section 150.3(d)—Pre-Enactment and Transition Period Swaps Exemption

The exemption offered in reproposed § 150.3(d) is self-executing and will not require a market participant to file for relief. Nevertheless, as explained in the December 2013 proposal, a market participant may incur costs to identify positions eligible for the exemption and to determine if that position is to be netted with post-enactment swaps for purposes of complying with a non-spot-month position limit. The Commission believes these costs will not be overly burdensome, and notes that market participants who assume such costs do so voluntarily.

v. Section 150.3(e)—Other Exemptions and Previously Granted Exemptions

Under the reproposed § 150.3(e), market participants electing to seek an exemption other than those specifically enumerated, will incur certain direct costs to do so. The Commission discussed the expected costs in the December 2013 proposal and continues to believe that the same costs will arise should market participants elect exemptive relief under reproposed § 150.3(e). As explained in the December 2013 proposal, market participants will incur costs related to petitioning the Commission under § 140.99 of the Commission's regulations or under CEA section 4a(a)(7). There also will be recordkeeping costs for those market participants who elect to pursue a § 150.3(e) exemption. The Commission believes that these costs will be minimal, as participants already maintain books and records under a variety of other Commission regulations and as the information required in these sections is likely already being maintained. The Commission has estimated the costs entities might incur and discussed those costs in the PRA section of this release.

vi. Section 150.3(f)—Previously Granted Exemptions

Market participants who had previously relied upon the exemptions granted under current § 1.47 will be able to continue to rely on such exemptions for existing positions under reproposed § 150.3(f). Between the December 2013 proposal and now, the Commission has determined to expand the relief in reproposed § 150.3(f). As more fully discussed above, the Commission amended the regulatory text so that previously-granted exemptions may apply to pre-existing financial instruments, rather than only to pre-existing swaps, and to exchange-granted, non-enumerated exemptions in non-legacy commodity derivatives outside of the spot month, with other conditions. The Commission believes that there will be recordkeeping costs but there also will be cost-savings in the form of market stability because market participants will not be required to liquidate positions prematurely, and the relief covers financial instruments not just swaps.

vii. Section 150.3(g) and (h)—Recordkeeping and Special Calls

Under reproposed § 150.3(g) and (h), the costs related to maintaining and producing records will be minimal because, under most circumstances, market participants already maintain books and records in compliance with Commission regulations and as part of prudent accounting and risk management policies and procedures. The Commission has estimated the costs entities might incur and discussed those costs in the PRA section of this release.

6. Section 150.5—Exemptions From Exchange-Set Position Limits

The Dodd-Frank Act scaled back the discretion afforded DCMs for establishing position limits under the earlier CFMA amendments. Specifically, among other things, the Dodd-Frank Act: (1) Amended DCM core principle 5 to require that, with respect to contracts subject to a position limit set by the Commission under CEA section 4a, a DCM must set limits no higher than those prescribed by the Commission;[1348] and (2) added parallel core principle obligations on newly-authorized SEFs, including SEF core principle 6 regarding the establishment of position limits.[1349]

a. Rule Summary

In light of these Dodd-Frank Act statutory amendments, the Commission has adopted § 150.5 to specify certain requirements and guidance for DCMs and SEFs establishing exchange-set limits.

Specifically, § 150.5(a)(1) requires that DCMs and SEFs set position limits for commodity derivative contracts, subject to federal position limits, at a level not higher than the Commission's levels specified in § 150.2. In addition, exchanges with cash-settled contracts price-linked to contracts subject to federal limits must also adopt limit levels not higher than federal position limits.

Further, § 150.5(a)(5) requires for all contracts subject to federal speculative limits, and §§ 150.5(b)(8) and 150.5(c)(8) suggest for other contracts not subject to federal speculative limits, that designated contract markets and swap execution facilities adopt aggregation rules that conform to § 150.4. Regulation § 150.5(a)(2)(i) requires for all contracts subject to federal speculative limits, and

[1346] CL–ICE–59962 at 6–7 (commenter argued that the conditional limit for natural gas ''has had no adverse consequences with supply constraints and underlying physical delivery contracts.'')

[1347] CL–ICE–59966 at 4–5, CL–ICE–59962 at 5, and CL–IECAssn–59679 at 30.

[1348] Dodd-Frank Act section 735(b). CEA section 4a(e), effective prior to, and not amended by, the Dodd-Frank Act, likewise provides that position limits fixed by a board of trade not exceed federal limits. 7 U.S.C. 6a(e).

[1349] Dodd-Frank Act section 733 (adding CEA section 5h; 7 U.S.C. 7b–3).

regulations §§ 150.5(b)(5)(i)(A) and (c)(5)(1) suggest for other contracts not subject to federal speculative limits, that exchanges conform their bona fide hedging exemption rules to the § 150.1 definition of bona fide hedging position.

Regulation § 150.5(a)(2)(ii) requires, and §§ 150.5(b)(5)(iii) and (c)(5)(iii) suggest that exchanges condition any exemptive relief from federal or exchange-set position limits on an application from the trader. And, if granted an exemption, such trader must reapply for such exemption at least on an annual basis. As noted *supra,* the Commission understands that requiring traders to apply for exemptive relief comports with existing DCM practice; thus, the Commission anticipates that the codification of this requirement will have the practical effect of incrementally increasing, rather than creating, the burden of applying for such exemptive relief.

Finally, under § 150.5(b) and § 150.5(c) for commodity derivative contracts not subject to federal position limits, the Commission provides guidance for exchanges to use their reasonable discretion to set exchange position limits and exempt market participants from exchange-set limits. This includes, under § 150.5(b), commodity derivative contracts in a physical commodity as defined in § 150.1, and, under § 150.5(c), excluded commodity derivative contracts as defined in section 1a(19) of the Act.

b. Baseline

The baseline is the current reasonable discretion afforded to exchanges to exempt market participant from their exchange-set position limits.

c. Benefits and Costs

Functioning as an integrated component within the broader position limits regulatory regime, the Commission expects the proposed changes to § 150.5 will further the four objectives outlined in CEA section 4a(a)(3).[1350] The Commission has endeavored to preserve the status quo baseline within the framework of establishing new federal position limits.

The reproposed regulations require that exchange-set limits employ aggregation policies that conform to the Commission's aggregation policy for contracts that are subject to federal limits under § 150.2, thus harmonizing aggregation rules for all federal and exchange-set speculative position limits. For contracts subject to federal speculative position limits under § 150.2, the Commission anticipates that a harmonized approach to aggregation will prevent confusion that otherwise might result from allowing divergent standards between federal and exchange-set limits on the same contracts. Further, the harmonized approach to aggregation policies for limits on all levels eliminates the potential for exchanges to use permissiveness in aggregation policies as a competitive advantage, which would impair the effectiveness of the Commission's aggregation policy. In addition, DCMs and SEFs are required to set position limits at a level not higher than that set by the Commission. Differing aggregation standards may have the practical effect of increasing a DCM- or SEF-set limit to a level that is higher than that set by the Commission. Accordingly, harmonizing aggregation standards reinforces the efficacy and intended purpose of §§ 150.5(a)(2)(ii), (b)(5)(iii) and (c)(5)(iii) by foreclosing an avenue to circumvent applicable limits. Moreover, by extending this harmonized approach to contracts not included in § 150.2, the Commission encourages a common standard for all federal and exchange-set limits. The adopted rule provides uniformity, consistency, and certainty for traders who are active on multiple trading venues, and thus should reduce the administrative burden on traders as well as the burden on the Commission in monitoring the markets under its jurisdiction.

With respect to exchange-set limits, DCM and SEF core principles already address the costs associated with the requirement that exchanges set position limits no higher than federal limits. Further, for commodity derivatives contracts subject to federal position limits, exchanges are provided the discretion to decide whether or not to set position-limits that are lower than the federal position limit. Finally, when an exchange grants an exemption from a lower exchange-set limit, it is not required to use the Commission's bona fide hedging position definition so long as the exempted position does not exceed the federal position limit.

To the extent that a DCM or SEF grants exemptions, the Commission anticipates that exchanges and market participants will incur minimal costs to administer the application process for exemption relief in accordance with standards set forth in the proposed rule. The Commission understands that requiring traders to apply for exemptive relief comports with existing DCM practice. Accordingly, by incorporating an application requirement that the Commission has reason to understand most if not all active DCMs already follow, the impact of the potential costs has been reduced because the nature of the exemption process is similar to what DCMs already have in place. For SEFs, the rules necessitate a compliant application regime, which will require an initial investment similar to that which DCMs have likely already made and need not duplicate. As noted above, the Commission considers it highly likely that, in accordance with industry best practices, to comply with core principles and due to the utility of application information in demonstrating compliance with core principles, SEFs may incur such costs with or without the adopted rules. Again, due to the new existence of these entities, the Commission is unable to estimate what costs may be associated with the requirement to impose an application regime for exemptive relief on the exchange level.

Also, with respect to phasing, exchanges are not required to use the Commission's definition of bona fide hedging position when setting positon limits on commodity derivative contracts in a physical commodity that are not subject to federal position limits (and when exchanges grant an exemption from exchange-set limits if such exemption does not exceed the federal limit) or excluded commodity derivative contracts. Nevertheless, exchanges are free to use the Commission's bona fide hedging position definition if they so choose.

Relative to the status quo baseline, this rulemaking imposes a ceiling on exchange-set position limits for referenced contracts in 25 commodities. The core principals already require such ceiling, and such costs are addressed in the part 37 and 38 rulemakings. As mandated and necessary, this rule adopts limits for 16 additional commodities. In addition, market participants may be facing hard position limits on some contract that previously only had accountability levels. As such, this rulemaking will confer any benefits that hard position limits have over accountability levels. This may include information gleaned from exemption applications that will better inform the supervisory functions of DCMs or SEFs as well as to protect markets from any adverse effects from market participants that hold positions in excess of an exchange set position limit. In addition, exchanges retain the ability to set accountability levels lower than the levels of the position limits; if an exchanges chooses to adopt such accountability levels, they would

[1350] CEA section 4a(a)(3)(B) applies for purposes of setting federal limit levels. 7 U.S.C. 6a(a)(3)(B). The Commission considers the four factors set out in the section relevant for purposes of considering the benefits and costs of these amendments addressed to exchange-set position limits as well.

provide exchanges with additional information regarding positions of various market participants.

Exchanges and market participants will have to adapt to new federal position limits. Position limits will alter the way that swap and futures trading is conducted. For many contracts that did not have federal limits, participants will be facing new exchange set position limits in the spot, single month, and all months combined. Such limits may impose new compliance costs on exchanges and market participants. These compliance costs may consists of adapting the method of aggregating contracts and filing for exchange exemptions to position limits. The Commission anticipates that these costs will be higher for contracts that have only had accountability levels and not hard exchange-set position limits. Exchange-set position limits may also deter some speculators from fully participating and affecting the price of some futures contracts. The Commission expects that for the most part, exchange-set position limits will not have much effect except for rare circumstances when exemptions to exchange set limits do not apply or other derivative contracts such as swap contracts (below the federal limit), forwards, or trade options are not adequate to meet a market participant's needs.

d. Response to Commenter

A commenter asked whether the Supplemental Proposal's cost-benefit analysis assesses the appropriateness of such requirement on exchange-set speculative position limits or includes the costs of processing non-enumerated bona fide hedging positions and Spread Exemptions for contracts subject only to exchange-set speculative position limits and not federal speculative position limits.[1351]

The Commission notes that if an exchange elects to set a position limit lower than a federal limit, the costs resulting from such choices are not imposed by § 150.5, because the exchange has made the choice not the Commission. The costs on market participants to apply for exchange set limits below the federal level are also discussed in § 150.2. The Commission is unable to forecast these costs, because it does not know when an exchange will set its limits lower than the federal limit; nor does it know how low any such exchange-set position limit level may be.

This rulemaking maintains the status quo for exchange-set speculative limits for contracts not subject to federal limits. Therefore, there are no costs and benefits resulting from this rulemaking on the processing of such exemptions.

7. Section 150.7—Reporting Requirements for Anticipatory Hedging Positions

a. Rule Summary

The revised definition of bona fide hedging position reproposed in § 150.1 of this rule incorporates hedges of five specific types of anticipated transactions: Unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, and anticipatory cross-hedges.[1352] The Commission is reproposing new requirements in § 150.7 for traders seeking an exemption from position limits for any of these five enumerated anticipated hedging transactions that were designed to build on, and replace, the special reporting requirements for hedging of unsold anticipated production and unfilled anticipated requirements in current § 1.48.[1353]

The Commission proposed to add a new series '04 reporting form, Form 704, to effectuate these additional and updated reporting requirements for anticipatory hedges. Persons wishing to avail themselves of an exemption for any of the anticipatory hedging transactions enumerated in the updated definition of bona fide hedging position in § 150.1 would be required to file an initial statement on Form 704 with the Commission at least ten days in advance of the date that such positions would be in excess of limits established in § 150.2.

Reproposed § 150.7(f) adds a requirement for any person who files an initial statement on Form 704 to provide annual updates that detail the person's actual cash market activities related to the anticipated exemption. Reproposed § 150.7(g) enables the Commission to review and compare the actual cash activities and the remaining unused anticipated hedge transactions by requiring monthly reporting on Form 204.

As is the case under current § 1.48, reproposed § 150.7(h) required that a trader's maximum sales and purchases must not exceed the lesser of the approved exemption amount or the trader's current actual anticipated transaction.

b. Baseline

The baseline is current § 1.48.

c. Benefits and Costs

The Commission remains concerned that distinguishing whether an over-the-limit position is entered into in order to reduce risk arising from anticipatory needs, or whether it is excess speculation, may be exceedingly difficult if anticipatory transactions are not well defined. The Commission is, therefore, reproposing the collection of Form 704 to collect information that is vital in performing this distinction. While there will be costs associated with fulfilling obligations related to anticipatory hedging, the Commission believes that advance notice of a trader's intended maximum position in commodity derivative contracts to offset anticipatory risks would identify—in advance—a position as a bona fide hedging position, avoiding unnecessary contact during the trading day with surveillance staff to verify whether a hedge exemption application is in process, the appropriate level for the exemption and whether the exemption is being used in a manner that is consistent with the requirements. Market participants can anticipate hedging needs well in advance of assuming positions in derivatives markets and in many cases need to supply the same information after the fact; in such cases, providing the information in advance allows the Commission to better direct its efforts towards deterring and detecting manipulation. The annual updates in § 150.7(d) similarly allow the Commission to verify on an ongoing basis that the person's anticipated cash market transactions, estimated in good faith, closely track that person's real cash market activities. Absent monthly filing pursuant to § 150.7(e), the Commission would need to issue a special call to determine why a person's commodity derivative contract position is, for example, larger than the pro rata balance of her annually reported anticipated production. The Commission believes it is reproposing a low cost method of obtaining the necessary information to ensure that anticipatory hedges are valid.[1354]

d. Summary of Comments

One commenter asserted that the reporting requirements for anticipatory hedges of an operational or commercial

[1351] CL–Working Group–60947 at 14.

[1352] *See* paragraphs 3(iii), 4(i), 4(iii), 4(iv) and (5), respectively, of the Commission's definition of bona fide hedging position in § 150.1 as discussed *supra.*

[1353] *See* 17 CFR 1.48. *See also* definition of bona fide hedging transactions in current 17 CFR 1.3(z)(2)(i)(B) and (ii)(C), respectively.

[1354] The Commission understands that there will be costs associated with the filing of Form 704. Costs of filing that form are discussed in the context of the part 19 requirements as well as in the Paperwork Reduction Act section of this release.

risk comprising an initial, supplementary and annual report are unduly burdensome. The commenter recommended that the Commission require either an initial and annual report or an initial and supplementary report.[1355] Another commenter agreed that the proposed requirements to file Forms 204, 704 and/or 604 ''are unduly burdensome and commercially impracticable,'' and stated that the Commission should ''scale back both the frequency and the content of the filings required to maintain bona fide hedge positions.'' [1356]

Another commenter suggested deleting Form 704 because it believes that no matter how extensive the Commission makes reporting requirements, the Commission will still need to request additional information on a case-by-case basis to ensure hedge transactions are legitimate.[1357] The commenter suggested that the Commission should be able to achieve its goal of obtaining enough information to determine whether to request additional information using Form 204 along with currently collected data sources and so the additional burden of the new series '04 reports outweighs the benefit to the Commission.[1358]

Several commenters remarked on the cost associated with Form 704. One commenter stated that the additional reporting requirements, including new Form 704 to replace the reporting requirements under current rule 1.48, and annual and monthly reporting requirements under rules 150.7(f) and 150.7(g) ''will impose significant additional regulatory and compliance burdens on commercials;'' the commenter believes that the Commission should consider alternatives, including targeted special calls when appropriate.[1359] Another commenter stated the reporting requirements for the series 04 forms is overly burdensome and would impose a substantial cost to market participants because while the proposal would require the Commission to respond fairly quickly, it does not provide an indication of whether the Commission will deem the requirement accepted if the Commission does not respond within a stated time frame. The commenter is concerned that a market participant may have to refuse business if it does not receive an approved exemption in advance of a transaction.[1360] A third commenter stated that Form 704 is ''commercially impracticable and unduly burdensome'' because it would require filers to ''analyze each transaction to see if it fits into an enumerated hedge category.'' The commenter is concerned that such ''piecemeal review'' would require a legal memorandum and the development of new software to track positions and, since the Commission proposed that Form 704 to be used in proposed § 150.11, the burden associated with the form has increased.[1361]

Finally, a commenter stated that the Commission significantly underestimated costs associated with reporting, and provided revised estimates of start-up and ongoing compliance costs for filing Form 704.[1362]

As discussed in the December 2013 Position Limits Proposal, the Commission remains concerned about distinguishing between anticipatory reduction of risk and speculation.[1363] Therefore, the Commission is retaining the requirement to file Form 704 for anticipatory hedges. The Commission notes that most of the information required on Form 704 is currently required under § 1.48, and that such information is not found in any other Commission data source, including Form 204.

The Commission is adopting the commenters' suggestions, however, to reduce the frequency of filings by maintaining the requirement for the initial statement and annual update but eliminating the supplemental filing as proposed in § 150.7(e). After considering the commenter's concerns, the Commission believes the monthly reporting on Form 204 and annual updates on Form 704 will provide sufficient updates to the initial statement and is deleting the supplemental filing provision in proposed § 150.7(e) to reduce the burden on filers. The Commission has made several burden-reducing changes to Form 704 and § 150.7(d), including merging the initial statement and annual update sections of Form 704, clarifying and amending the instructions to Form 704, and eliminating redundant information.[1364]

In response to the commenter who suggested the Commission consider targeted special calls and other alternatives to the annual and monthly filings, the Commission believes these filings are critical to the Commission's Surveillance program. Anticipatory hedges, because they are by definition forward-looking, require additional detail regarding the firm's commercial practices in order to ensure that a firm is not using the provisions in proposed § 150.7 to evade position limits. In contrast, special calls are backward-looking and would not provide the Commission's Surveillance program with the information needed to prevent markets from being susceptible to excessive speculation. However, the Commission expects the new filing requirements to be an improvement over current practice under § 1.48 because as facts and circumstances change, the Commission's Surveillance program will have a more timely understanding of the market participant's hedging needs.

The Commission notes in response to the commenter that there is no requirement to analyze individual transactions or submit a memorandum. Finally, while costs of filing Form 704 are discussed below in the context of part 19, the Commission notes that changes made to the frequency of the forms should help alleviate some of the cost burdens associated with filing Form 704.

8. Part 19—Reports

CEA Section 4i authorizes the Commission to require the filing of reports, as described in CEA section 4g, when positions equal or exceed position limits. Current part 19 of the Commission's regulations sets forth these reporting requirements for persons holding or controlling reportable futures and option positions that constitute bona fide hedging positions as defined in § 1.3(z) and in markets with federal speculative position limits—namely those for grains, the soy complex, and cotton. Since having a bona fide hedging position exemption affords a commercial market participant the opportunity to hold positions that exceed a position limit level, it is important for the Commission to be able to verify that, when an exemption is invoked, that it is done so for legitimate purposes. As such, commercial entities that hold positions in excess of those limits must file information on a monthly basis pertaining to owned stocks and purchase and sales commitments for entities that claim a bona fide hedging position exemption.

In order to help ensure that the additional exemptions described in § 150.3 are used in accordance with the requirements of the exemption

[1355] CL–IECAssn–59679 at 11.

[1356] CL–BG Group–59656 at 11.

[1357] CL–NGFA–60941 at 7–8.

[1358] *Id.*

[1359] CL–APGA–59722 at 10.

[1360] CL–EDF–59961 at 6.

[1361] CL–EEI–EPSA–60925 at 9.

[1362] CL–FIA at 35–36.

[1363] *See* December 2013 Position Limits Proposal, 78 FR at 75746.

[1364] *See, supra,* discussion of changes to Form 704 and § 150.7.

employed, as well as obtain information necessary to verify that any futures, options and swaps positions established in referenced contracts are justified, the Commission is making conforming and substantive amendments to part 19. First, the Commission is amending part 19 by adding new and modified cross-references to proposed part 150, including the new definition of bona fide hedging position in reproposed § 150.1.[1365] Second, the Commission is amending § 19.00(a) by extending reporting requirements to any person claiming any exemption from federal position limits pursuant to reproposed § 150.3. The Commission is adding three new series '04 reporting forms to effectuate these additional reporting requirements. Third, the Commission is updating the manner of part 19 reporting. Lastly, the Commission is updating both the type of data that would be required in series '04 reports, as well as the time allotted for filing such reports.

Below, the Commission describes each of the proposed changes; responds to commenters; and considers the costs and benefits of such changes.[1366]

a. Amendments to Part 19

In the December 2013 Position Limits Proposal, the Commission proposed to amend part 19 so that it would conform to the Commission's proposed changes to part 150.[1367] The proposed conforming amendments included: Amending part 19 by adding new and modified cross-references to proposed part 150, including the new definition of bona fide hedging position in proposed § 150.1; updating § 19.00(a) by extending reporting requirements to any person claiming any exemption from federal position limits pursuant to proposed § 150.3; adding new series '04 reporting forms to effectuate these additional reporting requirements; updating the manner of part 19 reporting; and updating both the type of data that would be required in series '04 reports as well as the timeframe for filing such reports.

b. Baseline

The baseline is current part 19.

c. Summary of Comments

The Commission received several comments regarding the general nature of series '04 reports and/or the manner in which such reports are required to be filed. One commenter stated that the various forms required by the regime, while not lengthy, represent significant data collection and categorization that will require a non-trivial amount of work to accurately prepare and file. The commenter claimed that a comprehensive position limits regime could be implemented with a ''far less burdensome'' set of filings and requested that the Commission review the proposed forms and ensure they are ''as clear, limited, and workable'' as possible to reduce burden. The commenter stated that it is not aware of any software vendors that currently provide solutions that can support a commercial firm's ability to file the proposed forms.[1368] Another commenter supports the Commission's decision to require applications for risk management exemptions but requests the Commission to reevaluate the cost the forms will impose such as new compliance programs, training of staff, and purchasing or modifying data management systems in order to meet and maintain the compliance requirements.[1369]

Several commenters requested that the Commission create user-friendly guidebooks for the forms so that all entities can clearly understand any required forms and build the appropriate systems to file such forms, including providing workshops and/or hot lines to improve the forms.[1370]

Finally, two commenters recommended modifying or removing the requirement to certify series '04 reports as ''true and correct.'' One commenter suggested that the requirement be removed due to the difficulty of making such a certification and the fact that CEA section 6(c)(2) already prohibits the submission of false or misleading information.[1371] Another noted that the requirement to report very specific information relating to hedges and cash market activity involves data that may change over time. The commenter suggested the Commission adopt a good-faith standard regarding ''best effort'' estimates of the data when verifying the accuracy of Form 204 submissions.[1372]

The Commission is reproposing the amendments to part 19. The Commission agrees with the commenters that the forms should be clear and workable, and offers several clarifications and amendments in other sections of this release in response to comments about particular aspects of the series '04 reports.[1373]

The Commission notes that the information required on the series '04 reports represents a trader's most basic position data, including the number of units of the cash commodity that the firm has purchased or sold, or the size of a swap position that is being offset in the futures market. The Commission believes this information is readily available to traders, who routinely make trading decisions based on the same data that is required on the series '04 reports. The Commission is moving to an entirely electronic filing system, allowing for efficiencies in populating and submitting forms that require the same information every month. Most traders who are required to file the series '04 reports must do so for only one day out of the month, further lowering the burden for filers. In short, the Commission believes potential burdens have been reduced while still providing adequate information for the Commission's Surveillance program. For market participants who may require assistance in monitoring for speculative position limits and gathering the information required for the series '04 reports, the Commission is aware of several software companies who, prior to the vacation of the Part 151 Rulemaking, produced tools that could be useful to market participants in fulfilling their compliance obligations under the new position limits regime.

In response to the commenters that requested guidebooks for the series '04 reporting forms, the Commission has revised the series '04 forms and the instructions to such forms as discussed *supra* in this release. The Commission believes that it is less confusing to ensure that form instructions are clear and detailed than it is to provide generalized guidebooks that may not respond to specific issues. The Commission's longstanding experience with collecting and reviewing Form 204 and Form 304 has shown that many questions about the series '04 reports are specific to the circumstances and trading strategies of an individual

[1365] These amendments are non-substantive conforming amendments and do not have implications for the Commission's consideration of costs and benefits.

[1366] The Commission notes that comments related to costs and benefits are described in this section, and other comments regarding these provisions are discussed in the section *supra* that describes the reproposed rules for part 19. For a complete picture of the comments received, the Commission's response to comments, and the reproposed rules, all sections of this preamble should be read together.

[1367] *See* December 2013 Position Limits Proposal, 78 FR at 75741–46.

[1368] CL–COPE–59662 at 24, CL–COPE–60932 at 10. *See also* CL–EEI–EPSA–60925 at 9.

[1369] CL–EDF–59961 at 6–7.

[1370] *See* CL–COPE–59662 at 24, CL–COPE–60932 at 10; CL–ASR–60933 at 4; CL–Working Group–60947 at 17–18; CL–EEI–EPSA–60925 at 3.

[1371] *See,* CL–CMC–59634 at 17.

[1372] CL–Working Group–59693 at 65.

[1373] *See, supra,* discussion of reproposed rules regarding series '04 reports and part 19.

market participant, and do not lend themselves to generalization that would be helpful to many market participants. The Commission notes that, should a market participant have questions regarding how to file a particular form, they are encouraged to contact Commission staff directly to get answers tailored to their particular circumstances.

Finally, the Commission is amending the certification language found at the end of each form to clarify that the certification requires nothing more than is already required of market participants in CEA section 6(c)(2). The Commission believes the certification language is an important reminder to reporting traders of their responsibilities to file accurate information under several sections of the Act, including but not limited to CEA section 6(c)(2).

d. Information Required on Series '04 Reports

i. Bona Fide Hedgers Reporting on Form 204—§ 19.01(a)(3)

Current § 19.01(a) sets forth the data that must be provided by bona fide hedgers (on Form 204) and by merchants and dealers in cotton (on Form 304). The Commission proposed to continue using Forms 204 and 304, which will feature only minor changes to the types of data to be reported under § 19.01(a)(3).[1374] These changes include removing the modifier ''fixed price'' from ''fixed price cash position;'' requiring cash market position information to be submitted in both the cash market unit of measurement (*e.g.,* barrels or bushels) and futures equivalents; and adding a specific request for data concerning open price contracts to accommodate open price pairs. In addition, the monthly reporting requirements for cotton, including the granularity of equity, certificated and non-certificated cotton stocks, would be moved to Form 204, while weekly reporting for cotton would be retained as a separate report made on Form 304 in order to maintain the collection of data required by the Commission to publish its weekly public cotton ''on call'' report.

One commenter suggested that the costs to industry participants in collecting and submitting Form 204 data and to the Commission in reviewing it ''greatly outweigh'' the regulatory benefit. The commenter recommended that the Commission undertake a cost-benefit analysis to reconsider what information is required to be provided under part 19 and on Form 204 and limit that information only to what will assist Commission staff in assessing the validity of claimed hedge exemptions.[1375]

One commenter stated that CFTC should reduce the complexity and compliance burden of bona fide hedging record keeping and reporting by using a model similar to the current exchange-based exemption process.[1376] The commenter also stated that the requirement to keep records and file reports, in futures equivalents, regarding the commercial entity's cash market contracts and derivative market positions on a real-time basis globally, will be complex and impose a significant compliance burden. The commenter noted such records are not needed for commercial purposes.[1377]

Another commenter recommended that the Commission should require a market participant with a position in excess of a spot-month position limit to report on Form 204 only the cash-market activity related to that particular spot-month derivative position, and not to require it to report cash-market activity related to non-spot-month positions where it did not exceed a non-spot-month position limit; the commenter stated that the burden associated with such a reporting obligation would increase significantly.[1378]

One commenter recommended that reporting rules require traders to identify the specific risk being hedged at the time a trade is initiated, to maintain records of termination or unwinding of a hedge when the underlying risk has been sold or otherwise resolved, and to create a practical audit trail for individual trades, to discourage traders from attempting to mask speculative trades under the guise of hedges.[1379]

The Commission recognizes that market participants will incur costs to file Form 204; these costs are described in detail below. However, the Commission believes that the costs of filing Form 204 are not overly burdensome for market participants, most of whom currently file similar information with either the Commission or the exchanges in order to obtain and maintain exemptions from speculative position limits. The Commission believes it is reproposing requirements for Form 204 that provide the Commission with the most basic information possible to ascertain the veracity of claimed bona fide hedging positions. The Commission has in some cases accepted commenter suggestions to reduce or amend the information required in order to reduce confusion and alleviate burden on filers.[1380] Where the Commission has retained required information fields, the Commission believes, based on its longstanding experience conducting surveillance in the markets it oversees, that such fields are necessary to determine the legitimacy of claimed bona fide hedging position exemptions.

The Commission notes that, while the exchange referred to by the commenter does not have a reporting process analogous to Form 204, it does require an application prior to the establishment of a position that exceeds a position limit. In contrast, advance notice is not required for most federal enumerated bona fide hedging positions.[1381] In the Commission's experience, the series '04 reports have been useful and beneficial to the Commission's Surveillance program and the Commission finds no compelling reason to change the forms to conform to the exchange's process. Further, the Commission notes that Form 204 is filed once a month as of the close of business of the last Friday of the month; it is not and has never been required to be filed on a real-time basis globally. A market participant only has to file Form 204 if it is over the limit at any point during the month, and the form requires only cash market activity (not derivatives market positions).

The Commission has never distinguished between spot-month limits and non-spot-month limits with respect to the filing of Form 204. The Commission notes that, as discussed in the December 2013 Position Limits Proposal, Form 204 is used to review positions that exceed speculative limits in general, not just in the spot-month.[1382] Because of this, the Commission is proposing not to adopt the commenter's recommendation to

[1374] The list of data required for persons filing on Forms 204 and 304 has been relocated from current § 19.01(a) to reproposed § 19.01(a)(3).

[1375] CL–Working Group–60396 at 17–18.

[1376] CL–ASR–59668 at 3.

[1377] *Id.* at 7. *See also* CL–ASR–60933 at 5.

[1378] CL–FIA–59595 at 38.

[1379] CL–Sen. Levin–59637 at 8.

[1380] *See supra* the Commission's determinations regarding part 19

[1381] The Commission notes that advance notice is required for recognition of anticipatory hedging positions by the Commission. *See supra* for more discussion of anticipatory hedging reporting requirements.

[1382] The Commission stated that the Form 204 ''must show the trader's positions in the cash market and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and option positions above the speculative limits'' because the Commission is seeking to ''ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so.'' *See* December 2013 Position Limits Proposal, 78 FR at 75741–42.

only require Form 204 when a market participant exceeds a spot-month limit.

In response to the commenter who suggested the Commission require a ''practical audit trail'' for bona fide hedgers, the Commission notes that other sections of the Commission's regulations provide rules regarding detailed individual transaction recordkeeping as suggested by the commenter.

ii. Conditional Spot-Month Limit Exemption Reporting on Form 504—§ 19.01(a)(1)

As proposed, § 19.01(a)(1) would require persons availing themselves of the conditional spot-month limit exemption (pursuant to proposed § 150.3(c)) to report certain detailed information concerning their cash market activities for any commodity specially designated by the Commission for reporting under § 19.03 of this part. In the December 2013 Position Limits Proposal, the Commission noted its concern about the cash market trading of those availing themselves of the conditional spot-month limit exemption and so proposed to require that persons claiming a conditional spot-month limit exemption must report on new Form 504 daily, by 9 a.m. Eastern Time on the next business day, for each day that a person is over the spot-month limit in certain special commodity contracts specified by the Commission.

The Commission proposed to require reporting on new Form 504 for conditional spot-month limit exemptions in the natural gas commodity derivative contracts only, until the Commission gains additional experience with the limits in proposed § 150.2 in other commodities as well.

Benefits and Costs

The reporting requirements allow the Commission to obtain the information necessary to verify whether the relevant exemption requirements are fulfilled in a timely manner. This is needed for the Commission to help ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so. In the absence of the reporting requirements detailed in part 19, the Commission would lack critical tools to identify abuses related to the exemptions afforded in § 150.3 in a timely manner. As such, the reporting requirements are necessary for the Commission to be able to perform its essential surveillance functions. These reporting requirements therefore promote the Commission's ability to achieve, to the maximum extent practicable, the statutory factors outlined by Congress in CEA section 4a(a)(3).

The Commission recognizes there will be costs associated with the changes and additions to the report filing requirements under part 19. Though the Commission anticipates that market participants should have ready access to much of the required information, the Commission expects that, at least initially, market participants will require additional time and effort to become familiar with new and amended series '04 forms, to gather the necessary information in the required format, and to file reports in the proposed timeframes. As described above, the Commission has attempted to mitigate the cost impacts of these reports.

Actual costs incurred by market participants will vary depending on the diversity of their cash market positions and the experience that the participants currently have regarding filing Form 204 and Form 304 as well as a variety of other organizational factors. However, the Commission has estimated average incremental burdens associated with the proposed rules in order to fulfill its obligations under the Paperwork Reduction Act (''PRA'').[1383]

For Form 204, the Commission estimates that approximately 425 market participants will file an average of 12 reports annually at an estimated labor burden of 3 hours per response for a total per-entity hour burden of approximately 36 hours, which computes to a total annual burden of 15,300 hours for all affected entities. Using an estimated hourly wage of $122 per hour,[1384] the Commission estimates an annual per-entity cost of approximately $4,392 and a total annual cost of $1,866,600 for all affected entities. These estimates are summarized below in Table IV–A–1.

TABLE IV–A–1—BURDEN ESTIMATES FOR FORM 204

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Form 204	425	3	12	$122.00	$4,392

For Form 304, the Commission estimates that approximately 200 market participants will file an average of 52 reports annually at an estimated labor burden of 1 hour per response for a total per-entity hour burden of approximately 52hours, which computes to a total annual burden of 10,400 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $6,344 and a total annual cost of $1,268,800 for all affected entities. These estimates are summarized below in Table IV–A–2.

[1383] *See supra* for discussion of the Commission's Paperwork Reduction Act estimates and explanation.

[1384] The Commission's estimates concerning the wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using $122 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation since 2013, and multiplied by 1.33 to account for benefits and 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (senior)'' and ''programmer (non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates have been rounded to the nearest hundred dollars.

TABLE IV–A–2—BURDEN ESTIMATES FOR FORM 304

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Form 304	200	1	52	$122.00	$6,344

For Form 504, the Commission estimates that approximately 40 market participants will file an average of 12 reports annually at an estimated labor burden of 15 hours per response for a total per-entity hour burden of approximately 180 hours, which computes to a total annual burden of 7,200 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $21,960 and a total annual cost of $878,400 for all affected entities. These estimates are summarized below in Table IV–A–3.

TABLE IV–A–3—BURDEN ESTIMATES FOR FORM 504

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Form 504	40	15	12	$122.00	$21,960

For Form 604 filed outside of the spot month, the Commission estimates that approximately 250 market participants will file an average of 10 reports annually at an estimated labor burden of 30 hours per response for a total per-entity hour burden of approximately 300 hours, which computes to a total annual burden of 75,000 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $36,600 and a total annual cost of $9,150,000 for all affected entities. For Form 604 filed during of the spot month, the Commission estimates that approximately 100 market participants will file an average of 10 reports annually at an estimated labor burden of 20 hours per response for a total per-entity hour burden of approximately 200 hours, which computes to a total annual burden of 20,000 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $24,400 and a total annual cost of $2,440,000 for all affected entities. These estimates are summarized below in Table IV–A–4.

TABLE IV–A–4—BURDEN ESTIMATES FOR FORM 604

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Form 604, Non-Spot-Month	250	30	10	$122.00	$36,600
Form 604, Spot-Month	100	20	10	122.00	24,400

For initial statements filed on Form 704, the Commission estimates that approximately 250 market participants will file an average of 1 report annually at an estimated labor burden of 15 hours per response for a total per-entity hour burden of approximately 15 hours, which computes to a total annual burden of 3,750 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $1,830 and a total annual cost of $457,500 for all affected entities. For annual updates filed on Form 704, the Commission estimates that approximately 250 market participants will file an average of 1 report annually at an estimated labor burden of 8 hours per response for a total per-entity hour burden of approximately 8 hours, which computes to a total annual burden of 2,000 hours for all affected entities. Using an estimated hourly wage of $122 per hour, the Commission estimates an annual per-entity cost of approximately $976 and a total annual cost of $244,000 for all affected entities. These estimates are summarized below in Table IV–A–5.

TABLE IV–A–5—BURDEN ESTIMATES FOR FORM 704

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Form 704, Initial Statement	250	15	1	$122	$1,830
Form 704, Annual Update	250	8	1	122	976

(2) Summary of Comments

Several commenters seemed not to understand which market participants will be required to file Form 504, as many made comments regarding the burden on bona fide hedgers (who are not required to file Form 504). One commenter stated its belief that the information required on Form 504 is redundant of information required on Form 204 and would overly burden hedgers.[1385] Another commenter stated that Form 504 creates a burden for hedgers to track their cash business and affected contracts and to create systems to file multiple forms. The commenter noted its belief that end-users/hedgers should never be subjected to the daily filing of reports.[1386] Another commenter requested that the Commission change the Proposed Rule to permit market participants that rely on the conditional limit to file monthly bona fide hedging reports rather than a daily filing of all cash market positions because Form 504 would impose significant burdens on commercial market participants with cash market positions, particularly when compared to purely speculative traders who do not hold cash market positions.[1387]

A commenter suggested that the Commission should modify the data requirements for Form 504 in a manner similar to the approach used by ICE Futures U.S. for natural gas contracts, that is, requiring a description of a market participant's cash-market positions as of a specified date filed in advance of the spot-month.[1388]

The Commission notes that there is a key distinction between Form 504 and Form 204. Form 504 is required of speculators that are relying upon the conditional spot-month limit exemption. Form 204 is required for hedgers that exceed position limits. To the extent a firm is hedging, there is no requirement to file Form 504.

In the unlikely event that a firm is both hedging and relying upon the conditional spot-month limit exemption, the firm would be required to file both forms at most one day a month, given the timing of the spot-month in natural gas markets (the only market for which Form 504 will be required). In that event, however, the Commission believes that requiring similar information on both forms should encourage filing efficiencies rather than duplicating the burden. For example, both forms require the filer to identify fixed price purchase commitments; the Commission believes it is not overly burdensome for the same firm to report such similar information on Form 204 and Form 504, should a market participant ever be required to file both forms.

The Commission does not believe that a description of a cash market position is sufficient to allow Commission staff to administer its Surveillance program. Descriptions are not as exact as reported information, and the Commission believes the information gathered in daily Form 504 reports would be more complete—and thus more beneficial—in determining compliance and detecting and deterring manipulation. The Commission reiterates that Form 504 will only be required from participants in natural gas markets who seek to avail themselves of the conditional spot-month limit exemption, limiting the burden to only those participants.[1389]

iii. Time and Place of Filing Reports—§ 19.01(b)

As proposed, § 19.01(b)(1) would require all reports, except those submitted in response to special calls or on Form 504, Form 604 during the spot-month, or Form 704, to be filed monthly as of the close of business on the last Friday of the month and not later than 9 a.m. Eastern Time on the third business day following the last Friday of the month.[1390] For reports submitted on Form 504 and Form 604 during the spot-month, proposed § 19.01(b)(2) would require filings to be submitted as of the close of business for each day the person exceeds the limit during the spot period and not later than 9 a.m. Eastern Time on the next business day following the date of the report.[1391] Finally, proposed § 19.01(b)(3) would require series '04 reports to be transmitted using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission or its designee.

One commenter recommended an annual Form 204 filing requirement, rather than a monthly filing requirement. The commenter noted that because the general size and nature of its business is relatively constant, the differences between each monthly report would be insignificant. The commenter recommended the CFTC ''not impose additional costs of monthly reporting without a demonstration of significant additional regulatory benefits.'' The commenter noted its futures position typically exceeds the proposed position limits, but such positions are bona fide hedging positions.[1392] Similarly, another commenter suggested that if the Commission does not eliminate the forms in favor of the requirements in the 2016 Supplemental Position Limits Proposal the Commission should require only an annual notice that details its maximum cash market exposure that justifies an exemption, to be filed with the exchange.[1393]

One commenter suggested that the reporting date for Form 204 should be the close of business on the day prior to the beginning of the spot period and that it should be required to filed no later than the 15th day of the month following a month in which a filer exceeded a federal limit to allow the market participant sufficient time to collect and report its information.[1394]

With regards to proposed § 19.01(b)(2), one commenter recommended that the Commission change the proposed next-day reporting of Form 504 for the conditional spot-month limit exemption and Form 604 for the pass-through swap offsets during the spot-month, to a monthly basis, noting market participants need time to generate and collect data and verify the accuracy of the reported data. The commenter further stated that the Commission did not explain why it needs the data on Form 504 or Form 604 on a next-day basis.[1395]

Another asserted that the daily filing requirement of Form 504 for participants who rely on the conditional spot-month limit exemption ''imposes significant burdens and substantial costs on market participants.'' The commenter urged a monthly rather than a daily filing of all cash market positions, which the commenter claimed is consistent with current

[1385] CL–Working Group–59693 at 65–66

[1386] CL–COPE–59662 at 24

[1387] *See,* CL–EEI–EPSA–59602 at 10.

[1388] CL–FIA–59595 at 37

[1389] As stated in the December 2013 Position Limits Proposal, the Commission will closely monitor the reporting requirements associated with conditional spot-month limit exemptions in natural gas to determine whether reporting on Form 504 would be appropriate in the future for other commodity derivative contracts in response to market developments or in order to facilitate surveillance efforts. *See* December 2013 Position Limits Proposal, 78 FR at 75744. However, the Commission is not proposing a conditional spot-month limit exemption in any other commodity at this time.

[1390] The timeframe for filing Form 704 is included as part of proposed § 150.7. *See supra* for discussion regarding the filing of Form 704.

[1391] In proposed § 19.01(b)(2), the Commission inadvertently failed to include reports filed under § 19.00(a)(1)(ii)(B) (*i.e.* Form 604 during the spot month) in the same filing timeframe as reports filed under § 19.00(a)(1)(i) (*i.e.* Form 504). The correct filing timeframe was described in multiple places on the forms published in the **Federal Register** as part of the December 2013 Position Limits Proposal.

[1392] CL–DFA–59621 at 2.

[1393] CL–FIA–60937 at 17.

[1394] CL–Working Group–60947 at 17–18

[1395] CL–FIA–59595 at 35.

exchange practices.[1396] Another commenter agreed, claiming that by making the reporting requirement monthly rather than daily, the Commission would balance the costs and benefits associated with Form 504 requirements on market participants relying on the conditional spot month limit.[1397]

In response to the commenters' suggestions that Form 204 be filed annually, the Commission notes that throughout the course of a year, most commodities subject to federal position limits under proposed § 150.2 are subject to seasonality of prices as well as less predictable imbalances in supply and demand such that an annual filing would not provide the Commission's Surveillance program insight into cash market trends underlying changes in the derivative markets. This insight is necessary for the Surveillance program to determine whether price changes in derivative markets are caused by fundamental factors or manipulative behavior. Further, the Commission believes that an annual filing could actually be more burdensome for firms, as an annual filing could lead to special calls or requests between filings for additional information in order for the Commission's Surveillance program to fulfill its responsibility to detect and deter market manipulation. In addition, the Commission notes that while one participant's positions may remain constant throughout a year, the same is not true for many other market participants. The Commission believes that varying the filing arrangement depending on a particular market or market participant is impractical and would lead to increased burdens for market participants due to uncertainty regarding when each firm with a position in a particular commodity derivative would be required to file.

The Commission is retaining the last Friday of the month as the required reporting date in order to avoid confusion and uncertainty, particularly for those participants who already file Form 204 and thus are accustomed to that reporting date.

The Commission is reproposing § 19.01(b)(2) to require next-day, daily filing of Forms 504 and 604 in the spot-month. In response to the commenter, the Commission notes that it described its rationale for requiring Forms 504 and 604 daily during the spot-month in the December 2013 Position Limits Proposal.[1398] In order to detect and deter manipulation during the spot-month, concurrent information regarding the cash positions of a speculator holding a conditional spot-month limit exemption (Form 504) or the swap contract underlying a large offsetting position in the physical-delivery contract (Form 604) is necessary during the spot-month. Receiving Forms 504 or 604 before or after the spot-month period would not help the Surveillance program to protect the price discovery process of physical-delivery contracts and to ensure that market participants have a qualifying pass-through swap contract position underlying offsetting futures positions held during the spot-month.

The Commission notes that Form 504 is required only for the Natural Gas commodity, which has a 3-day spot period. Daily reporting on Form 504 during the spot-month allows the Surveillance program to monitor a market participant's cash market activity that could impact or benefit their derivatives position. Given the short filing period for natural gas and the importance of accurate information during the spot-month, the Commission believes that requiring Form 504 to be filed daily provides an important benefit that outweighs the potential burdens for filers.[1399]

As a practical matter, the Commission notes that Form 604 is collected during the spot-month only under particular circumstances, *i.e.,* for an offset of a cash-settled swap position with a physical-delivery referenced contract during the spot-month. Because the ''five-day rule'' applies to such positions, the spot-month filing of Form 604 would only occur in contracts whose spot-month period is longer than 5 days (excluding, for example, energy contracts, but including many agricultural commodities).

9. Sections 150.9, 150.10, and 150.11—Processes for Recognizing Positions Exempt From Position Limits

The Commission is reproposing the process for recognizing certain market-participant positions as bona fide hedges (§ 150.9), spreads (§ 150.10), and anticipatory bona fide hedges (§ 150.11), so that the positions may be deemed exempt from federal and exchange-set position limits. The Commission invited the public to comment on the Commission's consideration of the costs and benefits of the processes in the 2016 Supplemental Position Limits Proposal, identify and assess any costs and benefits not discussed therein, and provide possible alternative proposals. The Commission received comment letters in 2013 that helped the Commission re-design the exemption-recognition processes and then reproposrepropose them in the 2016 Supplemental Position Limits Proposal. The Commission received more comment letters on the June 2016 proposed exemption-recognition processes and a number of commenters remarked on the costs and benefits.

The general theme of the costs-related comments is that the three, exemption-recognition processes have overly burdensome reporting requirements. And the majority of benefits-related comments expressed that the exchanges are the best positioned entities to assess whether market positions fall within one of the categories of positions exempt from position limits. There also were a few comments asserting that the Commission underestimated the quantified costs, such as staff hours needed to review exemption applications. The Commission is addressing the qualitative and quantitative comments in the discussion that follows. Furthermore, the Commission will explain why it believes, after careful consideration of the comments, that the reproposed exemption-recognition processes will, among other things, improve transparency via exchange- and Commission-reporting, and improve regulatory certainty by having applicants submit materials for review to exchanges, and by having exchanges assess whether positions should be deemed exempt from position limits.

The baseline against which the Commission considers the benefits and costs of the exemption-recognition rules is a combination of CEA requirements and Commission regulations that are now in effect. That is, the general baseline is the Commission's part 150 regulations and current §§ 1.47 and

[1396] CL–ICE–59669 at 7.

[1397] *See* CL–EEI–EPSA–59602 at 10.

[1398] December 2013 Position Limits Proposal, 78 FR at 75744–45. The Commission noted that its experience overseeing the ''dramatic instances of disruptive trading practices in the natural gas markets'' warranted enhanced reporting for that commodity during the spot month on Form 504. The Commission noted its intent to wait until it gained additional experience with limits in other commodities before imposing enhanced reporting requirements for those commodities. The Commission further noted that it was concerned that a trader could hold an extraordinarily large position early in the spot month in the physical-delivery contract along with an offsetting short position in a cash-settled contract (such as a swap), and that such a large position could disrupt the price discovery function of the core referenced futures contract.

[1399] Should the Commission determine in the future to require Form 504 for other commodities, particularly those with longer spot month periods, the Commission will evaluate the daily filing requirement as it applies to such other commodities.

1.48.[1400] For greater specificity, the Commission has identified the specific, associated baseline from which costs and benefits are determined under each discussion of the reproposed exemption rules below.

a. Section 150.9—Exchange Recognition of Non-Enumerated Bona Fide Hedging Positions

Under Section III.G., above, the Commission summarizes the changes it reproposed in rule § 150.9, which outlines the process that exchanges may employ to recognize certain commodity derivative positions as non-enumerated bona fide hedging positions. The reproposed version of § 150.9 closely follows the regulatory text proposed in the June 2016 Supplemental Proposal. Most of the changes are clarifications. There are, however, substantive changes between the regulatory text proposed in June 2016 and the reproposed regulatory text in this Release; they are to the following subsections:

- The exchange-application requirements under § 150.9(a)(1)(v) and § 150.9(a)(3)(ii), (iii), and (iv);
- the applicant-to-exchange, reporting requirement under § 150.9(a)(6); and
- the exchange-to-Commission, reporting requirement under § 150.9(c)(2).

i. Section 150.9(a)—Exchange-Administered Non-Enumerated Bona Fide Hedging Position Application Process

In paragraph (a) of reproposed § 150.9, the Commission identifies the process and information required for an exchange to assess whether it should grant a market participant's request that its derivative position(s) be recognized as an non-enumerated bona fide hedging position. In the reproposed version of § 150.9(a), the Commission clarified a condition in § 150.9(a)(1)(v).[1401] The clarification is that an exchange offering non-enumerated bona fide hedging position exemptions must have at least one year of experience and expertise to administer position limits for a referenced contract rather than experience and expertise in the derivative contract. In reproposed § 150.9(a)(2), the Commission offers guidelines for exchanges to establish adaptable application processes by permitting different processes for ''novel'' versus ''substantially similar'' applications for non-enumerated bona fide hedging position recognitions. Reproposed § 150.9(a)(3) describes in general terms the type of information that exchanges should collect from applicants. The Commission made a material change in reproposed § 150.9(a)(3)(iv) by reducing the amount of cash-market data an applicant must submit to an exchange from three years to one year.[1402] In addition, 150.9(a)(3)(ii) and (iv) were both changed to provide that the exchange need require the ''information'' rather than ''detailed information.'' Reproposed § 150.9(a)(4) obliges applicants and exchanges to act timely in their submissions and notifications, respectively, and that exchanges retain revocation authority. Reproposed § 150.9(a)(5) provides that the position will be deemed recognized as an non-enumerated bona fide hedging position when an exchange recognizes it. Reproposed § 150.9(a)(6) instructs exchanges to determine whether there should be a reporting requirement for non-enumerated bona fide hedging positions. The Commission changed § 150.9(a)(6) to relieve market participants from an additional filing, and to give exchanges discretion on non-enumerated bona fide hedging position reporting. Reproposed § 150.9(a)(7) requires an exchange to publish on their Web site descriptions of unique types of derivative positions recognized as non-enumerated bona fide hedging positions based on novel facts and circumstances.

ii. Section 150.9(b)—Non-Enumerated Bona Fide Hedging Position Recordkeeping Requirements

The Commission made no changes to the rule text in § 150.9(b) between the 2016 supplemental proposal and this Reproposal. Under reproposed § 150.9(b), exchanges will be required to maintain complete books and records of all activities relating to the processing and disposition of non-enumerated bona fide hedging position applications. As explained in reproposed § 150.9(b)(1) through (b)(2), the Commission instructs exchanges to retain applicant-submission materials, exchange notes, and determination documents. Moreover, consistent with current § 1.31, the Commission expects that these records will be readily accessible until the termination, maturity, or expiration date of the bona fide hedge recognition and during the first two years of the subsequent, five-year retention period.

iii. Section 150.9(c)—Non-Enumerated Bona Fide Hedging Positions Reporting Requirements

The Commission made a change to reporting to the rule text in § 150.9(c) between the 2016 supplemental proposal and this Reproposal. While the Commission is reproposing rules requiring weekly reporting obligations by exchanges for positions recognized as non-enumerated bona fide hedging positions, the Commission changed § 150.9(c)(1)(i) and § 150.9(c)(2) for purposes of clarification. In regards to § 150.9(c)(1)(i), the Commission is clarifying that the reports required under (c)(1)(i) are those for each commodity derivatives position that had been recognized that week and for any revocation or modification of a previously granted recognition. The change to § 150.9(c)(2) explains that exchanges must file monthly Commission reports only if the exchange has determined, in its discretion, that applicants should file exchange reports. The Commission also reproposes § 150.9(c)(1)(ii), which provides that exchanges post non-enumerated bona fide hedging position summaries on their Web sites.

iv. Section 150.9(d) and (e)—Commission Review

The Commission made no changes to the rule text in §§ 150.9 (d) or (e) between the 2016 supplemental proposal and this Reproposal. The Commission reproposes rules that states that market participants and exchanges must respond to Commission requests, as well as liquidated positions within a commercially reasonable amount of time if required under § 150.9(d).

v. Section 150.9(f)—Delegation to Director of the Division of Market Oversight

The Commission made no changes to the rule text in § 150.9(f) between the 2016 supplemental proposal and this Reproposal. In the reproposed version of § 150.9(f), the Commission delegates certain review authority for the non-enumerated bona fide hedging position recognition-process to the Director of the Division of Market Oversight.

vi. Baseline

For the non-enumerated bona fide hedging position process, the baseline for non-enumerated bona fide hedging positions subject to federal position limits is current § 1.47. For non-enumerated bona fide hedging position exemptions to exchange-set position limits, the baseline is the current exchange regulations and practices as well as the Commission's guidance to

[1400] *See* chart listing current regulations, December 2013 Position Limits Proposal, 78 FR 75712, Dec. 12, 2013.

[1401] For a fuller discussion of the change, *see* Section III.G.3.a.(i)–(iii).

[1402] For a fuller discussion of the change, *see* Section III.G.3.b.(iii) exchanges in current § 150.5(d). The current rule provides, generally, that an exchange may recognize bona fide hedging positions in accordance with the general definition of bona fide hedging position in current § 1.3(z)(1).

vii. Benefits and Discussion of Comments

The Commission continues to believe that the non-enumerated bona fide hedging position exemption-recognition process outlined in § 150.9 will produce significant benefits. As explained in the 2016 supplemental proposal, the Commission recognizes that there are positions that reduce price risks incidental to commercial operations. For that reason, among others, such positions that are shown to be bona fide hedging positions under CEA Section 4a(c) are not subject to position limits. And, therefore, it is beneficial for market participants to have several options regarding bona fide hedging positions. With this Reproposal, market participants will have three ways in which they may determine that positions are bona fide hedging positions. First, market participants could conclude that a commodity derivative position comports with the definition of bona fide hedging position under § 150.1. Second, market participants may request a staff interpretive letter under § 140.99 or seek exemptive relief under CEA section 4(a)(7). Third, they may file an application with an exchange for recognition of an non-enumerated bona fide hedging position under reproposed § 150.9.

While all of the aforementioned options are viable, the Commission continues to believe that reproposed § 150.9 outlines a framework similar to existing exchange practices that recognize non-enumerated bona fide hedge exemptions to exchange-set limits. These practices are familiar to many market participants. Moreover, a number of commenters agreed that exchanges should oversee the exemption-recognition process.[1403]

The Commission believes that under reproposed § 150.9, the Commission will be able to leverage exchanges' existing practices and expertise in administering exemptions. Thus, reproposed § 150.9 should reduce the need to invent new procedures to recognize non-enumerated bona fide hedging positions. As explained in the 2016 supplemental proposal, exchanges also may be familiar with the applicant-market participant's needs and practices so there will be an advanced understanding for why certain trading strategies are pursued. The Commission received comments that were consistent with this view.

For example, in response to proposed § 150.9(a)(3)(iv)—the rule requiring applicants to submit detailed information regarding the applicant's activity in the cash market during the past three years—there were a few comments. One commenter noted that exchanges should have the discretion to determine the requisite number of years of data that should be collected.[1404] Another commenter proposed that exchanges have the discretion to collect up to one year of data.[1405] A different commenter remarked that proposed § 150.9(a)(3)(iii) (requiring an applicant to identify ''the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted'') is unnecessary and unduly burdensome.'' [1406]

These comments support the Commission's determination to reduce filing burdens. In reproposed § 150.9(a)(3)(ii) and (iv), the Commission changed the requirement that the application process require an applicant submit ''detailed information'' in regards to certain information to ''information.'' The change provides the exchanges with the discretion to determine what level of detail is needed to make their determination. The Commission has also reduced the minimum cash market data requirement to one-year from three-years in proposed § 150.9(a)(3)(iv), which will reduce market participants burden in comparison to the proposed rule.[1407] Furthermore, the Commission continues to believe, even with this change to § 150.9(a)(3)(iv), that given the availability of the exchange's analysis and the Commission's macro-view of the markets, the Commission will be well-informed should it become necessary for the Commission to review a determination under reproposed § 150.9(d), and determine whether a commodity derivative position should be recognized as an non-enumerated bona fide hedging position. The Commission also has clarified in reproposed § 150.9(a)(3)(iii) that the filing must include the maximum size of all gross positions for which the application is submitted, which may be a longer time period than the proposed one-year period. In administering requests for recognition of non-enumerated bona fide hedging position exemptions under § 1.47, the Commission has found a maximum size statement, as required under § 1.47(b)(4), to be useful both at the time of review of the filing (in determining whether the requested maximum size is reasonable in relation to past cash market activity) and at the time of review of a filer's position that exceeds the level of the position limit (reducing the need for special calls to inquire as to the reason a position exceeds a position limit level).

In general, the non-enumerated bona fide hedging position recognition process under reproposed § 150.9 should reduce duplicative efforts because applicants will be saved the expense of applying to both an exchange for relief from exchange-set position limits and to the Commission for relief from federal limits. The Commission also seeks to collect relevant information. Thus, because commenters reasonably complained about the application requirement for three years of cash-market position information, the Commission changed the requirement to one year.[1408] Once commenter stated that the three-year data provided ''little practical benefit'' for assessing whether an non-enumerated bona fide hedging position is appropriate.[1409]

Another section where commenters observed redundancy was in proposed § 150.9(a)(6) regarding requirements for exchanges to require applicants to file reports.[1410] One commenter stated that the proposal to require reports ''is particularly problematic due to its vagueness in terms of the frequency that a cash market report must be provided.'' [1411] Another commenter explained further that proposed § 150.9(a)(6) had no ''incremental market surveillance or other regulatory benefit'' because other rules provide for applicants to reapply for exemptions

[1403] *See, e.g.,* CL–CME–60926; CL–Nodal–60948.

[1404] CL–AGA–60943 at 6.

[1405] CL–NCGA/NGSA–60919 at 10.

[1406] CL–Commercial Energy Working Group–60932 at 10.

[1407] It should be noted that this one-year cash-market history is less than the three-year cash-market history required under reproposed § 150.7(d)(1)(iv) for initial statements regarding enumerated anticipatory bona fide hedging positions.

[1408] For a fuller discussion, *see* Section III.G.1.b. *See also* the following comment letters: CL–AGA–60943 at p. 6 (requirement is vague and restrictive); CL–CCI–60935 at p. 7 (one year of data suggested); CL–EEI–EPSA–60925 at p. 10 (requirement is ''unduly burdensome and unnecessary''); CL–NCGA/NGSA–60919 at p. 10 (same); CL–COPE–60932 at p. 9 (criticized the three-year data requirement); CL–Commercial Energy Working Group–60932 at p. 11 (the requirement is unnecessary).

[1409] CL–Commercial Energy Working Group–60932 at 11.

[1410] *See also* CL–Commercial Energy Working Group–60932 at 12 (the same conclusion applies to proposed 105.10(a)(6), and § 150.11(a)(5)).

[1411] CL–AGA–60943 at 6.

annually, real-time market surveillance, the exchanges' abilities to make one-off requests for information, and the Commission's special call authority.[1412] There also was a commenter who stated that ''neither exchanges nor the Commission are likely to have resources available to meaningfully review such reports'' as those under § 150.9(a)(6), as well as those reports under § 105.10(a)(6).[1413] As explained above, the Commission changed the regulatory text so that exchanges may decide whether non-enumerated bona fide hedging position applicants should provide additional reports to exchanges. As a result of this change, market participants may have less reporting requirements but that assessment will depend on whether the exchanges—based on their experiences and expertise in position limits in general and in non-enumerated bona fide hedging positions specifically—decide to grant a non-enumerated bona fide hedging position exemption without establishing a reporting requirement.

As expressed in the 2016 supplemental proposal, the creation and retention of records under § 150.9 may be used as reference material in the future for similar bona fide hedge recognition requests either by relevant exchanges or the Commission. This will be beneficial because retained records will help the Commission to ensure that an exchange's determinations are internally consistent and consistent with the Act and the Commission's regulations thereunder. There is also the additional benefit that records will be accessible if they are needed for a potential enforcement action.

The Commission continues to believe that the exchange-to-Commission reporting under § 150.9(c) will have surveillance benefits. The reports will provide the Commission with notice that an applicant may take a commodity derivative position that the exchange has recognized as an non-enumerated bona fide hedging position, and also will show the applicant's underlying cash commodity and expected maximum size in the cash markets. Reports will facilitate the tracking of non-enumerated bona fide hedging positions recognized by the exchanges, and will assist the Commission in ensuring that a market participant's activities conform to the exchange's terms of recognition and to the Act. While there are great benefits, in reproposed § 150.9(c)(1)(i) and § 150.9(c)(2), the Commission made clarifications that, as noted above, eased the burden on exchanges and applicants. Asreproposed, § 150.9(c)(1)(i) clarifies that the reports required are only for those for each commodity derivatives position that had been recognized that week and for any revocation or modification of a previously granted recognition. In addition, reproposed § 150.9(c)(2) defers to the exchanges by clarifying that they have the discretion to determine whether a market participant must report under reproposed § 150.9(a)(6); however, if an exchange requires reports of a market participant, that exchange must forward any such report to the Commission under reproposed § 150.9(c)(2). This gives the exchanges flexibility and defers to their expertise. The web-posting of summaries also will benefit market participants in general by providing transparency and open access to the non-enumerated bona fide hedging position recognition process. In addition, reporting and posting gives market participants seeking recognition of a non-enumerated bona fide hedging position an understanding of the types of commodity derivative positions an exchange may recognize as an non-enumerated bona fide hedging position, thereby providing greater administrative and legal certainty.

viii. Costs and Discussion of Comments

In the June 2016 Supplemental Proposal, the Commission explained that to a large extent, exchanges and market participants have incurred already many of the compliance costs associated with the proposed exemptions. The Commission, however, detailed a number of the readily-quantifiable costs for exchanges and market participants associated with processing non-enumerated bona fide hedging position recognitions, as well as spreads and anticipatory bona fide hedges. The Commission invited public comment on the estimated financial numbers, which were detailed in tables. Several commenters remarked on the costs the Commission quantitatively estimated in the June 2016 Supplemental Proposal. One group commenter stated that the Commission underestimated costs to market participants.[1414] The same commenter explained that the Commission failed to ''break out the costs for submitting an initial application and filing subsequent updates every time information in the application changes.'' [1415] Another commenter stated that the 2016 Supplemental Proposal has ''highly unrealistic estimates of the time and cost that will be required to implement and maintain compliance programs.'' [1416]

One exchange commenter declared that the Commission ''significantly underestimates the number of exemptions that the Exchange will be required to review,'' and offered different numbers.[1417] For example, the exchange commenter stated that it reviewed as many as 500 exemption requests annually as opposed to the 285 exemption requests that the Commission estimated.[1418] In addition, the exchange commenter stated that the Commission underestimated the number of staff-review hours, and that the number should be two additional hours for a total of seven hours per exemption review.[1419] The exchange commenter also provided different hours for different exercises: (a) Seven hours for preparing quarterly Web site postings; (b) six hours for preparation for weekly reports; and (c) six hours for preparing monthly reports.[1420] The exchange commenter also explained that it believed it would need to hire a seasoned, senior level employee to help comply with the proposed rules and three regulatory analysts.[1421] Finally, the exchange commenter noted that the Commission failed to consider start-up costs associated with complying with reporting requirements.[1422]

In response, the Commission is persuaded by commenters, and is adjusting its estimated staff-review hours and costs that it believes exchanges and market participants will incur to comply with exemption-recognition processes in this Reproposal. These estimates are reflected in the tables below.

Even though the Commission has outlined three different exemption-application processes in this release, the Commission believes that aspects of the processes will become standardized and the data collected for one exemption will be the same as data collected for another exemption. As a result, it is likely that over time some costs will

[1412] CL–CCI–60935 at 7–8 (the same argument applies to proposed §§ 150.10(a)(6) and 150.11(a)(5)). See also CL–Commercial Energy Working Group–60932 at 12 (the same argument applies to proposed § 105.10(a)(6), and § 150.11(a)(5). See also CL–FIA–60937 at 16 (criticism of requirement to produce enhanced information regarding cash market activity and size of cash market exposure.

[1413] CL–ISDA–60931 at 10.

[1414] CL–Commercial Energy Working Group–60932 at 13.

[1415] *Id.*

[1416] CL–ISDA–60931 at 5.

[1417] CL–ICE–60929 at p 17.

[1418] *Id.*

[1419] *Id.*

[1420] *Id.*

[1421] *Id.*

[1422] CL–ICE–60929 at 17.

decrease. Some commenters, however, expressed different views. One commenter stressed that the Commission's proposed exemption processes triggered greater oversight, increased scope of monitoring, and need for additional staff; whereas a standardized application might reduce market-entry barriers.[1423] The same commenter remarked that increased compliance costs and capital investments might lead to decreased market participation and liquidity.[1424] The commenter then suggested the development of a standardized hedge exemption application to minimize monitoring and compliance costs.[1425] Finally, the same commenter asserted that a standardized application might drive efficiency and minimize regulatory risk exposure via innovation.

The Commission continues to believe that there are costs that are not easily quantified. These are qualitative costs that are related to the specific attributes and needs of individual market participants that are hedging. Given that qualitative costs are highly specific, the Commission continues to believe that market participants will choose to incur § 150.9-related costs only if doing so is less costly than complying with position limits and not executing the desired hedge position. Thus, by providing market participants with an option to apply for relief from speculative position limits under reproposed § 150.9, the Commission continues to believe it is offering market participants a way to ease overall compliance costs because it is reasonable to assume that entities will seek recognition of non-enumerated bona fide hedging positions only if the outcome of doing so justifies the costs. This is because the Commission appreciates that the costs of not trading might be substantially higher. The Commission also believes that market participants will consider how the costs of applying for recognition of an non-enumerated bona fide hedging position under reproposed § 150.9 will compare to the costs of requesting a staff interpretive letter under § 140.99, or seeking exemptive relief under CEA section 4a(a)(7). Likewise, exchanges must consider qualitative costs in their decision to create an non-enumerated bona fide hedging position application process or revise an existing program.

[1423] CL–EDF–60944 at 2.

[1424] *Id.*

[1425] *Id.*

The Commission acknowledges that there may also be other costs to market participants if the Commission disagrees with an exchange's decision to recognize an non-enumerated bona fide hedging position under reproposed § 150.9 or under an independent Commission request or review under reproposed § 150.9(d) or (e). These costs will include time and effort spent by market participants associated with a Commission review, which the Commission addresses in the tables below. There also is the possibility that market participants will lose amounts that the Commission can neither predict nor quantify if it became necessary to unwind trades or reduce positions were the Commission to conclude that an exchange's disposition of an non-enumerated bona fide hedging position application is inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1.

A few commenters remarked on this concern and pointed to the term that the Commission would provide applicants a ''commercially reasonable amount of time'' to unwind positions that the Commission determined did not fall within the categories of exempted positions under § 150.9(d)(4), 150.10(d)(4), and 150.11(d)(3).[1426] One commenter explained that if a market participant is required to unwind a position in the middle of its green-lit hedging activity, the unwind could cause ''significant harm to the participant,'' and the ''rapid unanticipated liquidation of positions could result in market disruption''.[1427] The commenter also highlighted that the less-than-24-hours, commercially-reasonable period compels market participants to seek pre-approval of positions by the Commission or not engage in risk mitigation.[1428] The commenter also added that market participants might restrict trading to some exchanges and concentrate market risk on a single exchange.[1429]

[1426] CL–MGEX–90936 at 8; CL–EEI–EPSA–60925 at 10 (one business to unwind is ''unreasonable'' in energy products); CL–NCGA/NGSA–60919 at 13 (concerned about Commission's suggestion that positions can be unwound in less than one business day); CL–NGFA–60941 at 3; CL–NCFC–60930 at 5 (dislikes the one-day unwind period for dairy market).

[1427] CL–MGEX–90936 at 8. *See also* CL–NCGA/NGSA–60919 at 13 (''Unwinding a position quickly in an illiquid market, such as in many non-spot month contracts, could create a significant market disruption.''); CL–NGFA–60941 at 3 (commented that a one-day liquidation ''in thinly traded contracts without broad liquidity'' could be extremely disruptive); CL–NCFC–60930 at 5 (''Requiring the same time period and the same process to unwind the dairy transactions could lead to a market disruption, disorderly trading and regulatory-influence and unnecessary price volatility.'').

The Commission recognizes that costs may result if the Commission disagrees with an exchange's disposition of a non-enumerated bona fide hedging position application under reproposed § 150.9 (or other exempt position under §§ 150.10 or 150.11). The Commission, however, believes such situations will be limited based on the history of exchanges approving similar applications for exemptions to exchange-set limits. Moreover, as explained in the 2016 supplemental proposal, exchanges have incentives to protect market participants from the harms that position limits are intended to prevent, such as manipulation, corners, and squeezes. In addition, an exchange that recognizes a market participant's non-enumerated bona fide hedging position (or other exempt position) that enables the participant to exceed position limits must then deter the same market participant from trading in a manner that causes adverse price impacts on the market; such adverse price impacts may cause financial harm to market participants, or even reputational risk or economic disadvantage to the exchange.[1430]

ix. Costs To Create or Amend Exchange Rules for Non-Enumerated Bona Fide Hedging Position Application Programs

The Commission believes that exchanges electing to process non-enumerated bona fide hedging position applications under reproposed § 150.9(a) are likely to already administer similar processes and will need to file with the Commission amendments to existing exchange rules rather than create new rules. The exchanges will only have to file amendments once. As discussed in the Paperwork Reduction Act discussion below, the Commission forecasts an average annual filing cost of $1,220 per exchange that files new rules or modifications per final process that an exchange adopts. Under the Paperwork Reduction Act, these costs are reported as an average annual cost over a five-year period.

[1428] CL–MGEX–90936 at 8.

[1429] *Id.*

[1430] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38488–89.

TABLE IV–A–6—BURDEN ESTIMATES FOR FILING NEW OR AMENDED RULES

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
New or amended rule filings under part 40 per § 150.9(a)(1), (a)(6)	6	5	2	$122.00	$1,220

x. Costs To Review Applications Under Reproposed Processes

An exchange that elects to process applications also will incur costs related to the review and disposition of such applications pursuant to reproposed § 150.9(a). For example, exchanges will need to expend resources on reviewing and analyzing the facts and circumstances of each application to determine whether the application meets the standards established by the Commission. Exchanges also will need to expend effort in notifying applicants of the exchanges' disposition of recognition or exemption requests. The Commission believes that exchanges electing to process non-enumerated bona fide hedging position applications under reproposed § 150.9(a) are likely to have processes for the review and disposition of such applications currently in place. The Commission has adjusted the costs in Table IV–A–7 based on information submitted by commenters. Thus, the Commission has forecast that the average annual cost for each exchange to process applications for non-enumerated bona fide hedging position recognitions is $277,500.

TABLE IV–A–7—BURDEN ESTIMATES FOR REVIEWING APPLICATIONS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Collection, review, and disposition of application per § 150.9(a)	6	7	325	$122.00	$277,550

xi. Costs To Post Summaries for Non-Enumerated Bona Fide Hedging Position Recognitions

Exchanges that elect to process the applications under reproposed § 150.9 will incur costs to publish on their Web sites summaries of the unique types of non-enumerated bona fide hedging position positions. The Commission has estimated an average annual cost of $25,620 for the web-posting of non-enumerated bona fide hedging position summaries.

TABLE IV–A–8—BURDEN ESTIMATES FOR POSTING SUMMARIES

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Summaries Posted Online per § 150.9(a)	6	7	30	$122.00	$25,620

xii. Costs To Market Participants Who Will Seek Non-Enumerated Bona Fide Hedging Position Relief From Position Limits

Under reproposed § 150.9(a)(3), market participants must submit applications that provide sufficient information to allow the exchanges to determine, and the Commission to verify, whether it is appropriate to recognize such position as an non-enumerated bona fide hedging position. These applications will be updated annually. Reproposed § 150.9(a)(6) will require applicants to file a report with the exchanges when an applicant owns, holds, or controls a derivative position that has been recognized as an non-enumerated bona fide hedging position. The Commission estimates that each market participant seeking relief from position limits under reproposed § 150.9 will likely incur approximately $976 annually in application costs.[1431]

TABLE IV–A–9—BURDEN ESTIMATES FOR MARKET PARTICIPANTS TO APPLY

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.9(a)(3) Application	325	4	2	$122.00	$976

[1431] Assuming that exchanges administer exemptions to exchange-set limits, these costs are incrementally higher.

xiii. Costs for Non-Enumerated Bona Fide Hedging Position Recordkeeping

The Commission believes that exchanges that currently process applications for spread exemptions and bona fide hedging positions maintain records of such applications as required pursuant to other Commission regulations, including § 1.31. The Commission, however, also believes that the reproposed rules may confer additional recordkeeping obligations on exchanges that elect to process applications for non-enumerated bona fide hedging positions. The Commission estimates that each exchange electing to administer the reproposed non-enumerated bona fide hedging position process will likely incur approximately $3,660 annually to retain records for each process.

TABLE IV–A–10—BURDEN ESTIMATES FOR RECORDKEEPING

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.9(b) Recordkeeping	6	30	1	$122.00	$3,660

xiv. Costs for Weekly and Monthly Non-Enumerated Bona Fide Hedging Position Reporting to the Commission

The Commission anticipates that exchanges that elect to process non-enumerated bona fide hedging position applications will be required to file two types of reports. The Commission is aware that five exchanges currently submit reports each month, on a voluntary basis, which provide information regarding exchange-processed exemptions of all types. The Commission believes that the content of such reports is similar to the information required of the reports in proposed rule § 150.9(c), but the frequency of such required reports will increase under the reproposed rule. The Commission estimates an average cost of approximately $38,064 per exchange for weekly reports under reproposed § 150.9(c).

TABLE IV–A–11—BURDEN ESTIMATES FOR SUBMITTING WEEKLY REPORTS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.9(c)(1) Weekly Report	6	6	52	$122.00	$38,064

For the monthly report, the Commission anticipates a minor cost for exchanges because the reproposed rules will require exchanges essentially to forward to the Commission notices received from applicants who own, hold, or control the positions that have been recognized or exempted. The Commission estimates an average cost of approximately $8,784 per exchange for monthly reports under reproposed § 150.9(c).

TABLE IV–A–12—BURDEN ESTIMATES FOR SUBMITTING MONTHLY REPORTS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.9(c)(2) Monthly Report	6	6	12	$122.00	$8,784

xv. Costs Related to Subsequent Monitoring

Exchanges will have additional surveillance costs and duties with respect to non-enumerated bona fide hedging position that the Commission believes will be integrated with their existing self-regulatory organization surveillance activities as an exchange.

b. Section 150.10—Spread Exemptions

Since the Commission issued the June 2016 Supplemental Proposal, the Commission made very few changes to the provisions authorizing exchanges to exempt spread positions from federal position limits under reproposed § 150.10. In addition to non-substantive changes for purposes of clarification, substantive changes were made in subsections s of paragraphs (a) and (c) of § 150.10: §§ 150.10(a)(1)(ii); 150.10(a)(3)(ii) and (iii); 150.10(a)(6); 150.10(c)(2); The Commission did not make changes to paragraphs (b), (d), (e), or (f) of reproposed § 150.10.

i. Section 150.10(a)—Exchange-Administered Spread Exemption

In paragraph (a) of reproposed § 150.10, the Commission identifies the process and information required for an exchange to grant a market participant's request that its derivative position(s) be recognized as an exempt spread position.

As an initial step under reproposed § 150.10(a)(1), exchanges that voluntarily elect to process spread exemption applications are required to notify the Commission of their intention to do so by filing new rules or rule amendments with the Commission under part 40 of the Commission's regulations. The Commission clarified reproposed § 150.10(a)(1)(ii) to explain that an exchange may offer spread exemptions if the contract, which is either a component of the spread or a referenced contract that is related to the spread, in a particular commodity is actively traded. The Commission reduced the burden of proposed § 150.10(a)(1)(ii) (that would require an exchange to have applied position limits for at least one year), by providing in reproposed § 150.10(a)(1) that an exchange must have at least one year of experience and expertise administering position limits for such referenced contract. As explained above, the exchange may gain such experience and expertise, for example, through employing experienced staff.

In reproposed § 150.10(a)(2), the Commission identifies four types of spreads that an exchange may approve. Reproposed § 150.10(a)(3) describes in general terms the type of information that exchanges should collect from applicants. In reproposed § 150.10(a)(3)(ii), similar to the change made in § 150.9(a)(3), the Commission changed the requirement that the application process require an applicant submit ''detailed information'' in regards to certain information to ''information.'' The change provides the exchanges with the discretion to determine what level of detail is needed to make their determination. The Commission clarified the reproposed requirements to explain that applicant must report its maximum size of all gross positions in the commodity related to the spread-exemption application. Reproposed § 150.10(a)(4) obliges applicants and exchanges to act timely in their submissions and notifications, respectively, and require exchanges to retain revocation authority. Reproposed § 150.10(a)(6) was modified and authorizes exchanges to determine whether enhanced reporting is necessary. Reproposed § 150.10(a)(7) requires exchanges to publish on its Web site a summary describing the type of spread position and explaining why it was exempted.

ii. Section 150.10(b)—Spread Exemption Recordkeeping Requirements

The Commission made no changes to the regulatory text in § 150.10(b) that was proposed in June 2016. Under the reproposed rule, exchanges must maintain complete books and records of all activities relating to the processing and disposition of spread exemption applications under reproposed § 150.10(b). This is similar to the record retention obligations of exchanges for positions recognized as non-enumerated bona fide hedging positionss.

iii. Section 150.10(c)—Spread Exemption Reporting Requirements

The Commission amended § 150.10(c)(2) and kept the rest of regulatory text in § 150.10(c) the same as the text proposed in the 2016 supplemental proposal. Under the reproposed rule exchanges will have weekly reporting obligations for spread exemptions. The change in subsection (c)(2) clarifies that exchanges have the discretion to determine whether applicants should have monthly reports that must ultimately be sent to the Commission. These reporting obligations are similar to the reporting obligations of exchanges for positions recognized as non-enumerated bona fide hedging positions.

iv. Baseline

For the reproposed spread exemption process for positions subject to federal limits, the baseline is CEA section 4a(a)(1). In that statutory section, the Commission is authorized to recognize certain spread positions. That statutory provision is currently implemented in a limited calendar-month spread exemption in § 150.3(a)(3). For exchange-set position limits, the baseline for spreads is the guidance in current § 150.5(a), which provides generally that exchanges may recognize exemptions for positions that are normally known to the trade as spreads.

v. Benefits

CEA section 4a(a)(1) authorizes the Commission to exempt certain spreads from speculative position limits. In exercising this authority, the Commission recognizes that spreads can have considerable benefits for market participants and markets. The Commission now proposes a spread exemption framework that utilizes existing exchanges—resources and exchanges—expertise so that fair access and liquidity are promoted at the same time market manipulations, squeezes, corners, and any other conduct that will disrupt markets are deterred and prevented. Building on existing exchange processes preserves the ability of the Commission and exchanges to monitor markets and trading strategies while reducing burdens on exchanges that will administer the process, and market participants, who will utilize the process.

In addition to these benefits, there are other benefits related to reproposed § 150.10 that will inure to markets and market participant. Yet, there is difficulty in quantifying these benefits because benefits are dependent on the characteristics, such as operational size and needs, of the market participants that will seek spread exemptions, and the markets in which the participants trade. Accordingly, the Commission considers the qualitative benefits of reproposed § 150.10.

For both exchanges and market participants, reproposed § 150.10 will likely alleviate compliance burdens to the status quo. Exchanges will be able to build on established procedures and infrastructure. As stated earlier, many exchanges already have rules in place to process and grant applications for spread exemptions from exchange-set position limits pursuant to part 38 of the Commission's regulations (in particular, current § 38.300 and § 38.301) and current § 150.5. In addition, exchanges may be able to use the same staff and electronic resources that will be used for reproposed § 150.9 and § 150.11. Market participants also may benefit from spread-exemption reviews by exchanges that are familiar with the commercial needs and practices of market participants seeking exemptions. Market participants also might gain legal and regulatory clarity and consistency that will help in developing trading strategies. Moreover, the Commission has reduced burdens by making changes to proposed §§ 150.10(a)(1) and (3). In the reproposed § 150.10(a)(1), the Commission changed the rule so that exchanges may employ experienced staff to satisfy the requirement that an exchange have at least one year of experience and expertise in administering position limits for referenced contracts related to spread exemptions. In reproposed § 150.10(a)(3)(ii), the Commission gave exchanges greater discretion in determining the level of detail needed from spread-exemption applicants.

Reproposed § 150.10 will authorize exchanges to approve spread exemptions that permit market participants to continue to enhance liquidity, rather than being restricted by a position limit. For example, by allowing speculators to execute intermarket and intramarket spreads in accordance with reproposed § 150.3(a)(1)(iv) and § 150.10, speculators will be able to hold a greater amount of open interest in underlying contract(s), and, therefore, bona fide hedgers may benefit from any increase in market liquidity. Spread exemptions might lead to better price continuity and price discovery if market participants who seek to provide liquidity (for example, through entry of resting orders for spread trades between different contracts) receive a spread exemption and, thus, will not otherwise be constrained by a position limit.

Here are two examples of positions that could benefit from the spread exemption in reproposed § 150.10:

• Reverse crush spread in soybeans on the CBOT subject to an intermarket spread exemption. In the case where soybeans are processed into two different products, soybean meal and soybean oil, the crush spread is the difference between the combined value of the products and the value of soybeans. There are two actors in this scenario: The speculator and the soybean processor. The spread's value approximates the profit margin from actually crushing (or mashing) soybeans into meal and oil. The soybean processor may want to lock in the spread value as part of its hedging strategy, establishing a long position in soybean futures and short positions in soybean oil futures and soybean meal futures, as substitutes for the processor's expected cash market transactions (purchase of the anticipated inputs for processing and sale of the anticipated products). On the other side of the processor's crush spread, a speculator takes a short position in soybean futures against long positions in soybean meal futures and soybean oil futures. The soybean processor may be able to lock in a higher crush spread, because of liquidity provided by such a speculator who may need to rely upon a spread exemption. It is important to understand that the speculator is accepting basis risk represented by the crush spread, and the speculator is providing liquidity to the soybean processor. The crush spread positions may result in greater correlation between the futures prices of soybeans and those of soybean oil and soybean meal, which means that prices for all three products may move up or down together in a closer manner.

- Wheat spread subject to intermarket spread exemptions. There are two actors in this scenario: The speculator and the wheat farmer. In this example, a farmer growing hard wheat will like to reduce the price risk of her crop by shorting MGEX wheat futures. There, however, may be no hedger, such as a mill, that is immediately available to trade at a desirable price for the farmer. There may be a speculator willing to offer liquidity to the hedger; the speculator may wish to reduce the risk of an outright long position in MGEX wheat futures through establishing a short position in CBOT wheat futures (soft wheat). Such a speculator, who otherwise will have been constrained by a position limit at MGEX or CBOT, may seek exemptions from MGEX and CBOT for an intermarket spread, that is, for a long position in MGEX wheat futures and a short position in CBOT wheat futures of the same maturity. As a result of the exchanges granting an intermarket spread exemption to such a speculator, who otherwise may be constrained by limits, the farmer might be able to transact at a higher price for hard wheat than might have existed absent the intermarket spread exemptions. Under this example, the speculator is accepting basis risk between hard wheat and soft wheat, reducing the risk of a position on one exchange by establishing a position on another exchange, and potentially providing liquidity to a hedger. Further, spread transactions may aid in price discovery regarding the relative protein content for each of the hard and soft wheat contracts.

Finally, the Commission is allowing exchanges to recognize and exempt spreads during the five-day spot month. There may be considerable benefits that evolve from spreads exempted during the spot month, in particular. Besides enhancing the opportunity for market participants to use strategies involving spread trades into the spot month, this relief may improve price discovery in the spot month for market participants. And, as in the intermarket wheat example above, the spread relief in the spot month may better link prices between two markets, *e.g.,* the price of MGEX wheat futures and the price of CBOT wheat futures. Put another way, the prices in two different but related markets for substitute goods may be more highly correlated, which benefits market participants with a price exposure to the underlying protein content in wheat generally, rather than that of a particular commodity.

vi. Costs and Discussion of Comments

As discussed in the 2016 supplemental proposal, the Commission has been able to quantify some costs, but other costs related to reproposed § 150.10 are not easily quantifiable. The Commission continues to believe that some costs are more dependent on individual markets and market participants seeking a spread exemption, and, thus, are more readily considered qualitatively. In general, the Commission believes that reproposed § 150.10 should provide exchanges and market participants greater regulatory and administrative certainty and that costs will be small relative to the benefits of having an additional trading tool under reproposed § 150.10.

The Commission comes to this conclusion even though the most common complaint about the spread-exemption process is that it requires excessive reporting. One exchange commenter focused specifically on the spread-exemption-recognition process, and stated that it is ''overly prescriptive as to the information that must be provided by the applicant, especially when the exchange may have superior information regarding intramarket spreads.'' [1432] The exchange commenter criticized the proposed intramarket spread exemption application as possibly being ''inefficient and time consuming thereby hindering the exchange from effectively supporting its bona fide hedgers.'' [1433] And the exchange commenter suggested that the Commission grant the exchanges the ''flexibility and discretion to establish'' application processes.[1434] The exchange commenter further explained that exchanges are best positioned to assess liquidity for bona fide hedgers and perform the price discovery function for granting exemptions, which, in turn protects market participants and the public.[1435]

The Commission recognizes that spread-exemption application requirements and reporting requirements are detailed. Moreover, these costs will be borne by exchanges and market participants. But, the Commission continues to believe that the qualitative costs will be reasonable in view of the benefits to exchanges and market participants of being able to use spread exemptions. Furthermore, the benefits of having an application process and reporting regime will create cost-savings to the public in the form of enhanced regulatory oversight.

The Commission, however, did respond to comments about proposed § 150.10(a)(3)(iii), which requires an applicant to identify ''the maximum size of all gross positions in derivative contracts to be acquired by the applicant during the year after the application is submitted.'' The comment was that the requirement was too broad and almost impossible because of the inability to predict trading activity over the next year.[1436] Another commenter described the proposed rule as ''unnecessary and unduly burdensome.'' [1437] The Commission, as discussed above regrading reproposed § 150.9(a)(3)(iii), has clarified in reproposed § 150.10(a)(3)(iii) that the filing must include the maximum size of all gross positions for which the application is submitted, which may be a longer time period that the proposed one-year period. As noted above, in administering requests for recognition of non-enumerated bona fide hedging position exemptions under § 1.47, the Commission has found a maximum size statement, as required under § 1.47(b)(4), to be useful both at the time

[1432] CL–Nodal–60948 at 2.

[1433] *Id.*

[1434] *Id.* at 3.

[1435] *Id.* at 4.

[1436] CL–ISDA–60931 at 10.

[1437] CL–Working Group–60947 at 10.

of review of the filing and at the time of review of a filer's position that exceeds the level of the position limit.

Finally, like the discussion about quantified costs related to repropoposed § 150.9, exchanges and market participants may have already many of the financial outlays for administering the application process and applying for spread exemptions, respectively. Yet, as commenters have asserted, the Commission might have underestimated the costs. In deference to the comments, the Commission has adjusted its estimates of quantified costs that will arise from repropoposed § 150.10 in Tables IV–A–13 through IV–A–19, below. The Commission's new estimates are based on commenters noting that the Commission estimated staff hours, as well as the number of exemption requests, were low.

Note: The activities priced in Tables A2 to G2 are similar to the activities discussed in the section affiliated with Tables A1 through G1, above.

TABLE IV–A–13—BURDEN ESTIMATES FILING NEW OR AMENDED RULES

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
New or amended rule filings under part 40 per § 150.10(a)(1), (a)(6)	6	5	2	$122.00	$1,220

TABLE IV–A–14—BURDEN ESTIMATES FOR REVIEWING APPLICATIONS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Collection, review, and disposition of application per § 150.10(a)	6	7	85	$122.00	$72,590

TABLE IV–A–15—BURDEN ESTIMATES FOR POSTING SUMMARIES

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Summaries Posted Online per § 150.10(a)	6	7	10	$122.00	$8,540

Regarding the following Table D2, note that reports are also required to be sent to the Commission in the case of exempt spread positions under § 150.10(a)(5).

TABLE IV–A–16—BURDEN ESTIMATES FOR MARKET PARTICIPANTS TO APPLY

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.10(a)(3) Spread Exemption Application	85	3	2	$122.00	$732

TABLE IV–A–17—BURDEN ESTIMATES FOR RECORDKEEPING

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.10(b) Recordkeeping	6	30	1	$122.00	$3,660

TABLE IV–A–18—BURDEN ESTIMATES FOR SUBMITTING WEEKLY REPORTS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.10(c)(1) Weekly Report	6	6	52	$122.00	$38,064

TABLE IV–A–19—BURDEN ESTIMATES FOR SUBMITTING MONTHLY REPORTS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.10(c)(2) Monthly Report	6	6	12	$122.00	$8,784

Other costs to exchanges will include those related to surveillance. For example, exchanges that elect to grant spread exemptions will have to adapt and develop procedures to determine whether a particular spread exemption furthers the goals of CEA section 4a(a)(3)(B) as well as monitor whether applicant speculators are, in fact, providing liquidity to other market participants. There will likely also be costs related to disagreements between the Commission and exchanges over exchanges' disposition of a spread applications, or costs from a Commission request or review under reproposed § 150.11(d) or (e). As expressed in the 2016 supplemental proposal, these costs are not easily quantified because they depend on the specifics of the Commission's request or review.

c. Section 150.11—Enumerated Anticipatory Bona Fide Hedges

Between the 2016 Supplemental Proposal and now, the Commission is making two changes in the following regulatory text: § 150.11(a)(1)(v) and § 150.11(a)(6).

i. Section 150.11(a)—Exchange-Administered Enumerated Anticipatory Bona Fide Hedge Process

Under reproposed § 150.11(a)(1), exchanges that voluntarily elect to process enumerated anticipatory bona-fide hedge applications are required to notify the Commission of their intention to do so by filing new rules or rule amendments with the Commission under part 40 of the Commission's regulations. In reproposed § 150.11(a)(1)(v), the Commission clarified that exchanges that elect to offer a § 150.11 exemption, must have at least one year of experience and expertise in the referenced contract, rather than the derivative contract. In reproposed § 150.11(a)(2), the Commission identifies certain types of information necessary for the application, including information required under reproposed § 150.7(d). In reproposed § 150.11(a)(3), the Commission states that applications must be updated annually and that the exchanges have ten days in which to recognize an enumerated anticipatory bona fide hedge. In addition, exchanges must retain authority to revoke recognitions. reproposed § 150.11(a)(4) states that once an enumerated anticipatory bona fide hedging position has been recognized by an exchange, the position will be deemed to be recognized by the Commission. Reproposed § 150.11(a)(5) discusses reports that must be filed by an applicant holding an enumerated anticipatory bona fide hedging position, as required under reproposed § 150.7(e). The Commission clarified those reporting requirements, which were also proposed in § 150.11(a)(3)(i), and eliminated language that was confusing to commenters regarding updating and maintaining the accuracy of such reports. Reproposed 150.11(a)(6) explains that exchanges may choose to seek Commission review of an application and the Commission has ten days in which to respond.

ii. Section 150.11(b)—Enumerated Anticipatory Bona Fide Hedge Recordkeeping Requirements

The Commission did not make any changes to § 150.11(b) as proposed in the 2016 supplemental proposal. Exchanges must maintain complete books and records of all activities relating to the processing and disposition of anticipatory hedging applications under reproposed § 150.11(b).

iii. Section 150.11(c)—Enumerated Anticipatory Bona Fide Hedge Reporting Requirements

The Commission did not make any changes to § 150.11(c) as proposed in the 2016 supplemental proposal. Exchanges will have weekly reporting obligations under reproposed § 150.11(c).

iv. Baseline

The baseline is the same as it was in the December 2013 Position Limits Proposal: The current filing process detailed in current § 1.48.

v. Benefits

There are significant benefits that will likely accrue should § 150.11 be finalized. Recognizing anticipatory positions as bona fide hedging positions under § 150.11 will provide market participants with potentially a more expeditious recognition process than the Commission proposal for a 10-day Commission recognition process under reproposed § 150.7. The benefit of prompter recognitions, though, is not readily quantifiable, and, in most circumstances, is subject to the characteristics and needs of markets as well as market participants. So it is challenging to quantify the benefits that will likely be associated with reproposed § 150.11.

For example, exchanges will be able to use existing resources and knowledge in the administration and assessment of enumerated anticipatory bona fide hedging positions. The Commission and exchanges have evaluated these types of positions for years (as discussed in the December 2013 Position Limits Proposal). Utilizing this experience and familiarity will likely produce such benefits as prompt but reasoned decision making and streamlined procedures. In addition, reproposed § 150.11 permits exchanges to act in less than ten days—a timeframe that will be less than the Commission's process under current § 1.48, or under reproposed § 150.7.[1438] This could potentially enable commercial market participants to pursue trading strategies in a more timely fashion to advance their commercial and hedging needs to reduce risk.

Reproposed § 150.11, similar to reproposed § 150.9 and § 150.10, also will provide the benefit of enhanced record-retention and reporting of positions recognized as enumerated anticipatory bona fide hedging positions. As previously discussed, records retained for specified periods will enable exchanges to develop consistent practices and afford the Commission accessible information for review, surveillance, and enforcement efforts. Likewise, weekly reporting under § 150.11 will facilitate the tracking of positions by the Commission.

vi. Costs and Discussion of Comments

The § 150.11-related comments in response to the 2016 supplement proposal's request for comments

[1438] *See* discussion in December 2013 Position Limits Proposal, 78 FR 75745–46, Dec. 12, 2013.

centered on the claim that the exemption process and reporting requirements are burdensome. Nevertheless, as explained above, the Commission made a few changes to clarify application and reporting requirements.

The costs for reproposed § 150.11 are similar to the costs for reproposed §§ 150.9 and 150.10, and have been quantified are in Tables A3 through G3. As mentioned earlier, the Commission has increased the number of staff hours and exemption requests based on commenters stating that the Commission underestimated costs. Other costs associated with reproposed § 150.11, like those for reproposed §§ 150.9 and 150.10, are more qualitative in nature and hinge on specific market and participant attributes. Other costs could arise from reproposed § 150.11 if the Commission disagrees with an exchange's disposition of an enumerated anticipatory bona fide hedging position application, or costs from a Commission request or review under reproposed § 150.11(d). These costs will include time and effort spent by market participants associated with a Commission review. In addition, market participants will lose amounts that the Commission can neither predict nor quantify if it became necessary to unwind trades or reduce positions were the Commission to conclude that an exchange's disposition of an enumerated anticipatory bona fide hedging position application is not appropriate or is inconsistent with the Act. This concern was raised by commenters as discussed above. The Commission believes that such disagreements will be rare based on the Commission's past experience and review of exchanges' efforts. Nevertheless, the Commission notes that assessing whether a position is for the reduction of risk arising from anticipatory needs or excessive speculation is complicated.

Note: For a general description of reproposed rules identified in the following Tables IV–A–20 to IV–A–24, see discussion above.

TABLE IV–A–20—BURDEN ESTIMATES FOR FILING NEW OR AMENDED RULES

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
New or amended rule filings under part 40 per § 150.11(a)(1), (a)(5)	6	5	2	$122.00	$1,220

TABLE IV–A–21—BURDEN ESTIMATES FOR REVIEWING APPLICATIONS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
Collection, review, and disposition of application per § 150.11(a)	6	7	90	$122.00	$76,860

TABLE IV–A–22—BURDEN ESTIMATES FOR MARKET PARTICIPANTS TO APPLY

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.11(a)(2) Application on Form 704	90	3	2	$122.00	$732

TABLE IV–A–23—BURDEN ESTIMATES FOR RECORDKEEPING

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.11(b) Recordkeeping	6	30	1	$122.00	$3,660

TABLE IV–A–24—BURDEN ESTIMATES FOR SUBMITTING WEEKLY REPORTS

Required record or report	Total number of respondents	Burden hours per response	Annual number of responses per respondent	Hourly wage estimate	Per-entity labor cost
§ 150.11(c) Weekly Report	6	6	52	$122.00	$38,064

Exchanges will have additional surveillance costs and duties that the Commission believes will be integrated with their existing self-regulatory organization surveillance activities as an exchange.

10. Summary of CEA Section 15(a) Factors

CEA section 15(a) requires the Commission to consider the costs and benefits of its actions in light of five factors.

a. Protection of Market Participants and the Public

The imposition of position limits is intended to protect the markets and market participants from manipulation and excessive speculation. Position limits may serve as a prophylactic measure that reduces market volatility due to a participant otherwise engaging in large trades that induce price impacts. Such price impacts may occur when a party who is holding large open interest is not willing or is unable to meet a call for additional margin. In such an instance, a substantial amount of open interest may have to be liquidated in a short time interval. In addition, price impacts could also occur from a large trader establishing or liquidating large positions.

There are additional benefits to imposing position limits in the spot month. Spot month position limits are designed to deter and prevent corners and squeezes as well as promote a more orderly liquidation process at expiration.[1439] Spot month position limits may also make it more difficult to mark the close of a futures contract to possibly benefit other contracts that settle on the closing futures price. Marking the close harms markets by spoiling convergence between futures prices and spot prices at expiration. Convergence is desirable, because many market participants want to hedge the spot price of a commodity at expiration. In addition, since many other contracts, including cash market contracts, settle based on the futures price at expiration, the mispricing might affect a larger amount of the commodity than the deliverable supply of the futures contract.

The CEA provides that position limits do not apply to positions shown to be bona fide hedging positions, as defined by the Commission, or spread positions, as recognized by the Commission. Exemptions from federal position limits for bona fide hedging positions of qualified market participants help ensure the hedging utility of the futures markets while protecting market participants from excess speculation. The Commission believes that the reproposed rules will preserve the important protections of the federal position limit regime while maintaining the hedging function of the futures or swaps markets.

The Commission believes the exemption provisions of these reproposed rules will have a negligible effect on the protection afforded market participants and the public, as compared to the level of protection that is provided by the exemptions policy reflected currently in § 150.3. Moreover, by expanding current § 150.3 to allow exchanges to review applications for exemptions from federal limits, the Commission will be able to rely on the exchanges' experience and expertise in monitoring their own contract markets, with Commission supervision, to help ensure that any exemptions do not detract from the protection of market participants and the public. Because exchanges have experience and expertise, including as part of their SRO functions, the Commission believes they will be able to carefully design exemptions under which position limits will continue to protect market participants while meeting needs for bona fide hedging. Moreover, exchanges have strong incentives—such as maintaining credibility of their markets through protecting against the harms of excessive speculation and manipulation—to appropriately administer exemptions.

b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

There is a potential market integrity issue with excess speculation. People may not be willing to participate in a futures market if they perceive that there is a participant with an unusually large speculative position exerting what they believe is unreasonable market power. A lack of participation may harm liquidity, and consequently, may harm market efficiency.

On the other hand, traders who find position limits binding may have to trade in substitute instruments—such as futures contracts that are similar but not the same as the core referenced futures contract, forward contracts, trade options, or futures on a foreign board of trade—in order to meet their demand for speculative instruments. These traders may also decide to not trade beyond the federal speculative position limit. Trading in substitute instruments may be less effective that trading in referenced contracts and, thus, may raise the transaction costs for such traders. In these circumstances, futures prices might not fully reflect all the speculative demand to hold the futures contract, because substitute instruments may not fully influence prices the same way that trading directly in the futures contract does. Thus, market efficiency might be harmed.

c. Price Discovery

Reduced liquidity may have a negative impact on price discovery. In the absence of position limits, market participants might elect to trade less as a result of a perception that the market pricing is unfair as a consequence of what they perceive is the exercise of too much market power by a larger speculator. On the other hand, liquidity may also be harmed by a speculator being restricted from additional trading by a position limit. The Commission has set the levels of position limits at high levels, to avoid harming liquidity that may be provided by speculators that would establish large positions, while restricting speculators from establishing extraordinarily large positions. The Commission believes that the recognition and exemption processes will foster liquidity and potentially improve price discovery by making it easier for market participants to have their bona fide hedging exemptions and spread exemptions recognized, however.

Position limits may serve as a prophylactic measure that reduces market volatility due to a participant otherwise engaging in large trades that induce price impacts which interrupt price discovery. Spot month position limits make it more difficult to mark the close of a futures contract to possibly benefit other contracts that settle on the closing futures price. Marking the close harms markets by spoiling convergence between futures prices and spot prices at expiration and damaging price discovery.

d. Sound Risk Management Practices

The Commission believes that traders knowing their positions and ensuring that they do not exceed a position limit or exempted level is a sound risk management practice. Under the exemption processes, market participants must explain and document the methods behind their hedging or spreading strategies to exchanges, and the Commission or exchanges would have to evaluate them. As a result, the Commission believes that the evaluation processes should help market participants, exchanges, the Commission, and the public to understand better the risk management techniques and objectives of various market participants.

e. Other Public Interest Considerations

The Commission has not identified any other public interest considerations.

[1439] Most futures contracts do not ultimately result in physical delivery. Instead, most positions are eliminated by a trader taking an offsetting position in the contract.

The Commission declined to treat the goal of fostering innovation and growth for the betterment of markets as an additional public interest consideration, because these objectives are amorphous and likely difficult to accomplish with a position limit. Instead, exchanges have proper incentives and a variety of tools, including financial innovation, with which to increase liquidity on their exchanges.

9. CEA Section 15(b) Considerations

Section 15(b) of the CEA requires the Commission to consider the public interest to be protected by the antitrust laws and to endeavor to take the least anticompetitive means of achieving the objectives, policies and purposes of the CEA, before promulgating a regulation under the CEA or issuing certain orders. The Commission believes that the rules and guidance in this notice are consistent with the public interest protected by the antitrust laws.

The Commission acknowledges that, with respect to exchange qualifications to recognize or grant non-enumerated bona fide hedging positions, spread exemptions, and anticipatory bona fide hedging position exemptions for federal position limit purposes, the threshold experience requirements that it is reproposing will advantage certain more-established incumbent DCMs (''incumbent DCMs'') over smaller DCMs seeking to expand or future entrant DCMs (collectively ''entrant DCMs'') or SEFs.[1440] Specifically, incumbent DCMs—based on their past track records of: (1) Listing actively traded referenced contracts or actively traded components of spreads; and (2) setting and administering exchange-set position limits applicable to those contracts for at least a year, or having otherwise hired staff with such position limit experience gained elsewhere—will be immediately eligible to submit rules to the Commission under part 40 of the Commission's regulations to process trader applications for recognition of non-enumerated bona fide hedging positions, spread exemptions,[1441] and anticipatory bona fide hedges; in contrast, entrant DCMs and SEFs will be foreclosed from doing so until such time as they have met the eligibility criteria, although the Commission has clarified in the reproposed rule that any exchange may meet the experience requirement, but not the actively traded contract requirement, by hiring staff with appropriate experience. However, in the absence of any comments supporting a contrary view, the Commission does not perceive that an ability to process applications for non-enumerated bona fide hedging positions, spread exemptions and/or anticipatory bona fide hedging positions is a necessary function for a DCM or SEF to compete effectively as a trading facility. In the event an incumbent DCM declines to process a trader's request for hedging recognition or a spread exemption,[1442] the trader may seek the recognition or exemption directly from the Commission in order to trade on an entrant DCM or SEF. Accordingly, the Commission does not view the reproposed threshold experience requirements as establishing a barrier to entry or competitive restraint likely to facilitate anticompetitive effects in any relevant antitrust market for contract trading.[1443]

The Commission invited comment on any considerations related to the public interest to be protected by the antitrust laws and potential anticompetitive effects of the proposal, as well as data or other information to support such considerations. One exchange commenter responded that it was concerned that the overly prescriptive intramarket spread exemption application process might diminish spread trading on all exchanges.[1444] More specifically, the exchange commenter stated that it believed it would be adversely affected by the proposed spread exemption rule because it is an exchange that offers a certain type of spread trading.[1445] Moreover, the exchange commenter relies on intramarket spread trading to enhance liquidity on less actively traded contracts and believes the publication requirement under § 150.10(a)(7) would have an anti-competitive effect.[1446]

In response, the Commission notes that it has the responsibility to review the record of the exchange in granting spread exemptions. For example, a spread trader, who is a speculator, may amass a large position in a referenced contract and a corresponding large position in a non-referenced contract. Such a speculator has an incentive to mark the close of the core referenced futures contract to benefit their large position in a referenced contract. The Commission is concerned that it has an adequate record to review timely a grant of a spread exemption, which would allow a speculator to build a large position in a referenced contract, exempt from position limits. Regarding the publication requirement, the Commission reiterates that the publication requirement is only for a summary describing the type of spread position and why it was exempted and, thus, does not require details of all components of spread trading within low liquidity non-referenced contract markets to be revealed; the Commission notes it would not expect such a summary would reveal identifying information for any trader, but, rather, would reveal, at a minimum, the referenced contract and a generic description of the type of non-referenced contract that is a component of the spread. In addition, the Commission notes that spread trades may qualify as bona fide hedging positions, obviating the need for a spread exemption. Finally, the Commission notes an exchange may petition the Commission for an exemption under CEA section 4a(a)(7) or the Commission staff for a no-action letter under § 140.99.

B. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). This reproposed rulemaking would result in the collection of information within the meaning of the PRA, as discussed

[1440] *See* reproposed §§ 150.9(a)(1), 150.10(a)(1), and 150.11(a)(1).

[1441] In the case of qualifications to exempt certain spread positions, the contract may be either a referenced contract that is a component of the spread or another contract that is a component of the spread. *See* reproposed § 150.10(a)(1)(i).

[1442] The Commission recognizes that in certain circumstances it might be in an exchange's economic interest to deny processing a particular trader's application for hedge recognition or a spread exemption. For example, this might occur in a circumstance in which a trader has reached the exchange-set limit and the exchange determines that liquidity is insufficient to maintain a fair and orderly contract market if the trader's position increases.

[1443] *See, e.g., Brown Shoe Co.* v. *U.S.,* 370 U.S. 294, 324–25 (1962) (''The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it''); *U.S.* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 593 (1957)(''Determination of the relevant market is a necessary predicate to finding a violation''); *Rebel Oil* v. *Atl. Richfield Co.,* 51 F. 3d 1421, 1434 (9th Cir. 1995) (''A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel will have market power in dealing with any group of buyers,'' quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶518.1b, at 534 (Supp. 1993)).

[1444] CL–Nodal–60948 at 4.

[1445] *Id.* at 4.

[1446] *Id.* at 4.

below. Specifically, if adopted, it would amend previously-approved collection of information requirements. Therefore, the Commission is submitting this reproposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The information collection requirements reproposed herein will be an amendment to the previously-approved collection associated with OMB control number 3038–0013.[1447]

If the reproposed changes to regulations are adopted, responses to this collection of information would be mandatory. Several of the reporting requirements would be mandatory in order to obtain exemptive relief, and, therefore, would be mandatory under the PRA to the extent a market participant elects to seek such relief. The Commission will protect any proprietary information received in accordance with the Freedom of Information Act and 17 CFR part 145, titled ''Commission Records and Information.'' In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.''[1448] The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.[1449]

In December 2013, the Commission proposed a number of modifications to its speculative position limits regime. Under that proposal, market participants with positions in a ''referenced contract,'' as defined in § 150.1, would be subject to the position limit framework established in parts 19 and 150 of the Commission's regulations. Proposed changes to part 19 would prescribe new forms and reporting requirements for persons claiming exemptions to speculative position limits and update reporting obligations and required information on existing forms. In proposed part 150, the Commission changed reporting requirements for DCMs listing a core referenced futures contract as well as for traders who wish to apply for an exemption from exchange-set position limits. The Commission also proposed to update and change recordkeeping requirements for market participants and exchanges.

In June 2016, the Commission published in the **Federal Register** a supplemental notice of proposed rulemaking to update and revise the regulations proposed in the December 2013 Position Limits Proposal. The Commission proposed to allow a participant to exceed speculative position limits to the extent that the participant's position is recognized as a non-enumerated bona fide hedging position, an exempt spread position, or an enumerated anticipatory bona fide hedge, by a DCM or SEF. The Commission proposed to require new or amended rule filings under part 40 of its regulations that comply with certain conditions set forth in the revisions to part 150. Further, the proposed changes stated that in order to seek exemptive relief market participants would need to file applications with a DCM or SEF that met criteria established under the proposal.

In this Reproposal, the Commission is reproposing its changes to parts 1, 15, 17, 19, 37, 38, 140, 150, and 151 of the Commission's regulations. Specifically, with regard to the PRA, the Commission is reproposing the following: New and amended series '04 forms under part 19 and § 150.7; submission of deliverable supply estimates under § 150.2(a)(3); recordkeeping obligations under § 150.3(g); revised special call authority under § 150.3(h); exchange set limit exemption application requirements under § 150.5(a)(2); and requirements for recognition of non-enumerated bona fide hedging positions, certain spread positions, and enumerated anticipatory bona fide hedging positions under § 150.9, § 150.10, and § 150.11, respectively.

The Commission proposes reorganizing the information found in the OMB Collection Numbers associated with this rule. In particular, the Commission proposes that the burdens related to series '04 forms be moved from OMB Collection #3038–0009 to OMB Collection #3038–0013. This change is non-substantive but allows for all information collections related to exemptions from speculative position limits to be housed in one collection, making it simpler for market participants to know where to find the relevant PRA burdens. If adopted, OMB Collection #3038–0009 would hold collections of information related to parts 15, 17, and 21 while OMB Collection #3038–0013 would hold collections of information related to parts 19 and 150.

2. Methodology and Assumptions

It is not possible at this time to accurately determine the number of respondents that will be affected by the these rules. Many of the regulations that impose PRA burdens are exemptions that a market participant may elect to take advantage of, meaning that without intimate knowledge of the day-to-day business decisions of all its market participants, the Commission could not know which participants, or how many, may elect to obtain such an exemption. Further, the Commission is unsure of how many participants not currently in the market may be required to or may elect to incur the estimated burdens in the future.

The provisions under § 150.9–11 permits designated contract markets and swap execution facilities to elect to process applications for recognition of non-enumerated bona fide hedging positions, exempt spread positions, or enumerated anticipatory bona fide hedges; accordingly the Commission does not know which, or how many, designated contract markets and swap execution facilities may elect to offer such recognition processes, or which, or how many market participants may submit applications. The Commission is unsure of how many designated contract markets, swap execution facilities, and market participants not currently active in the market may elect to incur the estimated burdens in the future.

Finally, many of the regulations proposed herein are applying to participants in swaps markets for the first time, and the Commission's lack of experience enforcing speculative position limits for such markets and for many of the participants therein hinders its ability to determine with precision the number of affected entities. These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA.

3. Information Provided by Reporting Entities/Persons

To determine the number of entities who may file series '04 forms with the Commission and/or exemption applications with DCMs that elect to process such applications, the Commission used its proprietary data collected from market participants as well as information provided by DCMs regarding the number of exemptions processed by exchange surveillance programs each year.[1450] As discussed

[1447] Part 19—Reports by persons holding bona fide hedge positions—currently covered by OMB control number 3038–0009, is being proposed for inclusion in OMB control number 3038–0013.

[1448] 7 U.S.C. 12(a)(1).

[1449] 5 U.S.C. 552a.

[1450] The Commission also described this information in the 2016 Supplemental Position *supra,*[1451] the Commission analyzed data covering a two-year period of July 1, 2014–June 30, 2016 to determine how many participants would have been over 60, 80, 100, 125, 150, 175, 200, and 500 percent of the limit levels in each of the 25 commodities subject to limits under § 150.2 had such levels been in effect during the covered period.[1452] The Commission determined that in that period, 409 unique entities would have exceeded any of the limits in any commodities; the Commission is using a figure of 425 entities to account for any additional entities which may be required to comply with limits. The Commission assumes that only entities over such levels—or close to being over such levels—will file the necessary forms and applications. The Commission's analysis does not account for persons holding hedging or other exemptions from position limits, and the figures provided by DCMs account for exemptions filed for all commodities, not just the 25 subject to limits under § 150.2. Accordingly, the Commission believes the estimates of the number of 425 respondents used herein are highly conservative.

To determine the number of exchanges who would be affected by the reproposal, the Commission analyzed how many exchanges currently list actively traded contracts in the commodities for which federal position limits will be set, as the proposed rules in § 150.5 as well as in §§ 150.9, 150.10, and 150.11 will all apply to exchanges that list commodity derivative contracts that may be subject federal limits under § 150.2(d).

The Commission's estimates concerning wage rates are based on 2013 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using a figure of $122 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1800-hour work-year, adjusted to account for the cumulative rate of inflation since 2013. This figure was then multiplied by 1.33 to account for benefits, and further by 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (average of senior and non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates below have been rounded to the dollar.

A commenter estimated that for an exchange to promulgate the regulations required of them under this part such an exchange would need a senior level regulation employee and three regulatory analysts.[1453] When the Commission estimated a per-hour wage rate using these professions, however, the average hourly wage rate was lower than the $122 estimated above.[1454] In this reproposal, the Commission is therefore estimating all burdens with the higher wage rate. The Commission notes that the wage rate used for PRA calculations is an average rate, and that some entities may face a higher or lower wage rate based on individual circumstances.

4. Collections of Information

(a) Recordkeeping and Reporting Obligations for Market Participants

(i) Forms 204 and 304

Previously, the Commission estimated the combined annual labor hours for both Form 204 and Form 304 to be 1,350 hours, which amounted to a total labor cost to industry of $68,850 per annum.[1455] Below, the Commission has estimated the costs for each form separately.

As proposed, Form 204 would be required to be filed when a trader accumulates a net long or short commodity derivative position that exceeds a federal limit in a referenced contract. Form 204 would inform the Commission of the trader's cash positions underlying those commodity derivative contracts for purposes of claiming bona fide hedging exemptions.

The Commission estimates that approximately 425 traders would be required to file Form 204 once a month (12 times per year) each. At an estimated 3 labor hours to complete and file each Form 204 report for a total annual burden to industry of 15,300 labor hours, the Form 204 reporting requirement would cost industry $1,866,600 in labor costs.

As proposed, Form 304 would be required to be filed by merchants and dealers in cotton and contains information on the quantity of call cotton bought or sold on a weekly basis. Form 304 would be required in order for the Commission to produce its weekly cotton ''on call'' report.[1456]

The Commission estimates that approximately 200 traders would be required to make a Form 304 submission for call cotton 52 times per year each. At 1 hour to complete each submission for a total annual burden to industry of 10,400 labor hours, the Form 304 reporting requirement would impose upon industry $1,268,800 in labor costs.

(ii) Form 504

As proposed, § 19.01(a)(1) would require persons claiming a conditional spot month limit exemption pursuant to § 150.3(c) to file Form 504. Unlike other series '04 forms, Form 504 would apply only to commodity derivative contracts in natural gas markets.[1457] A Form 504 filing would show the composition of the natural gas cash position underlying a referenced contract that is held or controlled for which the exemption is claimed. The Commission notes that this form should be submitted daily for each day of the 3-day spot period for the core referenced futures contract in natural gas. The Commission estimates that approximately 40 traders would claim a conditional spot month limit 12 times per year, and each corresponding submission would take 15 labor hours to complete and file. Therefore, the Commission estimates that the proposed Form 504 reporting requirement would result in approximately 7,200 total annual labor hours for an additional industry-wide labor cost of $878,400.

Limits Proposal. *See* 2016 Supplemental Position Limits Proposal, 81 FR 38500.

[1451] *See supra* discussion of number of traders over the limit levels.

[1452] The Commission also used this analysis to determine the number of entities subject to the Commission's recordkeeping and special call rules in § 150.3.

[1453] CL–ICE–60929 at 17.

[1454] The Commission computed the alternative wage rate as a weighted national average of salary for professionals with the following titles (and their relative weight); ''compliance manager'' (25 percent weight), 3 ''compliance examiner, intermediate'' (15 percent each) and ''assistant/associate general counsel'' (30 percent). After adjusting for inflation, overhead, and benefits, the wage rate was $107. These titles appeared to best represent the commenter's suggestion but without additional input from the commenter it is impossible to ascertain the commenter's original intent regarding titles of necessary staffing.

[1455] This estimate was based upon an average wage rate of $51 per hour. Adjusted to the hourly wage rate used for purposes of this PRA estimate, the previous total labor cost would have been $202,500.

[1456] The Commission's Weekly Cotton On-Call Report can be found here: *http://www.cftc.gov/MarketReports/CottonOnCall/index.htm.*

[1457] *See supra,* discussion of conditional spot month limit exemption (§ 150.3(c)).

The Commission requests comment on its estimates regarding new Form 504.

(iii) Form 604

Persons claiming a pass-through swap exemption pursuant to § 150.3(a) would be required to file proposed Form 604 showing various data (depending on whether the offset is for non-referenced contract swaps or spot-month swaps) including, at a minimum, the underlying commodity or commodity reference price, the applicable clearing identifiers, the notional quantity, the gross long or short position in terms of futures-equivalents in the core referenced futures contracts, and the gross long or short positions in the referenced contract for the offsetting risk position. For proposed Form 604 reports filed for positions held outside of the spot month, the Commission estimates that approximately 250 traders would claim a pass-through swap exemption an average of 10 times per year each. At approximately 30 labor hours to complete each corresponding submission for a total burden to traders of 75,000 annual labor hours, compliance with the proposed Form 604 filing requirements industry-wide would impose an additional $9,150,000 in labor costs.

(iv) Form 704

Traders claiming anticipatory bona fide hedging exemptions would be required to file proposed Form 704 for the initial statement/application pursuant to § 150.7(d), along with an annual update on the same form. Because annual update requires mostly the same information as the initial statement, allowing market participants to update only fields that have changed since the initial statement was filed rather than having to update the entire form, the Commission anticipates the annual update requiring about half the time to complete. The Commission estimates that approximately 250 traders would claim anticipatory exemptions by filing an initial statement approximately once per year. At an estimated 15 labor hours to complete and file an initial statement on Form 704 for a total annual burden to traders of 3,750 labor hours, the anticipatory exemption filing requirement would cost industry an additional $457,500 in labor costs. The annual update to proposed Form 704 is estimated to be required of the same 250 traders once a year, at an estimated 8 hours to complete and file, for an industry-wide burden of 2,000 hours and $244,000 in labor costs.

(v) Recordkeeping and Other Provisions

Any person claiming an exemption from federal position limits under part 150 would be required to keep and maintain books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions to serve as a reasonable basis to demonstrate reduction of risk on each day that the exemption was claimed. These records would be required to be comprehensive, in that they must cover anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, pass-through swaps, cross-commodity hedges, and more.

The Commission estimates that approximately 425 traders would claim an average of 50 exemptions each per year that fall within the scope of the recordkeeping requirements of proposed § 150.3(g). At approximately one hour per exemption claimed to keep and maintain the required books and records, the Commission estimates that industry would incur a total of 20,000 annual labor hours amounting to $2,592,500 in additional labor costs.

In addition, proposed § 150.3(h) would provide that upon call from the Commission any person claiming an exemption from speculative position limits under proposed § 150.3 must provide to the Commission any information as specified in the call. It is difficult to determine in advance of any such call who may be required to submit information under proposed § 150.3(h), how that information may be submitted, or how many labor hours it may take to prepare and submit such information. However, for the purposes of the PRA, the Commission has made estimates regarding the potential burden.

The Commission estimates that approximately 425 traders would be eligible to be called upon for additional information under proposed § 150.3(h) each year. At approximately two hours per exemption claimed to keep and maintain the required books and records, the Commission estimates that industry would incur a total of 850 annual labor hours amounting to $103,700 in additional labor costs.

(vi) Exchange-Set Limits and Exchange-Recognized Exemptions

Traders who wish to avail themselves of any exemption from a DCM or SEF's speculative position limit rules would need to submit an application to the DCM or SEF explaining how the exemption would be in accord with sound commercial practices and would allow for a position that could be liquidated in an orderly fashion. As noted supra, the Commission understands that requiring traders to apply for exemptive relief comports with existing DCM practice; thus, the Commission anticipates that the proposed codification of this requirement would have the practical effect of incrementally increasing, rather than creating, the burden of applying for such exemptive relief. The Commission estimates that approximately 425 traders would claim exemptions from DCM or SEF-established speculative position limits each year, with each trader on average making 1 application to the DCM or SEF each year. Each submission is estimated to take 2 hours to complete and file, meaning that these traders collectively would incur a total burden of 850 labor hours per year for an industry-wide additional labor cost of $39,976.

Under proposed §§ 150.9(a)(3), 150.10(a)(3), and 150.11(a)(2), designated contract markets and swap execution facilities that elect to process applications to establish an application process that elicits sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to recognize a commodity derivative position as an non-enumerated bona fide hedging position, exempt spread position or enumerated anticipatory bona fide hedge, respectively. Pursuant to proposed §§ 150.9(a)(4)(i), 150.10(a)(4), and 150.11(a)(3), an applicant would be required to update an application at least on an annual basis. Further, DCMs and SEFs have authority under §§ 150.9(a)(6), 150.10(a)(6), and 150.11(a)(5) to require that any such applicant file a report with the designated contract market or swap execution facility pertaining to the use of any exemption that has been granted.

The Commission anticipates that market participants would be mostly familiar with the non-enumerated bona fide hedging position application provided by exchanges that currently process such applications, and thus believes that the burden for applying to an exchange would be minimal. Information included in the application would be required to be sufficient to allow the exchange to determine, and the Commission to verify, whether the position meets the requirements of CEA section 4a(c), but specific data fields are left to the exchanges to determine. The Commission notes that there would be a slight additional burden for market participants to submit the notice regarding the use of any exemption granted, should the DCM or SEF require such a report.

The Commission estimates that 325 entities would file an average of 2 applications each year to obtain recognition of certain positions as non-enumerated bona fide hedges and that each application, including any usage report that may be required by the DCM or SEF, would require approximately 4 burden hours to complete and file. Thus, the Commission estimates an average per entity burden of 8 labor hours and an industry-wide burden of 2,600 labor hours annually. The Commission estimates an average cost of approximately $976 per entity or $317,200 for the industry as a whole for applications under § 150.9(a)(3).

The Commission anticipates that market participants would be mostly familiar with the spread exemption application provided by exchanges that currently process such applications, and thus believes that the burden for applying to an exchange would be minimal. Information included in the application is required to be sufficient to allow the exchange to determine, and the Commission to verify, whether the position fulfills the objectives of CEA section 4a(a)(3)(B), but specific data fields are left to the exchanges to determine. The Commission notes that there would be a slight additional burden for market participants to submit the notice regarding the use of any exemption granted should the DCM or SEF require such a report.

The Commission estimates that 85 entities would file an average of 2 applications each year to obtain an exemption for certain spread positions and that each application, including any usage report required by the DCM or SEF, would require approximately 3 burden hours to complete and file. Thus, the Commission approximates an average per entity burden of 6 labor hours and an industry-wide burden of 510 labor hours annually. The Commission estimates an average cost of approximately $732 per entity or $62,220 for the industry as a whole for applications under § 150.10(a)(2).

The Commission anticipates that market participants would be mostly familiar with the enumerated anticipatory bona fide hedge application provided by exchanges that currently process such applications, and thus believes that the burden for applying to an exchange would be minimal. The application is required to include, at a minimum, the information required under § 150.7(d). The Commission estimates that 90 entities would file an average of 2 applications each year to obtain recognition that certain positions are enumerated anticipatory bona fide hedges and that each application would require approximately 3 burden hours to complete and file. Thus, the Commission estimates an average per entity burden of 6 labor hours and an industry-wide burden of 510 labor hours annually. The Commission estimates an average cost of approximately $732 per entity or $65,880 for the industry as a whole for applications under proposed § 150.11(a)(2). The Commission invites comments on any these proposed estimates.

(b) Recordkeeping and Reporting Obligations for DCMs and SEFs

(i) Submission of Estimates of Deliverable Supply

For purposes of assisting the Commission in resetting spot-month limits, proposed § 150.2(e)(3)(ii) would require DCMs to supply the Commission with an estimated spot-month deliverable supply for each core referenced futures contract listed. The estimate must include documentation as to the methodology used in deriving the estimate, including a description and any statistical data employed. The Commission estimates that the submission would require a labor burden of approximately 20 hours per estimate. Thus, a DCM that submits one estimate may incur a burden of 20 hours for a cost of approximately $2,440. DCMs that submit more than one estimate may multiply this per-estimate burden by the number of estimates submitted to obtain an approximate total burden for all submissions, subject to any efficiencies and economies of scale that may result from submitting multiple estimates.

The Commission notes that, in response to comments, the Commission proposes to allow a DCM that does not wish a spot-month limit level to be changed to petition the Commission to not change the limit level and, if the petition is approved, the DCM would not need to submit deliverable supply estimates for such a commodity. A DCM that submits one petition may incur a burden of one hour, resulting in an estimated per-petition cost of approximately $488. Again, DCMs that submit more than one petition may multiply this per-petition burden by the number of petitions submitted.

(ii) Filing New or Amended Rules Pursuant to Part 40

Designated contract markets and swap execution facilities that elect to process the recognition of non-enumerated bona fide hedging positions, exempt spread positions, or enumerated anticipatory bona fide hedging positions would be required to file new rules or rule amendments pursuant to Part 40 of this chapter, establishing or amending its application process for recognition of the above-referenced positions, consistent with the requirements of proposed §§ 150.9, 150.10, and 150.11.

The Commission estimates that, at most, 6 entities would file new rules or rule amendments pursuant to Part 40 to elect to process non-enumerated bona fide hedging, spread, or enumerated anticipatory hedging applications. The Commission determined this estimate by analyzing how many exchanges currently list actively traded contracts for the 28 commodities for which federal position limits would be set, because proposed §§ 150.9(a), 150.10(a), and 150.11(a) would require a referenced contract to be listed by and actively traded on any exchange that elects to process applications for recognition of positions in such referenced contract. The Commission anticipates that the exchanges that would elect to process applications under these sections are likely to have processes for recognizing such exemptions currently, and so would need to file amendments to existing exchange rules rather than adopt new rules. Thus, the Commission approximates an average per entity burden of 10 labor hours.[1458] The Commission estimates an average cost of approximately $1,220 per entity for filing revised rules under part 40 of the Commission's regulations.

(iii) Review and Disposition of Applications

An exchange that elects to process applications may incur a burden related to the review and disposition of such applications pursuant to proposed §§ 150.9(a), 150.10(a), and 150.11(a). The review of an application would be required to include analysis of the facts and circumstances of such application to determine whether the application meets the standards established by the Commission. Exchanges would be required to notify the applicant regarding the disposition of the application, including whether the application was approved, denied, referred to the Commission, or requires additional information.

In the 2016 Supplemental Proposal, the Commission noted that the exchanges that would elect to process non-enumerated bona fide hedging position, exempt spread position, and

[1458] Table IV–B–1 at the end of this section provides a more detailed breakdown of costs.

enumerated anticipatory bona fide hedging position applications are likely to have processes for the review and disposition of such applications currently in place. The Commission noted its preliminary belief that in such cases, complying with the rules would be less burdensome because the exchange would already have staff, policies, and procedures established to accomplish its duties under the rules.

One exchange submitted a comment requesting the Commission alter its estimates of the burdens to exchanges for reviewing such submissions, noting that the proposed rules ''provide[d] for the collection of considerably more documents than are currently required for Exchange exemption requests.'' The commenter continued that the ''review and consideration of these documents will result in additional time spent on each exemption request'' and suggested the Commission increase its estimate from five hours to seven hours per review.[1459] The commenter also suggested the Commission increase the number of applications that exchanges are estimated to process, stating that the Commission's estimate of 285 exemption requests (for all three types of applications) paled in comparison to the exchange's estimate of 500 applications.[1460]

The Commission notes that it is unclear whether the exchange's estimate of 500 applications includes applications in commodities outside of the commodities subject to the proposed rules. If so, the exchange may have overestimated the number of new applications the exchange may process per year. Further, the estimates of one exchange may not be representative of the number of applications received by the other five exchanges. However, in an abundance of caution, the Commission proposes to use the exchange's estimate for the number of applications. Since the commenter did not suggest the proportion of applications was improperly distributed amongst the sections regarding non-enumerated bona fide hedging positions, exempt spread positions, and enumerated anticipatory hedging positions, the Commission has estimated the costs resulting from each type of application using roughly the same proportion as originally proposed.

Thus, the Commission estimates that each exchange would process approximately 325 non-enumerated bona fide hedging position applications per year and that each application would require 7 hours to process, for an average per entity burden of 2,275 labor hours annually. The Commission estimates an average cost of approximately $277,500 per entity under § 150.9(a).

The Commission estimates that each exchange would process about 85 spread exemption applications per year and that each application would require 7 hours to process, for an average per entity burden of 595 labor hours annually. The Commission estimates an average cost of approximately $72,590 per entity under proposed § 150.10(a). The Commission invites comments on these estimates.

The Commission estimates that each entity would process about 90 anticipatory hedging applications per year and that each application would require 7 hours to process, for an average per entity burden of 630 labor hours annually. The Commission estimates an average cost of approximately $76,860 per entity under proposed § 150.11(a).

(iv) Publication of Summaries

Exchanges that would elect to process the applications under proposed §§ 150.9 and 150.10 may incur burdens to publish on their Web sites summaries of the unique types of non-enumerated bona fide hedging position positions and spread positions, respectively. This requirement would be new even for exchanges that already have a similar process under exchange-set limits.

The Commission estimated in the 2016 Supplemental Position Limits Proposal that a single summary would require 5 hours to write, approve, and post. An exchange also commented that these summaries would likely require seven hours per summary to prepare.[1461] Thus, the Commission now estimates that each exchange would post approximately 40 summaries per year, with an average per summary burden of 7 labor hours.[1462] The Commission estimates an average cost of approximately $34,160 per entity, representing the combined burdens of § 150.9(a)(7) and § 150.10(a)(7). The Commission invites comments on these estimates.

(v) Recordkeeping

Designated contract markets and swap execution facilities that elect to process applications are required under proposed §§ 150.9(b), 150.10(b), and 150.11(b) to keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing and disposition of applications for recognition of non-enumerated bona fide hedging positions, exempt spread positions, and enumerated anticipatory bona fide hedges. The Commission believes that exchanges currently process applications for recognition of non-enumerated bona fide hedging positions, exempt spread positions, and enumerated anticipatory bona fide hedges maintain records of such applications as required pursuant to other Commission regulations, including § 1.31. However, the Commission also believes that the rules may confer additional recordkeeping obligations on exchanges that elect to process applications for recognition of non-enumerated bona fide hedging positions, exempt spread positions, and enumerated anticipatory bona fide hedges.

The Commission estimates that 6 entities would have recordkeeping obligations pursuant to proposed §§ 150.9(b), 150.10(b), and 150.11(b). Thus, the Commission approximates an average per entity burden of 90 labor hours annually for all three sections. The Commission estimates an average cost of approximately $10,980 per entity for records and filings under §§ 150.9(b), 150.10(b), and 150.11(b).[1463] The Commission invites comments on its estimates.

(vi) Reporting

The Commission anticipates that exchanges that elect to process applications for recognition of non-enumerated bona fide hedging positions, spread exemptions, and enumerated anticipatory bona fide hedges would be required to file two types of reports. In particular, proposed §§ 150.9(c) and 150.10(c) would require a designated contract market or swap execution facility that elects to process applications for non-enumerated bona fide hedging positions and exempt spread positions to submit to the Commission (i) a summary of any non-enumerated bona fide hedging position and exempt spread position newly published on the designated contract market or swap execution facility's Web site; and (ii) no less frequently than monthly, any report submitted by an applicant to such designated contract market or swap execution facility pursuant to rules authorized under

[1459] *See* CL–ICE–60929 at 17.

[1460] *Id.*

[1461] *See* CL–ICE–60929 at 17.

[1462] The Commission has combined the burdens for summaries published in accordance with § 150.9(a)(7) and § 150.10(a)(7) in order to make the text clearer. Table IV–B–1 at the end of this section provides a more detailed breakdown of costs by regulation.

[1463] The Commission has combined the burdens for recordkeeping under §§ 150.9(b), 150.10(b), and 150.11(b). Table IV–B–1 at the end of this section provides a more detailed breakdown of costs by regulation.

proposed §§ 150.9(a)(6)and 150.10(a)(6), respectively. Further, proposed §§ 150.9(c), 150.10(c), and 150.11(c) would require designated contract markets and swap execution facilities that elect to process relevant applications to submit to the Commission a report for each week as of the close of business on Friday showing various information concerning the derivative positions that have been recognized by the designated contract market or swap execution facility as an non-enumerated bona fide hedging position, exempt spread position, or enumerated anticipatory bona fide hedge position, and for any revocation, modification or rejection of such recognition.

The Commission understands that 5 exchanges currently submit reports, on a voluntary basis each month, which provide information regarding exchange-recognized exemptions of all types. The Commission stated in the 2016 Supplemental Position Limits Proposal its preliminary belief that the content of such reports is similar to the information required of the reports in §§ 150.9(c), 150.10(c), and 150.11(c), but the frequency of such reports would increase under the proposed rules. The Commission estimated that the weekly report would require approximately 3 hours to complete and submit and that the monthly report would require 2 hours to complete and submit.

An exchange commented that the Commission ''significantly understated'' the time required to prepare, review, and submit the weekly and monthly reports based on the amount of time the exchange currently spends to prepare and submit the reports it already submits. The commenter suggested the Commission revise its estimates to reflect the exchange's estimates of six hours to prepare the weekly report and six hours to prepare the monthly report.[1464]

The Commission estimates that 6 entities would have weekly reporting obligations pursuant to reproposed §§ 150.9(c)(1), 150.10(c)(1), and 150.11(c).[1465] The Commission is revising its estimate to reflect the commenter's assertion that the weekly report will require a burden of approximately 6 hours to complete and submit. Thus, the Commission estimates an average per entity burden of 936 labor hours annually. The Commission estimates an average cost of approximately $114,192 per entity for weekly reports pursuant to all three related sections. The Commission invites comments on its estimates.

The Commission also estimates that 6 entities would have monthly reporting obligations pursuant to reproposed §§ 150.9(c)(2) and 150.10(c)(2).[1466] The Commission also estimates that the monthly report would require a burden of approximately 6 hours to complete and submit. Thus, the Commission approximates an average per entity burden of 144 labor hours annually. The Commission estimates an average cost of approximately $17,568 per entity for monthly reports under both sections.

TABLE IV–B–1—BREAKDOWN OF BURDEN ESTIMATES BY REGULATION AND TYPE OF RESPONDENT

Type of respondent	Required record or report	Total number of respondents	Annual number of responses per respondent	Total annual responses	Estimated number of burden hours per response	Annual burden
A	B	C	D	E [1467]	F	G [1468]
Exchange	New or amended rule filings under part 40 per § 150.9(a)(1), (a)(6).	6	2	12	5	60
Exchange	New or amended rule filings under part 40 per § 150.10(a)(1), (a)(6).	6	2	12	5	60
Exchange	New or amended rule filings under part 40 per § 150.11(a)(1), (a)(5).	6	2	12	5	60
Exchange	Collection, review, and disposition of application per § 150.9(a).	6	325	1,950	7	13,650
Exchange	Collection, review, and disposition of application per § 150.10(a).	6	85	510	7	3,570
Exchange	Collection, review, and disposition of application per § 150.11(a).	6	90	540	7	3,780
Exchange	Summaries Posted Online per § 150.9(a)	6	30	180	7	1,260
Exchange	Summaries Posted Online per § 150.10(a)	6	10	60	7	420
Exchange	§ 150.9(b) Recordkeeping	6	1	6	30	180
Exchange	§ 150.10(b) Recordkeeping	6	1	6	30	180
Exchange	§ 150.11(b) Recordkeeping	6	1	6	30	180
Exchange	§ 150.9(c)(1) Weekly Report	6	52	312	6	1,872
Exchange	§ 150.10(c)(1) Weekly Report	6	52	312	6	1,872
Exchange	§ 150.11(c) Weekly Report	6	52	312	6	1,872
Exchange	§ 150.9(c)(2) Monthly Report	6	12	72	6	432
Exchange	§ 150.10(c)(2) Monthly Report	6	12	72	6	432
Exchange	§ 150.2(a)(3)(ii) DS Estimate Submission Petition.	6	4	24	1	24
Exchange	§ 150.2(a)(3)(ii) DS Estimate Submission	6	4	24	20	480
Exchange	§ 150.5(a)(2)(ii) Exchange-Set Limit Exemption Application.	6	425	2,550	2	5,100
Market Participant.	§ 150.5(a)(2)(ii) Exchange-Set Limit Exemption Application.	425	1	425	2	850
Market Participant.	§ 150.9(a)(3) NEBFH Application	325	2	650	4	2,600

[1464] *See* CL–ICE–60929 at 17.

[1465] The Commission has combined the burdens for recordkeeping under §§ 150.9(c), 150.10(c), and 150.11(c). Table IV–B–1 at the end of this section provides a more detailed breakdown of costs by regulation.

[1466] The Commission has combined the burdens for recordkeeping under §§ 150.9(c)(2) and 150.10(c)(2). Table IV–B–1 at the end of this section provides a more detailed breakdown of costs by regulation.

TABLE IV–B–1—BREAKDOWN OF BURDEN ESTIMATES BY REGULATION AND TYPE OF RESPONDENT—Continued

Type of respondent A	Required record or report B	Total number of respondents C	Annual number of responses per respondent D	Total annual responses E [1467]	Estimated number of burden hours per response F	Annual burden G [1468]
Market Participant.	§ 150.10(a)(3) Spread Exemption Application.	85	2	170	3	510
Market Participant.	§ 150.11(a)(2) Application On Form 704	90	2	180	3	540
Market Participant.	§ 150.3(g) Recordkeeping	425	50	21,250	1	21,250
Market Participant.	§ 19.01(a)(1) Form 504	40	12	480	15	7,200
Market Participant.	§ 19.01(a)(2)(i) Form 604 Non Spot Month	250	10	2,500	30	75,000
Market Participant.	§ 19.01(a)(2)(ii) Form 604 Spot Month	100	10	1,000	20	20,000
Market Participant.	§ 19.02 Form 304	200	52	10,400	1	10,400
Market Participant.	§ 19.01(a)(3) Form 204	425	12	5,100	3	15,300
Market Participant.	§ 150.3(h) Special Call	425	1	425	2	850
Market Participant.	§ 150.7(a) Form 704 Initial Statement	250	1	250	15	3,750
Market Participant.	§ 150.7(a) Form 704 Annual Update	250	1	250	8	2,000
Totals		431	116.13	50,052	3.91	195,734

[1467] Column C times column D.
[1468] Column E times column F.

4. Initial Set-Up and Ongoing Maintenance Costs

In documents submitted to OMB in accordance with the requirements of the Paperwork Reduction Act, the Commission estimated that the total annualized capital, operational, and maintenance costs associated with complying with the proposed rules amending part 150 would be approximately $11.6 million across approximately 400 firms. Of this $11.6 million, the Commission estimated that $5 million would be from annualized capital and start-up costs and $6.6 million would be from operating and maintenance costs. These cost estimates were based on Commission staff's estimated costs to develop the reports and recordkeeping required in the proposed part 150.

The Commission explained that the proposed expansion of the number of contract markets with Commission-set position limits, and the Congressional determination that such limits be applied on an aggregate basis across all trading venues and all economically-equivalent contracts, might increase operational costs for traders to monitor position size to remain in compliance with federal position limits. The Commission further explained that as such limits have been in place in the futures markets for over 70 years, the Commission believed that traders in those markets would have already developed means of compliance and thus would not require additional capital or start-up costs. The Commission stated its expectation that, while affected futures entities would be able to significantly leverage existing systems and faculties to comply with the extended regime, entities trading only or primarily in swaps contracts may not have developed such means.

One commenter provided specific estimates of the start-up costs to develop new systems to track and report positions, stating that per-entity costs will range from $750,000 to $1,500,000. The commenter also stated that ongoing annual costs would range from $100,000 to $550,000 per entity.[1469] The Commission notes that the commenter did not provide data underlying its cost estimates from which the Commission could duplicate the commenter's estimates.

The Commission maintains its belief that market participants will be able to leverage existing systems and strategies for tracking and reporting positions. As noted above, the Commission recognizes that expanding the federal speculative position limits regime into additional commodities beyond the legacy agricultural commodities will increase monitoring costs for firms. However, the Commission continues to expect that firms trading in the commodities subject to federal limits under § 150.2 do currently monitor for exchange-set and/or federal limits, and submit reports to claim exemptions in contracts for future delivery in such commodities. The Commission therefore continues to believe that costs for futures market participants resulting from the rules adopted herein are marginal increases upon existing costs, rather than entirely new burdens. Further, the Commission notes that it is difficult to ascertain an estimate of the average cost to market participants, as, depending on its size and complexity, a market participant could comply with position limits using anything from an Excel spreadsheet to multiple transaction capture systems.

The Commission is increasing its estimates to respond to the commenter. For swaps market participants unused to speculative position limits on swaps contracts, the Commission continues to estimate a greater cost to start and continue monitoring for and complying with speculative position limits.

Specifically, the Commission estimates that 441 entities would incur annualized start-up costs across all affected entities of $47,800,000. The

[1469] *See* CL–FIA–59595 at 35–36.

Commission also estimates that 441 entities would incur ongoing operating and maintenance costs of $12,075,000 across all affected entities. The Commission invites comments on its estimates. Table IV–B–2 breaks down the start-up and annual operating and maintenance costs by affected entities.

TABLE IV–B–2—BREAKDOWN OF START-UP AND ANNUAL OPERATING AND MAINTENANCE COSTS

	Total number of respondents	Total annualized capital/start-up costs	Average annualized capital/start-up costs	Total annual operating & maintenance costs	Average annual (operating & maintenance costs)	Total annualized cost requested
§§ 19 and 150—Futures & Swaps Participants	425	42,500,000	100,000	10,625,000	25,000	53,125,000
§§ 19 and 150—Swaps Only Participants	10	5,000,000	500,000	1,000,000	100,000	6,000,000
§ 150—Exchanges	6	300,000	50,000	450,000	75,000	750,000
Total		47,800,000		12,075,000		59,875,000

5. Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the reproposed information collection requirements discussed above. The Commission will consider public comments on this reproposed collection of information in:

(1) Evaluating whether the reproposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) evaluating the accuracy of the estimated burden of the reproposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) minimizing the burden of the reproposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW., Washington, DC 20581, (202) 418–5160 or from *http://RegInfo.gov.* Organizations and individuals desiring to submit comments on the reproposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202) 395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this Release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this Release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the Reproposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[1470] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[1471] The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[1472]

One commenter, the NFP Electric Entities,[1473] stated that the Commission ''ignore[d] its responsibilities under the RFA'' because it did not account for the impact on the members of the trade associations. The commenter states that the rules impose costs on ''small entities'' that ''should not be swept up in the Commission's new speculative position limits.'' [1474] The Commission notes, however, that under the Between NFP Electrics Exemptive Order certain delineated non-financial energy transactions between certain specifically defined entities were exempted, pursuant to CEA sections 4(c)(1) and 4(c)(6), from all requirements of the CEA and Commission regulations issued thereunder, subject to certain anti-fraud, anti-manipulation, and record inspection conditions.[1475] All entities

[1470] 44 U.S.C. 601 *et seq.*

[1471] 5 U.S.C. 601(2), 603–05.

[1472] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618–19, Apr. 30, 1982 (DCMs, FCMs, and large traders) (''RFA Small Entities Definitions''); Opting Out of Segregation, 66 FR 20740–43, Apr. 25, 2001 (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548, Jun. 4, 2013 (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, Jan. 19, 2012, (swap dealers and major swap participants); and Special Calls, 72 FR 50209, Aug. 31, 2007 (foreign brokers).

[1473] The NFP Electric Entities is a group of trade associations related to electricity entities comprised of the National Rural Electric Cooperative Association, the American Public Power Association, and the Large Public Power Council, with the support of ACES and The Energy Authority.

[1474] *See* CL–NFP–59690 at 26–27.

[1475] *See* the Between NFP Electrics Exemptive Order (Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives, 78 FR 19670 (Apr. 2, 2013) (''Federal Power Act 201(f) Order'').

Continued

that meet the requirements for the exemption provided by the Federal Power Act 201(f) Order are, therefore, already exempt from position limits compliance for all transactions that meet the Order's conditions.

Further, while the requirements under this rulemaking may impact non-financial end users, the Commission notes that position limits levels apply only to large traders. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the December 2013 Position Limits Proposal [1476] and the 2016 Supplemental Position Limits Proposal.[1477]

V. Appendices

A. Appendix A—Review of Economic Studies [1478]

Introduction

There are various statistical techniques for testing various hypotheses about position limits and related matter. Many of these techniques are deployed to determine whether speculative positions influence price, price changes, or volatility. The Commission has engaged in a comprehensive review and analysis of the various economic studies and papers in the administrative record.

These economic studies bearing on the proposed rule arrived in the administrative record in various ways. They include studies cited in the Commission's notice of proposed rulemaking; studies substantially relied upon in comment letters; and studies mentioned in a list submitted by commenter Markus Henn (''Henn Letter'').[1479] Those studies that were submitted formally for the record receive focused discussion in Section IV below.

As a group, these studies do not show a consensus in favor of or against position limits. Many studies limited themselves to subsidiary questions and did not direct address the desirability or utility of position limits themselves. The quality of the studies varies. Some studies are written by esteemed economists and published in academic, peer-reviewed journals. For other studies, that is not the case. Those studies that did at least touch on position limits had disparate conclusions on the ability economists to use market fundamentals to explain commodity prices; the existence of ''excessive speculation'' in various futures markets; and the utility of position limits. Section 4a(a)(1) of the CEA provides for position limits as a means to address certain specified burdens on interstate commerce. Studies that dispute the utility of position limits for the purposes Congress identified are less helpful than studies addressing other questions.

Preliminary Matters

1. Defining ''Speculation'' and Use of Proxies To Measure Speculation

It can be difficult to distinguish between ordinary speculation that is permitted and desirable, because it facilitates the transfer of risk and provides liquidity for hedgers, and harmful or ''excessive'' speculation. Ideally, speculation may better align prices with market fundamentals.[1480] Speculators in the commodity futures market can generally enhance liquidity and reduce a hedger's cost associated with searching for a counterparty who wants to take an opposition position. Speculators facilitate the needs of hedgers to transfer price risk and increase overall trading volume, all of which can generally contribute to the well-being of a marketplace.[1481]

Congress has found ''excessive speculation'' in futures contracts to be ''an undue and unnecessary burden on interstate commerce.'' [1482] In accordance with that finding, Congress has provided for position limits in order to ''diminish, eliminate, or prevent such burden.'' This paper evaluates economic studies concerning how position limits can diminish unreasonable price fluctuations and changes.

a.''Excess Speculation'' and Volatility

Although volatility may be an indicator of excess speculation, as Congress has determined, price volatility, in itself, does not establish ''excess speculation.'' [1483] Changes in fundamentals of supply and demand can create substantial volatility, and some commodities are, based on their nature, more prone to price volatility. Changes in these fundamentals may induce disagreement between market participants on the appropriate price, causing some measure of price volatility, but this does not necessarily imply the existence of excess speculation.

One of the main functions of the swaps and futures markets is to permit parties with structural exposure to price risk (hedgers such as buyers or sellers of commodity-related products) to manage price changes or price volatility by transferring price risk to others. Speculators in these markets often, in effect, shield hedgers from some forms of price volatility by accepting this price risk. The nation's futures and swaps markets helps producers and suppliers of these commodities, and the customers they serve, hedge price risk to avoid price uncertainty when desired. In this way, volatility and speculation are not *per se* unwelcome phenomena in these markets. They are natural events in these markets. It is the nature of markets to fluctuate.[1484]

See also CL–NFP–59690 at 14–15. The Federal Power Act 201(f) Order exempted all ''Exempt Non-Financial Energy Transactions'' (as defined in the Federal Power Act 201(f) Order) that are entered into solely between ''Exempt Entities'' (also as defined in the Federal Power Act 201(f) Order, namely ''any electric facility or utility that is wholly owned by a government entity as described in the Federal Power Act ('FPA') section 201(f) . . .; (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994 . . .; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative's status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), . . . and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing.''). *See* Federal Power Act 201(f) Order at 19688.

[1476] *See* December 2013 Position Limits Proposal, 78 FR at 75784.

[1477] *See* 2016 Supplemental Position Limits Proposal, 81 FR at 38499.

[1478] Earlier this year, a draft literature review written by staff was released prematurely. Although there are similarities between the analysis in that document and the analysis herein, that document did not represent the final views of the Commission or the Office of the Chief Economist.

[1479] February 10, 2014, comment letter by Markus Henn of World Economic, Ecology & Development, including an attachment, a November 26, 2013 list entitled ''Evidence on the Negative Impact of Commodity Speculation by Academics, Analysis and Public Institutions.'' *See http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59628&SearchText=henn.* As noted, of the various economic studies and papers in the administrative record, some were cited in the December 2013 Position Limits Proposal. Others were substantially relied upon in comment letters or mentioned in a list submitted by commenter Markus Henn (CL–WEED–59628); these studies are available in the comment letter file through the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1708.*

[1480] Speculation is a natural market phenomenon in a market with differing investor expectations. Harrison and Kreps, Speculative Investor Behavior in a Stock Market with Heterogeneous Expectations, Quarterly Journal of Economics (Oxford University Press 1978).

[1481] Bahattin Büyükşahin and Jeffrey H. Harris, The Role of Speculators in the Crude Oil Futures Market (working paper 2009).

[1482] 7 U.S.C. 6a(a)(1).

[1483] *Id.*

[1484] What may be ''natural'' volatility in one commodity futures market may be unexpected in

Just as volatility is not a per se harmful or unexpected event in the commodity futures markets, speculation in those markets is welcome and will often actually reduce volatility. A well-reasoned 2009 economic study (by economists who were then CFTC employees) concluded that speculative trading in the futures market is not, in and of itself, destabilizing.[1485] This frequently cited study concludes that normal speculative trading activity actually reduces volatility levels, as a general rule, while acknowledging that there are limited empirical studies on the subject. ''The limited nature of the previous literature on the market impact of speculators can be attributed to the difficulty of obtaining data on their trading activities.'' [1486] There is, however, substantial theoretical literature that predicts that profitable speculation has a stabilizing effect, ''since speculators buy when the price is low, therefore, increasing depressed prices, and sell when the price is high, therefore, decreasing inflated prices.'' [1487]

Some economic studies attempt to distinguish between normal and helpful speculative activity and excessive speculation: between normal volatility and, in the words of the Commodity Exchange Act, ''unreasonable fluctuations'' in price.[1488] Part of the research task before any economist studying markets for excessive speculation is to model and interpret excessive speculation and unwanted volatility so as to distinguish between unwanted phenomena and the proper workings of a well-functioning market.

b. Working's Speculative T Index

While there is no well-established economic definition of ''excess speculation,'' many economists studying commodity futures marketplace have used a proxy for speculation in commodity futures marketplace known in the economic literature as the Working's speculative T index. Economist Holbrook Working devised in 1960 a ratio to measure the adequacy or excessiveness of speculation. As applied to commodity futures positions, the speculative T index is used to assess the amount of speculative positions in the marketplace beyond the amount of speculative positions necessary to provide liquidity for hedgers in the marketplace.[1489]

The Working's speculative T index is calculated as follows:

$$T = \begin{cases} 1 + \frac{SS}{HL+HS} & if\ HS \geq HL \\ 1 + \frac{SL}{HL+HS} & if\ HL \geq HS \end{cases}$$

where SS is short speculator (non-commercial) positions, SL is long speculator positions, HS is short hedge (commercials) positions and HL is long hedge positions.

It is calculated by computing the ratio of long and short positions for all trades in the commodity market, including those of hedgers and those of speculators.[1490] A high ratio indicates many speculators are holding commodity futures positions. When this speculative T-index is included as an economic variable in economist's models to explain prices, economists may interpret the T index to be a proxy for the relative amount of speculation in the marketplace.

A high Working T index is one way to quantify excess speculation in technical terms, but even then that may not translate into excessive speculation in ''economic terms.''[1491] Additional economic analysis or historical comparisons are useful to understand the meaning and impact of a relatively high number of speculators in a market place.[1492]

c. Absence of Consensus on ''Price Bubbles''

There are several published studies on the effect of speculation on prices and price volatility, as well as studies on speculation generally. These studies employ various statistical methodologies. Some of these find the existence of ''price bubbles,'' meaning somehow artificially high prices that last longer than they should. These studies are analyzed below, but there is no academic consensus on what a ''price bubble'' is and how it can be detected. Thus many of the interpretations set forth in the ''price bubble'' studies are not the only plausible explanation for their statistical findings.

As further detailed below, there is no broad academic consensus on the economic definition of ''excess speculation'' or ''price bubble'' in commodity futures markets. There is also no broad academic consensus on the best statistical model to test for the existence of excess speculation. There is open skepticism in many economic quarters that there can even exist a significant ''price bubble'' in commodity futures markets.[1493]

A large measure of the difficulty stems from the difficulties of second-guessing the market's determination of the price of a commodity contract:

> Experts may express opinions about what the fundamental price should be, given current supply and demand conditions, but

another. Some critics of the proposed rule emphasize that different commodity markets behave differently, and that not all of the commodity markets referenced in the rule are likely to behave as the crude oil markets did in the 2006–2009 time period. On the other hand, some economic studies suggest there can be ''spillovers'' or transmission of volatility from one commodity market to the next. *See, e.g.,* Du, Yu, and Hayes, *Speculation and Volatility Spillover in the Crude Oil and Agricultural Commodity Markets: A Bayesian Analysis,* Energy Economics (2012).

[1485] Brunetti and Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009). The Commission cited this study in particular in its December 2013 Position Limits Proposal. In addition, a copy of this economic study was formally submitted by the CME Group, Inc., as part of the administrative record in a March 28, 2011 comment.

[1486] *Id.* at 3.

[1487] *Id.* at 5.

[1488] 7 U.S.C. 6a(a)(1).

[1489] *See* Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market,* at 9 n.7, 10–11 & 24 (working paper 2009) (employing this technique).

[1490] The Working speculative index is ''predicated on the fact that long and short hedgers do not always trade simultaneously or in the same quantity, so that speculators fill the role of satisfying unmet hedging demand in the marketplace. *Id.* at 1.

[1491] *Id.* at 10.

[1492] *See id.* at 9–10 (a speculative index of 1.41 for crude oil futures contracts in 2008 meant that share of speculation beyond what was minimally necessary to meeting short and long hedging needs, was 41 percent: while such a percentage may seem on its face ''potentially alarming,'' it is comparable historically with agricultural commodity markets).

[1493] Dwight R. Sanders & Scott H. Irwin, *A speculative bubble in commodity futures prices? Cross-sectional evidence,* 41 Agricultural Economics 25–32 (2010) (arguing that while ''bubble'' explanations ''are deceptively appealing, they do not generally withstand close examination''). Because commodity index fund buying is very predictable, it seems highly unlikely that in ordinary market environment traders would fail to trade against an index fund if the fund were driving prices away from fundamental values.

a basic axiom of classical economics is that free markets do a better job of weighing information and determining prices that any group of experts.[1494]

Nonetheless, there are statistical techniques, and theoretical models, that economists have employed to attempt to discern whether recent behavior in the nation's commodity futures markets has deviated from what can be reasonably ascribed to the fundamentals of supply and demand.

d. The Project: Studying Whether Speculative Positions Causing Unwarranted Price Moves

In order to test for the presence of ''excessive'' speculation, many of these economic studies look to whether the existence of substantial positions by speculative traders causes price volatility or a semi-permanent change in price. The idea underlying these studies is that if the presence of sufficiently large positions can induce such price behavior, it is ''excessive.'' Economists use various statistical tools, including correlation analysis, to determine whether there is price behavior caused by speculative positions that is ''unwarranted.'' ''Unwarranted'' price movements are those not associated with fundamentals of supply and demand, the inherent volatility of market prices, or other factors independent of position.

In these studies, economists discuss whether positions have caused movements in price. Technically, economists will study ''price returns'' for a class of commodity, rather than just ''price'' (the nominal price level). Price return gives one the change in price over time, divided by price.[1495]

$$\text{A price return is } \frac{P_{t+1}-P_t}{P_t}.$$

Price return measures price changes over the scale of the underlying price. That is, different commodities may have entirely different scales for prices; by dividing by the underlying price, price returns put different commodity classes on the same percentage scale for comparison purposes.

The conclusions of these various economic analyses, discussed in detail in Section III below, have achieved a reasonable measure of academic consensus on some subsidiary matters bearing on the ultimate question of whether excessive speculation has had an impact on the commodity futures markets. However, there is no academic consensus on the ultimate question of the extent and breadth of the impact, and there is no singular economic study of compelling persuasiveness.

2. Dearth of Compelling Empirical Studies on the Effect of Position Limits on Prices or Price Volatility

There are not many compelling, peer-reviewed economic studies engaging in quantitative, empirical analysis of the impact of position limits on prices or price volatility, and thus on whether position limits are useful in curbing excessive speculation.[1496] The limitations that inhere in empirical analysis of this complex question are set forth below.

a. Trader Identity and Role: Incomplete Data

As many economic researchers observe in their studies, there is no decisive accounting on whether a particular trade or set of trades is speculative or hedging. In practice, researchers often use a rough proxy based on the nature of the trader: Whether they are commercial or non-commercial. However, in both practice and theory, this proxy may fail: Commercial traders may speculate and non-commercial traders may well hedge. For example, a commercial trader might speculate and take an outsize position, in the sense that it exceeds a given hedging business need, in a commodity on the belief that the price will go up and down. Thus ''traders sometimes may be misclassified between commercial and noncommercial positions, and some traders classified as commercial may have speculative motives.'' [1497]

Further compounding these classification problems, the publicly available data also aggregates traders' positions across maturity dates for futures contracts, while the price for any given commodity futures contract is not aggregated by maturity.[1498] In addition, section 8 of the Commodity Exchange Act limits the distribution of detailed trade positon data to academic researchers. The identity of individual traders for specific trades, and their position in the market at the time of name, is not disseminated publicly to economic researchers.[1499] Thus, even when a position limit breach occurs, it is difficult to measure the impact on individual participants in the marketplace.

Even when an economic researcher can find detailed information on specific trades and the nature of the traders, that might not be sufficient to characterize an individual trade as hedging or speculative. A market participant may have business needs it hedges with derivatives and also engage in speculative trading. Thus the identity of the market participant purchasing the commodity futures contracts alone does not accurately capture the motivation for or purpose of the trade. Thus, an economic researcher faces significant data constraints in reliably characterizing trades as speculative or hedging, making it difficult to determine whether position limits are useful in curbing certain speculative activity.

b. Limitations on Studying Markets With Pre-Existing Position Limits

Designing an economic study of the effect of position limits is complicated by the fact that for many commodity markets, position limits are already in place. There is therefore not reliable empirical data for how certain modern commodity futures markets would operate in the absence of position limits. For all the agricultural commodities referenced in the rule, the futures markets have already had in place spot-month position limits at least as strict as those proposed in the rule. For energy commodities such as crude oil, there have been pre-existing ''accountability levels,'' meaning an exchange has the option (but not the requirement) to ask a trader to reduce its position if it exceeds a certain level. For crude oil, the current all-months-combined accountability level is 20,000 contracts. The position limit in the proposed rule for the all-months-combined limit is 109,200 contracts.

The existence of binding position limits in agricultural commodities and accountability levels in the energy markets does not mean that traders do not transgress these limits in current markets and take outsized market positions for speculative reasons. But the existence of current limits does make the economist's task of measuring position limit impact more difficult. When an economist studies an agricultural futures market and attempts to assess the economic advantages and disadvantages of imposing position limits, he or she does not have a dataset of market prices in a marketplace

[1494] D. Andrew Austin & Mark Jickling, *Hedge Fund Speculation and Oil Prices* (1 ed. 2011).

[1495] P is price and t is a particular time, with t+1 being the point in time that is one fixed increment away over which the return is being computed.

[1496] As noted above, however, CEA section 4a(a) reflects the underlying assumption that position limits may be useful for that purpose.

[1497] International Monetary Fund, *IMF Global Financial Stability Report: Financial Stress and Deleveraging: Macrofinancial Implications and Policy* (Oct. 2008).

[1498] *Id.*

[1499] Julien Chevallier, *Price relationships in crude oil futures: new evidence from CFTC disaggregated data,* 15 Environmental Economics and Policy Studies 135 (2012).

without position limits. Thus economists are dependent upon economic models and model interpretation when they attempt to describe how a marketplace without position limits would function. Many economic studies do not account in their models for pre-existing position limits or accountability levels. In fact, many economic studies that bear on the rulemaking do not endeavor to reach the ultimate question of the impact of position limits on prices and market dynamics at all.

There may be fewer instances of dramatic, large-scale ''excessive speculation'' because position limits have been in place in many of these commodity futures markets since 1938. There have thus been few opportunities to study the effect of the imposition of a position limits rule.[1500]

c. Inherent Difficulties of Modelling Complex Economic Phenomena

There is no singularly persuasive study, because these studies use economic models that are, by nature, simplifications of a complex reality. Each of the various models and statistical methods used in these diverse studies has advantages and disadvantages, but they deploy imperfect market data to answer ambitious and complex economic questions. Given the data and modeling limitations, it is unreasonable to expect an economic model that is fulsome (extending to position limits and market speculation), accurate (accommodating and reflecting economic history), and predictive. This is particularly true in the context of market data involving volatile and complex events.

Some studies are better-designed and better-executed than others, which means that they used defensible models with transparent source data. These are discussed throughout this review. Much of the analysis below highlights the flexibility of model design choices and the sensitivity of the results to these modelling choices.

3. Staff-Level Congressional Determinations

There have been findings by policymakers that excessive speculation exists in various commodity futures markets, as the Commission observed in its notice of proposed rulemaking. For example, the Staff of the Permanent Subcommittee on Investigations of the Homeland Security and Government Affairs found [1501] that excessive speculation has had ''undue'' influence on wheat price movements,[1502] the natural gas market,[1503] and oil prices.[1504] Congress itself found ''excessive speculation'' in futures contracts to be ''an undue and unnecessary burden on interstate commerce.'' [1505]

These studies, like all the studies analyzed here, were undertaken in an absence of definitive economic definitions and tests for excessive speculation; limitations on data quality and availability; and the inherent difficulty of modelling complex phenomena.

Discussion

1. Empirical Studies: Economic Studies with Statistical Analysis Bearing on Speculative Positions in the Commodity Markets or Speculation Generally

Economic studies presented in the context of this rulemaking may involve theoretical models; statistical analysis based upon market data; and, most commonly, a combination of both. The economic studies using statistical methods can be categorized into basic statistical methods, such as models of fundamental supply and demand (and related methods), Granger causality, or other methods. The economic studies presented or cited in the comment letters in this rulemaking are best grouped and analyzed by the statistical method they employ, for there are advantages and disadvantages particular to each statistical method.

This discussion evaluates 244 papers in connection with the position limits rule: 133 studies submitted as comments or mentioned in the December 2013 Position Limits Proposal; over 100 additional studies or articles listed in the Henn Letter; and ten additional studies submitted by commenters not included in the above sets.

This group of 244 papers can be categorized below by statistical methodology: 36 Granger causality analyses; 25 comovement or cointegration analyses; 46 studies creating models of fundamental supply and demand; 8 switching regressions or similar analyses; 3 studies using eigenvalue stability analysis; 26 papers presenting theoretical models; and 73 papers that were primarily surveys of the economic literature, perhaps with some aspect of empirical testing or analysis.[1506]

a. Granger ''Causality''

i. Overview of the Granger Method

Below is a discussion of the 36 analyses employing the ''Granger'' or ''Granger causality'' method of statistical analysis. This discussion includes a description of the method and its advantages and disadvantages.

The Granger method seeks to find whether a linear correlation exists between two sets of data that are known as ''time series.'' An example of a time series would be a pair of numbers constituting future prices and time, with the time between the different future prices being a fixed amount of time. This fixed time is known as the ''time step.'' The Granger method takes two time series, such as Series A (futures price returns, each for a different time, for a fixed time step) and Series B

[1500] CFTC, *A Study of the Silver Market, Report To The Congress In Response To Section 21 Of The Commodity Exchange Act, Part Two,* 123 (May 19, 1981) (observing that the imposition of a position limit in silver futures contracts by the Chicago Board of Trade in 1979 did not raise prices); *id.* at 123–24 (observing that price reaction to position limits involves a variety of factors and ''it is not possible to predict in advance the effect of imposition of position limits'').

[1501] *See* Analysis, Section III(B), infra (discussing an economic analysis of these reports).

[1502] Permanent Subcomm. on Investigations of the U.S. Senate, Comm. on Homeland Sec. & Governmental Affairs, *Excessive Speculation in the Wheat Market,* (2009), *available at http://hsgac.senate.gov/public/_files/REPORTExcessiveSpecullationintheWheatMarketwoexhibitschartsJune2409.pdf.*

[1503] Permanent Subcomm. on Investigations of the U.S. Senate, Comm. on Homeland Sec. & Governmental Affairs, Excessive Speculation in the Natural Gas Market, (2007), *available at http://www.hsgac.senate.gov//imo/media/doc/REPORTExcessiveSpeculationintheNaturalGasMarket.pdf?attempt=2.*

[1504] Permanent Subcomm. on Investigations of the U.S. Senate, Comm. on Homeland Sec. & Governmental Affairs, *The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat,* at 19–32 (2006) *available at http://www.hsgac.senate.gov//imo/media/doc/REPORTExcessiveSpeculationintheNaturalGasMarket.pdf?attempt=2* (finding increased speculation in energy commodities and an effect of speculation on prices).

[1505] 7 U.S.C. 6a(a)(1).

[1506] The remaining 27 papers fall into two groups. Two additional papers presented unique methodologies involving volatility are interwoven into the analysis below. The remaining twenty-five papers were not ultimately susceptible to meaningful economic analysis. These papers included pure opinion pieces, studies written in foreign languages, press releases, background documents on basic points of economics or law, studies unavailable due to broken hyperlinks that could not be resolved, or studies founded on methodologies too suspect to warrant extensive discussion. In the latter category, for example, was an unpublished study purported to use a ''novel source of information''—Google metrics involving user searches—as a proxy for the demand associated with ''corn price dynamics.'' Massimo Peri, Daniela Vandone & Lucia Baldi, *Internet, noise trading and commodity futures prices,* 33 International Review of Economics & Finance 82–89 (2014) (cited by Henn Letter). *See also,* Letter from Markus Henn, World Economic, Ecology & Development, to CFTC (Feb. 10, 2014). *See also,* Markus Henn, Evidence on the Negative Impact of Commodity Speculation by Academics, Analysis and Public Institutions, (Nov. 26, 2013).

(changes in speculative positions over the same time step). It then seeks to determine whether there is a linear correlation between Series A and Series B. This is done by using position data that is lagged over time.

For example, for the time of 12:00 p.m. and the price of $20 for a May cotton futures contract, the researcher using Granger ''causality'' would associate a position in May cotton futures from a set time prior to 12:00 p.m. If the time step were one minute, that time would be 11:59 a.m. The researcher performs a regression analysis on these two time series (price and time on the one side of the equation, and position and lagged time on the other). They estimate the correlation (technically, they look at the coefficient of the regression) through this analysis to come to a conclusion of whether, over that minute-interval, it can be said that there is a linear correlation between futures prices and positions.

While the Granger test is referred to as the ''Granger causality test,'' it is important to note that, notwithstanding this shorthand, ''Granger causality'' does not establish an actual cause-and-effect relationship. What the Granger method gives as a result is evidence of the existence of a linear correlation between the two time series or a lack thereof.

Moreover, the Granger method only tests for linear correlations. It cannot exclude causation associated with other statistical relationships.

The persuasiveness of a Granger study often turns on the soundness of the modelling choices, as discussed further in subsection 3 below.[1507]

ii. Advantages of the Granger Method

At the highest level, the Granger method is based on well-credentialed statistical methodology. It has been used for several decades by economists and its properties are well-established and well-debated in the economic literature. In that sense, unlike some of the other methods employed in this context, it has stood the test of time. It has been deployed in macroeconomics and financial economics.

The Granger test has several advantages. It is auditable in the sense that it can be fully replicated by a third party. The method is relatively simple to apply. It need not depend on complex mathematics. The method's straightforward approach permits a great deal of transparency in analyzing both inputs and results. Although the results can be highly sensitive to modelling choices, the modelling choices are made explicitly. That is, the equations that are used for the linear regression can easily be viewed together with the definitions for the variables.

iii. Disadvantages of the Granger Method

Not all statistical methods apply well to all situations. In the particular context of speculation and positions limits, application of the Granger methodology has some disadvantages and causes for concern. While the statistical answers are, by their nature, fairly precise, the drafting of the question and the economic interpretation of the results can cause problems. This limitation of the Granger method of course is shared with some other statistical methods. However, we discuss below why this is particularly true of Granger in the context of these studies on speculation and prices. Many of the potential problems in these studies do not so inhere so much in the method itself as in the modelling choices, other operational choices such as the length of time step and time lag, and the interpretation of the results.[1508] Below, we analyze why this is so.

First, the typical application of the Granger method in the studies review assumes a linear relation between the variables of interest: For example, prices and positions. The technique is useful for describing statistical patterns in data among variables ordered in time. But Granger does not claim to discuss simultaneous events. It is a statistical test which, in rough terms, says that if event A typically precedes event B, then event A ''Granger-causes'' event B. Granger is a statistical method for analyzing data for correlations, and ''Granger causation'' is not ''causation'' per se. It does not illustrate the method and means of actual causation nor does it claim to establish actual causation in reality.

For example, the Granger method cannot explain what causal mechanism links two events, events A and B, and a Granger model cannot detect all real-world causation. For example, an individual Granger model cannot conclude whether there is a relation between event A and event B that is ''hidden'' because the time step chosen is so long that the events look to occur simultaneously over the observed interval (be it a day or a week).

A second disadvantage concerns the sensitivity of the test to the time period studied. Especially in the context of the Granger method, the selection of the particular time internal is important to obtain the most useful results: Selection of too large a time period may hide correlations. Some of the position studies use daily price data, while others use weekly price data. When commodity prices are quite volatile, and positions are more gradual in changes, daily time steps may have greater unexplained variation in the commodity prices than when the time series for price data is constructed based on weekly sampling. A study by International Monetary Fund economists, using weekly data, observed that this time interval ''may hamper the identification of very short-run effects, given that the transmission from positions to prices may happen at higher frequency. Indeed, some market participants anecdotally suggest that there are short-run effects that may last only a matter of days.'' [1509]

Another potential problem is picking a time lag that is too short to detect possible market phenomenon. ''[K]nowing whether price changes lead or lag position changes over short horizons (a few days) is of limited value for assessing the price pressure effects of flows into commodity derivatives markets.'' [1510]

In the statistical calculations underlying the Granger method, this greater volatility may lead to a larger denominator in what is called the ''t-statistic,'' and that will in turn lead to a lower t-statistic (in absolute value). The t-statistic is used in the Granger method to assess how well a variable, such as positions, explains another variable, such as commodity prices. In this way, the selection of the time interval can easily affect the strength of the Granger method result.

A third disadvantage of Granger inheres in the selection of the time lag. A Granger analysis will not capture an effect that is delayed beyond the length of the time lag. And a Granger analysis with too long a time lag may not detect

[1507] *See generally* Grosche, *Limitations of Granger Causality Analysis To Assess the Price Effects From the Financialization of Agricultural Commodity Markets Under Bounded Rationality,* at 2–5 (Agricultural and Resource Economics 2012).

[1508] *See, e.g.,* Grosche, *Limitations of Granger Causality Analysis To Assess the Price Effects From the Financialization of Agricultural Commodity Markets Under Bounded Rationality* (Agricultural and Resource Economics 2012); Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* Law & Policy Journal of the University of Denver (2015).

[1509] Antoshin, Canetti, and Miyajima, *IMF Global Financial Stability Report: Financial Stress and Deleveraging: Macrofinancial Implications and Policy,* Annex 1.2, Financial Investment in Commodities Markets at p. 65 (October 2008) (footnote and citation omitted).

[1510] Singleton, *The 2008 Boom/Bust in Oil Prices,* at 15 (working paper March 23, 2011) (''Of more relevance is whether flows affect returns and risk premiums over weeks and months.'') (footnote omitted).

price changes during periods of price volatility. The Granger technique does not guide the selection of the time lag. There are some heuristic techniques to help determine the time lag based on the ''goodness-of-fit'' [1511] of regressions, but these supplemental techniques may yield time lags that do not have a strong theoretical footing.[1512]

In such ways, and others, the authors of such study have wide license in modelling design. The results can be highly dependent upon and sensitive to model design choices. Key design decisions of seemingly little import, such as the selection of time steps, can in fact make a substantial difference in the study's result. While such flexibility can be useful, this flexibility also permits Granger results to be sensitive to modelling assumptions. Such sensitivity, especially in the particular context of the volatile commodity prices, is problematic. Volatility in commodity prices is a complex phenomenon, with possibly overlapping effects of short- and long-term volatility and many exogenous variables that can affect prices. In short, ''care must be taken not to overstate the interpretive power'' of Granger causality studies.[1513]

Finally, the method cannot discern the true cause of something when event A and B occur almost simultaneously. Granger cannot say whether A caused B or whether C causes A and then C causes B with a brief time lag. In this way, Granger correlation analysis is fundamentally incapable of establishing a cause and effect relationship.

There can also be limitations with regard to the data used in Granger studies on position limits, the majority of which used Commission data. There is a problem which inheres in this data in the particular context of position limit studies. The trade data used identifies the entity doing the trade as ''commercial'' or ''non-commercial.'' The data does not identify whether a particular trade is a hedge or a speculative gamble.[1514] While the studies' authors may infer that a trader's identity as a commercial trader is strongly associated with hedging (or at least non-speculative trades), in practice that may be far from the case.

There is also the statistical concept of ''robustness,'' meaning roughly that the results of a study are not qualitatively different based on different applications (different data sets, different tweaks of assumptions). In several ways, application of the Granger method in this particular context offers grounds for caution for study authors seeking statistical robustness. First, for a given time step and commodity, the particular time interval chosen may affect the result. Second, a Granger method is, by its nature, very sensitive to which particular dataset is chosen. Once again, a study's author(s) have wide discretion in the selection of which datasets to study, and Granger methodology will be highly sensitive to this selection.

There is the related problem of economic robustness. For example, because of individual market characteristics, a study limited to a particular commodity or time period may fail to detect patters that would be detectable applying the same method in to other time periods of commodities. Applying Granger analysis to commodity prices presents special challenges in this context because many commodity prices can be quite volatile, especially in the short-term. That is, the Granger method may have low ''statistical power'' in this context. In mathematical terms, high volatility in one of the Granger variables can lead to large standard errors for regression coefficients for the t-statistic.[1515]

A modelling choice to include other variables can further reduce the statistical power of the statistical test used in the Granger method.[1516] Other economic variables in the regression analysis, if not properly chosen, can compromise the Granger ''causality'' test. For instance, explanatory variables may not be uncorrelated to the speculative position or position change variables. To the extent that the variables are correlated to speculative positions, they may, in the estimation of the regression, wash out the price effect. The t-statistic of the regression coefficient remains small because the standard error estimate of the coefficient is large due to common correlation between explanatory variables.[1517]

Authors of Granger method studies may add ''control variables'' in order to reflect other factors that may be affecting or relevant to the two main variables of primary interest (such as price and position). The introduction of control variables will help to discount spurious corrections between the variables of primary interest by studying whether another variable could be correlated to (and thus ''Granger causing'') variables such as price and position. Adding extra variables can, on the one hand, affect for third factors which may be relevant. On the other hand, the introduction of the third factors may compromise the statistical power of the primary question of interest.

Finally, there are also economic studies casting doubt on the suitability of commodities data for meaningful Granger tests, given volatility in commodities price data.[1518] This is because volatility increases the standard error of the estimated coefficient for the lagged variable(s). Thus, Granger tests examining commodities data may lack statistical power to detect Granger causality.

iv. Comparison of Strengths and Weaknesses

Granger techniques provide great flexibility. This flexibility also provides great license to economists on selection of critical factors such as the length of the time lag and the time step. The ultimate conclusions of such studies may be influenced by model design. Unsurprisingly, different economists reach different results. In this sense, the conclusions of Granger-based papers are vulnerable to criticism.

v. Analysis of Studies Reviewed That Use Granger Methodology

Overall, when the Granger studies find a correlation (in the sense of a lead-lag relationship) between speculative positions and price returns, they do so not with respect to price returns as a whole, but the risk premium component of price returns. The risk premium is the portion of expected return of a futures contract associated with holding the contract. It is not an express term of the contract, but an amount that can be derived from economic analysis as the difference between the futures price return and a hypothesized price return

[1511] Roughly speaking, ''goodness-of-fit'' analyses examine how well the data fits the model. Using a goodness of fit criteria allows the data to select the number of lags that empirically fits the data the best.

[1512] *See generally* Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* Law & Policy Journal of the University of Denver (2015) at 136–38 (discussing problems associated with Granger test's assumptions and parameters).

[1513] *Id.* at 138.

[1514] There are other difficulties in the CFTC dataset that complicate empirical analysis of herding activity. *See* Acharya, Ramadorai, and Lochstoer, *Limits to Arbitrage and Hedging: Evidence from the Commodity Markets,* at 19 (Journal of Financial Economics 2013).

[1515] *See* Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market* (working paper 2009) (later published in The Energy Journal, Vol. 32, No. 2, 167–202 (2011) under the title *Do Speculators Drive Crude Oil Futures Prices?*).

[1516] These test statistics is a t-test for one lag in the relevant variable or an F-test for multiple lags.

[1517] This argument is also correct for F-tests (a multivariable extension of t-tests).

[1518] David Frenk, Review of Irwin and Sanders 2010 OECD Report, at p. 6 (Better Markets June 20, 2010) and citations therein, cited in Henn Letter at 6–7.

for a futures contract. The risk premium is the return required to bear the undiversifiable risk on the relevant side of a futures contract.[1519]

There are also Granger studies that analyze speculative positions with respect to price returns as a whole or price volatility; these do not find a statistically significant correlation. Moreover, those studies that do find a lead-lag correlation using the Granger methodology in the risk premium context are limited to studies in particular markets in particular time frames: Studies using weekly, not daily, price data and analyzing crude oil and ethanol-related commodities (including wheat, which is an economic substitute for corn) during the 2007–2010 timeframe.

There are 36 primarily Granger-based economic studies in the administrative record. For analysis purposes, these papers are grouped according to whether they discuss primarily crude oil or other energy derivatives (8 studies); the possible impact of commodity index funds across multiple commodities (13); and agricultural commodities (15).

Crude Oil and Other Energy Derivatives

There was a substantial increase in crude oil prices through July 2008, followed by a significant price collapse from July 2008 through March of 2009.[1520] Several Granger analyses have looked at price returns and/or price volatility in the crude oil markets, or the energy markets generally, in the 2007–2009 timeframe.[1521]

Professor Kenneth Singleton found evidence that speculative positions Granger-caused risk premium on weekly time intervals during the 2007 to 2009 period when studying the crude oil futures markets.[1522] Part of Singleton's results were replicated in part in a paper by Hamilton and Wu using a different methodology than Granger causality analysis.[1523] Professor Singleton found a link between the volume of speculative positions and an increase in risk premium. Because risk premium is a component of price returns and hence price, he thus found a link—Granger causal link—between speculative positions and price. However, because risk premium is just a relatively small component of price, this study does not purport to explain entirely the large 2008 changes in crude oil prices.

In the case of index funds, many funds take long positions. The presence of large index funds positions raises an issue of whether what economists would call this ''heterogeneity of views'' can affect marketplace health. Singleton presents, with his Granger-like analysis, a discussion of heterogeneity in this context. He conjectures—without supporting empirical analysis—that learning about economic fundamentals with heterogeneous views may induce excessive price volatility, drift in commodity prices, and a tendency towards booms and busts. He asserts that under these conditions the flow of financial index investments into commodity markets may harm price discovery and thus social welfare.[1524]

Another paper using Granger analysis concluded that speculators did have an impact on price volatility in the crude oil market.[1525]

Some commenters have suggested that using a weekly, not a daily, time interval for a Granger analysis in this context is a better choice because speculative positions change gradually and there is, on a daily basis, substantial price volatility, especially in the crude oil market.[1526] The common sense explanation for this may be that prices change more often and more rapidly than position sizes, as a general rule. A weekly time interval is a good way to filter out price changes that speculative position changes cannot explain.[1527]

Other Granger analyses of the crude oil market use shorter time intervals and do not find Granger-causality between speculative position changes and either price returns, price changes or price volatility.[1528] The academic literature contains a divergence of views on whether the existence of ''excess speculation'' in the crude oil market would necessarily result in something that is easy to measure, like increases in oil inventories. Some economists argue against the role of ''excess speculation'' in crude oil, observing that when there was a run-up in prices of certain commodities, there was no noticeable increase in inventories.[1529] This assumes that a fundamental shock in the oil prices, for example, is likely to increase or decrease inventories, as hedgers in the physical market anticipate future price increases or decreases. However, other economists have explained that, at least in theory, speculation can affect spot oil prices without causing substantial increases in inventory (providing the price elasticity of oil demand is small).[1530]

[1519] In theory, if the futures contract at expiration is a perfect substitute for the spot commodity, then the expiring futures price should converge to the spot price. It is important to note that many expiring futures contracts are imperfect substitutes for the spot commodity and this might prevent convergence. Moreover, the risk premium decreases to zero as the futures contract approaches expiration. Thus, the risk premium has no effect on the final convergence of the futures to the spot price at expiration of the futures contract, but could, in theory, impact the rate of convergence (although any impact may be negligible).

[1520] Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market* at 2 (working paper 2009).

[1521] *See, e.g.,* Goyal and Tripathi, *Regulation and Price Discovery: Oil Spot and Futures Markets* (working paper 2012); Irwin and Sanders, *Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data* (working paper 2014); Kaufmann and Ullman, *Oil Prices, Speculation, and Fundamentals: Interpreting Causal Relations Among Spot and Futures Prices,* Energy Economics, Vol. 31, Issue 4 (July 2009); Kaufman, *The role of market fundamentals and speculation in recent price changes for crude oil,* Energy Policy, Vol. 39, Issue 1 (January 2011); Mobert, *Do Speculators Drive Crude Oil Prices?* (2009 working paper); Sanders, Boris, and Manfredo, *Hedgers, Funds, and Small Speculators in the Energy Futures Markets: An Analysis of the CFTC's Commitment of Traders Reports,* Energy Economics (2004); Singleton, *Investor Flows and the 2008 Boom/Bust in Oil Prices* (working paper March 23, 2011) (published in final form in Management Science in 2013); Singleton, *The 2008 Boom/Bust in Oil Prices* (working paper May 17, 2010).

[1522] Kenneth J. Singleton, *Investor Flows and the 2008 Boom/Bust in Oil Prices,* SSRN Electronic Journal 15 (2011) 18. (Equation 6, lagged correlation analysis that is, functionally, a Granger analysis).

[1523] Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013) (replicating Singleton's result using a different methodology, a two-factor linear model of fundamental supply and demand).

[1524] Kenneth J. Singleton, *Investor Flows and the 2008 Boom/Bust in Oil Prices,* SSRN Electronic Journal 15 (2011) 5–8.

[1525] Jochen Möbert, Deutsche Bank Research, *Dispersion in beliefs among speculators* 9–10 (2009). This paper concluded that as net long positions increased, volatility increased. This paper was inconclusive of the impact of speculation on price levels (*id.* at 8–9), and observed caveats on the difficulty of accurate modelling in the complex crude oil market (*id.* at 11).

[1526] Frenk, *Review of Irwin and Sanders 2010 OECD Report,* at 6 (Better Markets June 10, 2010).

[1527] There are not many other economic studies in the administrative record duplicating the results of Singleton and Hamilton and Wu. A few others reached similar conclusions regarding the crude oil market using Granger analysis, but these are relatively modest or narrowly constructed studies that are not often cited by economic peers. *See* Goyal and Tripathi, *Regulation and Price Discovery: Oil Spot and Futures Markets* (working paper 2012) (concluding that regulations of the nation of India, including position limits, may have mitigated short duration ''bubbles'').

[1528] Kaufmann and Ullman, *Oil Prices, Speculation, and Fundamentals: Interpreting Causal Relations Among Spot and Futures Prices,* Energy Economics, Vol. 31, Issue 4 (July 2009); Kaufman, *The role of market fundamentals and speculation in recent price changes for crude oil,* Energy Policy, Vol . 39, Issue 1 (January 2011); Sanders, Boris, and Manfredo, *Hedgers, Funds, and Small Speculators in the Energy Futures Markets: An Analysis of the CFTC's Commitment of Traders Reports,* Energy Economics (2004).

[1529] Irwin and Sanders, *Index Funds, Financialization, and Commodity Futures Markets,* at 14–15, Applied Economic Perspectives and Policy (2010).

[1530] Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009); Parsons, *Black Gold & Fool's Gold: Speculation in the Oil Futures Market* at 82, 106–107 (Economia 2009) (if oil prices were

Irwin and Sanders conclude that there is no Granger-causation between positions in a particular commodity index fund and price returns in four energy commodity markets.[1531] Irwin and Sanders' paper contains a fairly robust Granger analysis which analyzes several models in conjunction with their standard model equation for position and price. However, all of the equations that they test for Granger causation contain a possible prejudice: The use of variables that may be correlated with price other than the position variable, thus masking the power of the position variable. Moreover, their paper fails to show that the particular index fund data they used was generally representative of index funds by statistical testing.[1532]

There is an earlier paper by Sanders, Boris, and Manfredo that has a similar result.[1533] However, this 2004 paper uses variables that may be correlated with price other than position data, and so, in the Granger analysis, the price equation used for Granger testing may mask some or all of the impact of positions on price (if any).[1534] As discussed, Irwin and Sanders' 2014 paper is also not completely free from this masking problem. However, it has only one, not several, variables that could mask correlation between position changes and price returns: A lagged price return variable. Irwin and Sanders, aware of the possibility of this masking of correlation, present a defense of their choice to include a lagged price return variable in their model. They argue that one does not know whether positions will affect just current price returns or both current and lagged price returns, and in this way it is not necessarily the case that there is a masking effect.

This argument does not prove that there is no masking effect. There is at least the concern that the Irwin and Sanders model, as constructed, masks possible Granger-causality between position changes and price returns. Theoretically, one could learn more by examining the linear correlation between explanatory variables (lagged price returns and changes in position) by performing additional diagnostic regressions. These regressions would estimate correlations between explanatory variables and resolve the open question of whether the price equation is significantly ''masking'' Granger-causality between position changes and price returns.

Selecting between competing models with divergent results becomes more of a judgment call than a science. Irwin and Sanders' 2014 paper is well-done, as are papers with opposite conclusions, which find an empirical relationship between position changes and price returns (risk premia), such as the Singleton Granger analysis discussed above, and a paper by Hamilton and Wu based on a different statistical method discussed below.[1535]

It is impossible to easily discern who is correct or what accounts for the difference in result. It could be the ''masking'' issue in the Irwin and Sanders model. It could also be the focus in the Irwin and Sanders work on price returns, as opposed to the focus in both Singleton's as well as Hamilton and Wu's on just a component of price returns, risk premia. Irwin and Sanders, by focusing on price returns, are doing Granger-causality testing with a model less sensitive to changes in just risk premia. The differing results could also be due to the different time horizons (weekly versus daily time increments) used in the competing studies.

This clash of well-executed studies is on an important issue—the dramatic changes in crude oil prices in 2006–2009. The study by Kaufman is not directly on point.[1536] He finds Granger-causation between different types of crude oil contracts, but does not look to positions or whether positions Granger-cause changes in price returns.

Kaufmann also finds that far-out futures contracts and spot crude oil are not correlated and he concludes that the reason for this lack of correlation is speculation in the crude oil market. However, there are gaps in this inference. Kaufmann assumes there should be a long-run equilibrium between the spot and the futures price but cannot discern a supply and demand reason for the lack of correlation. There are many factors of supply and demand that would lead to differences between far-out futures prices and spot prices in the crude oil market during the time period studied—1986–2007. These factors include the depletion of oil fields; variability in economic growth; discovery of new oil sources and better modes of extraction; adaption of oil infrastructure.[1537]

Index Funds Generally

Some economists have used the Granger methodology to study a group of commodity markets and to analyze, overall, the effect, or lack thereof, of commodity index fund investments on both energy and agricultural commodity prices.[1538] These relatively few Granger studies on the ''financialization'' effect vary in their conclusions. Overall, as a group, the Granger studies on the effect of index funds across a swath of

driven above the level determined by fundamental factors of supply and demand by forces such as speculation, storage would not necessarily increase, for ''successful innovations in the financial industry made it possible for paper oil to be a financial asset in a very complete way''); *accord* Lombardi and Van Robays, *Do Financial Investors Destabilize the Oil Price?*, at 21–22, European Central Bank Working Paper Series No. 1346 (June 2011). The ability drawdown or stock pile inventory is limited by storage capacity. Further, since it is expensive to store oil above ground, buy and hold strategies are only a loose constraint on prices.

[1531] Dwight R. Sanders & Scott H. Irwin, *Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data,* 46 Energy Economics (working paper 2014).

[1532] In this paper, Irwin and Sanders critiqued Singleton's results, concluding that Singleton found Granger causation because he improperly calculated positon data. This debate cannot be resolved definitively. In the absence of better daily data on position in both swaps and position markets, it is unclear who is correct here.

[1533] Dwight R. Sanders, Keith Boris & Mark Manfredo, *Hedgers, funds, and small speculators in the energy futures markets: An analysis of the CFTC's Commitments of Traders reports,* 26 Energy Economics 425–445 (2004).

[1534] *Id.* at 439, Equation 5.

[1535] James D. Hamilton & Jing Cynthia Wu, *Risk premia in crude oil futures prices,* 42 Journal of International Money and Finance 9–37 (2014).

[1536] Robert K. Kaufmann, *The role of market fundamentals and speculation in recent price changes for crude oil,* 39 Energy Policy 105–115 (2011).

[1537] *Cf.* Kaufmann and Ullman, *Oil Prices, Speculation, and Fundamentals: Interpreting Causal Relations Among Spot and Futures Prices,* 31 Energy Economics (July 2009) (concluding that there is Granger-price causation between different types of crude oil). This study does not look for causation between position and price and so, again, is of marginal relevance in the position limits context.

[1538] *See, e.g.,* Antoshin, Canetti, and Miyajima, *IMF Global Financial Stability Report: Financial Stress and Deleveraging: Macrofinancial Implications and Policy,* Annex 1.2, Financial Investment in Commodities Markets (October 2008); Jeffrey H. Harris and Bahattin Büyükşahin, *The Role of Speculators in the Crude Oil Futures Market* (working paper 2009); Brunetti and Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009); Frenk, *Review of Irwin and Sanders 2010 OECD Report* (Better Markets June 10, 2010); Gilbert, *Speculative Influences on Commodity Futures Prices, 2006–2008,* UN Conference on Trade and Development (2010) (page citations are to the 2009 working paper version placed in the administrative record); Gilbert, *Commodity Speculation and Commodity Investment* (powerpoint presentation 2010); Irwin and Sanders, *The Impact of Index and Swap Funds on Commodity Futures Markets: A Systems Approach,* Journal of Alternative Investments (2011); Irwin and Sanders, *The Impact of Index and Swap Funds on Commodity Futures Markets: Preliminary Results* (working paper 2010); Mayer, *The Growing Interdependence Between Financial and Commodity Markets,* UN Conference on Trade and Development (discussion paper 2009); Stoll and Whaley, Commodity Index Investing and Commodity Futures Prices (working paper 2010); Tse and Williams, *Does Index Speculation Impact Commodity Prices?,* Financial Review, Vol. 48, Issue 3 (2013); Tse, The Relationship Among Agricultural Futures, ETFs, and the US Stock Market, Review of Futures Markets (2012). A fairly late submission by Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* Law & Policy Journal of the University of Denver (2015), studies generally the limitations of Granger causality.

commodity futures prices do not agree.[1539]

Gilbert concluded that commodity index fund positons did Granger-cause price increases in certain commodity futures markets during the 2006–2008 time period.[1540] Gilbert, a Professor of Economics at the University of Trento, Italy, found that this price impact appeared to be lasting or ''permanent.'' [1541]

Gilbert's study is based upon a composed proxy for commodity fund index investments. The index data they use is not explained in sufficient detail in the paper and the results derived from this index are therefore not replicable.[1542] The price equation he uses for testing is problematic.[1543]

Gilbert's numerical results on price impact are dramatic, finding substantial average impact in various commodities due to speculation, with average impact in parts of 2008 of over 10 percent for aluminum, copper, nickel, wheat, and corn.[1544] Yet he provides little detail on how he arrived at these percentages other than to say that they are ''estimates'' that he inferred from the statistical results set forth in his Table 5.[1545] Because his findings are not well-documented and contain unexplained inferences, his paper is unreliable.

By contrast, the Granger analysis of Stoll and Whaley concludes that inflows and outflows from commodity index funds to the commodity markets do not have Granger-caused price changes in the commodity futures market.[1546] The authors of this study did find a fleeting price impact from when commodity index funds roll over to another contract month. (This fleeting rollover impact finding may be outdated; markets have learned to anticipate and account for index fund rollovers.) [1547]

Stoll and Whaley's analysis does not account for the possibility that there could be a delayed effect on futures price changes associated with a delay in laying off, in the futures markets, risks acquired in commodity index swap contracts. In practices, dealers may do this, acquiring risk in multiple markets within acceptable limits as they manage their portfolio risk.[1548] Moreover, a paper by Tse and Williams criticizes Stoll and Whaley's approach for using ''low frequency data'' and failing to use ''sufficiently granular data to capture fast futures markets dynamics.'' [1549] Using intraday, shorter time intervals to analyze the possible effect of commodity fund investments in the futures markets, Tse and Williams conclude that there was ''transmission'' of price impacts from futures contracts in a particular commodity fund index (the GSCI index) to commodities that were not in the index. However, this Granger-causation result does not necessarily establish any price impact associated with excessive speculation. Other factors may lead to this result, such as time delay in illiquid markets, the role of the GSCI index as a price influencing mechanism, or the more rapid market response that tends to occur with more liquid markets.[1550]

While both the Stoll and Whaley and the Gilbert papers are often cited in the literature, they both have limitations in scope and approach. Other studies do not fully resolve this academic debate. In a paper by James W. Williams, the limitations of Granger causality analysis in the position limits context is discussed.[1551]

The general findings of Irwin and Sanders support Stoll and Whaley's conclusions.[1552] Irwin and Sanders analyzed weekly CFTC price data over a number of years and found that there was neither Granger-causation between index fund positions and futures price returns or Granger-causation between changes in fund positions and futures price volatility. Utilizing a Working's T-index, Irwin and Sanders also find that there was not excessive speculation in these markets.

Frenk criticizes Irwin and Sanders for (1) both their specific methodology, arguing that they used incorrect proxies for hedging volumes and (2) rehearsing the general disadvantages of using Granger analysis.[1553] Frenk identifies difficulties in Irwin and Sanders' data and underlying assumption.

There is a significant problem with the Irwin and Sanders paper. The price formula used for Granger testing in their paper is complex, incorporating many lagged price returns and lagged positions, and risks masking correlation due to the possible interdependence of

[1539] There are many more studies using the comovement or cointegration analysis, discussed in Section I(B) below, that look at the financialization questions.

[1540] Christopher L. Gilbert, *Speculative Influences on Commodity Futures Prices,* 2006–2008 (2010).

[1541] *Id.* at 23; *see also id.* at 24, Table 6 (average price impact by commodity, including a maximum price impact of over 16 percent for crude oil during 2006–2008 time period).

[1542] Several statements about the index in the paper indicate a lack of economic rigor, or at least major inferential leaps, in the assumption that the index approximates commodity index funds. *Id.* at 18, 21.

[1543] *See id.* at 22 (Equation 4) (complex equation that subtracts logarithmic prices without detailed economic justification for the destructive of data though subtraction).

[1544] *Id.* at 24, Table 6.

[1545] *See id.* at 23–24 (little or no statistical assessment of how the results of Table 4 and 5 results translate into the large price impact percentages in Table 6).

[1546] Hans R. Stoll & Robert E. Whaley, *Commodity Index Investing and Commodity Futures Prices* (working paper 2010).

[1547] Stoll and Whaley also found a divergence of futures and cash prices in wheat in 2006–2009 period, especially in 2008 period, but concluded that there were limited negative impacts on market functioning associated with this failure to diverge. This result should not be used to suggest that divergence is not a costly phenomenon. Stoll and Whaley's analysis is limited to CME's wheat futures contract. It failed to converge for a period of time because storage was mispriced in the contract during this time period, and market participants knew this and prices reflected this difference. CME eventually changed the wheat contract to charge a more appropriate amount for storage and the divergence phenomenon dissipated. So this example of divergence is associated with economic differences between the spot and futures contracts. It not an example of divergence associated with market manipulation, with attendant social welfare costs. *See* Frank Easterbrook, *Monopoly, Manipulation, and the Regulation of Futures Markets,* S118, Journal of Business (1986) (''When the closing price on a futures contract significantly diverges from the price of the cash commodity immediately before and after, this is strong evidence that someone has reduced the accuracy of the market price and inflicted real economic loss on participants in the market.'').

[1548] *See* Frank Easterbrook, *Monopoly, Manipulation, and the Regulation of Futures Markets* S124, Journal of Business (1986) (in the specific context of position limits, ''Offenses may be harder to detect when they involve more than one market.'').

[1549] Yiuman Tse & Michael R. Williams, *Does Index Speculation Impact Commodity Prices? An Intraday Analysis,* 48 Financial Review 365–383 (2013).

[1550] Stoll and Whaley also observed that commodity index funds should not be thought of as speculators because they participated in these markets to diversify their returns (relative to equity holdings). In Tse, *The Relationship Among Agricultural Futures, ETFs, and the US Stock Market,* Review of Futures Markets (2012), Tse concluded that there were now positive correlations between agricultural ETF returns and S&P 500. This result suggests that the diversification benefit has at least decreased. In this paper, Tse also found, using 5-minute, intraday returns, that agricultural ETF price returns are Granger-caused by some of the underlying commodity futures market. This result is a rare result finding causation *from* the futures prices *to* financial or institutional traders.

[1551] James W. Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* 37 Law & Policy 135–38 (2015). (sensitivities of Granger studies to parameters, including time-sensitivity to time intervals, makes ''Granger-inspired studies of excessive speculation . . . problematic,'' a problem compounded by the volatile nature of the commodity markets).

[1552] Dwight R Sanders & Scott H Irwin, *The Impact of Index Funds in Commodity Futures Markets: A Systems Approach,* 14 The Journal of Alternative Investments 40–49 (2011).

[1553] David Frenk, Better Markets, Inc., *Speculation and Financial Fund Activity and The Impact of Index and Swap Funds on Commodity Futures Markets* 6 (2010). Some of Frenk's critiques fall short of the mark. For example, he criticizes Irwin and Sanders for using a one-week interval for their testing. *Id.* at 7. This is not a flaw in the Irwin and Sanders paper and in fact using a one-week time interval helps to ameliorate another problem Frenk identifies: The difficulty of applying Granger analysis to highly volatile data such as commodity prices.

variables.[1554] In a model designed to test whether there is Granger-causation between position changes and price return, additional variables may diminish the statistical power of the position change variable in the testing equation by masking the effect of positon on price returns. The inclusion of these lagged price returns and position change variables in the model design may well diminish the statistical power of the position change variable.[1555] In this way it may also mask a possible correlation between position changes and price returns.[1556]

Other studies doing Granger testing for the effects of commodity index funds on prices arrive at conflicting results.[1557] Then-CFTC economists who were able to access non-public, daily market data to do Granger-based economic analysis of the possible impact of commodity index funds have added to this debate.[1558] A battery of Granger tests discussed in a paper prepared by Bahattin Büyükşahin and Jeffrey H. Harris lead to the conclusion that there was no Granger-causation between swap dealer positions (a proxy for commodity index fund positions) and returns in the crude oil or natural gas futures.[1559] This finding stayed consistent across tests using different time periods within 2000 to 2008 and different lag periods. Rather, Büyükşahin and Harris found price changes Granger-cause changes in position. This study performs an additional Working T analysis and concludes that this measure of speculative positions was not Granger causing price changes in the crude oil or natural gas markets.

The study by Brunetti and Büyükşahin is also an important contribution to the literature.[1560] Brunetti and Büyükşahin consider price returns and positions in several markets (crude oil, natural gas, corn, Eurodollar, and mini-Dow) and find no Granger causation between position and price returns for any of these commodity markets during a time period when commodity index funds were participating in these markets. This study also finds that speculators in these markets during the time period are decreasing, not increasing, volatility.

These CFTC-staff studies have the advantage of using non-public, daily data. However, such studies are subject to the same limitations that are inherent in Granger analysis in this context: The open question of whether the proper time lag was selected, the ad hoc assumption of the time step selected to compute the volatility, and the inclusion in both studies of variables such as lagged price returns that may inadvertently mask correlation. The inherent limitations of Granger analysis may well bear on the conflicting results of these Granger papers.

Agricultural Commodities

The final set of Granger papers concern the agricultural commodity markets. These include a series of papers by Irwin and Sanders and co-authors not finding Granger causation between positions and price returns.[1561] A few papers arrive at nuanced or inconclusive results, but generally cannot find significant Granger causation between position and price in the agricultural commodity markets.[1562]

There are studies (some are more properly categorized as articles) that do purport to find Granger causation between positions and price returns.[1563] The papers finding substantial price impacts caused by speculative positions in the commodity futures markets are not published in academic, peer-reviewed economic or agricultural journals.[1564]

[1554] Dwight R Sanders & Scott H Irwin, *The Impact of Index Funds in Commodity Futures Markets: A Systems Approach,* 14 The Journal of Alternative Investments 40–49 (2011).

[1555] In Table 54 of the Irwin and Sanders paper, the price return equation used for the Granger correlation analysis diminishes the potential impact of positions on current price returns. Irwin and Sanders use this equation to test for Granger-causation between price returns and position changes, but inclusion of lagged price returns in the equation is problematic. Within the workings of the Granger statistics, placing lagged price returns and change of position data in the same equation can mask the impact of change of positions on price. That is because price returns and lagged price returns may have common correlation; a statistician would say that lagged price return data and change in positions are competing for common correlation with price returns in the Table 4 equation. In this way, the explanatory power of the change in position variable in this Irwin and Sanders paper is diminished by introduction of the lagged price return variables.

[1556] *See* James W. Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* 37 Law & Policy 137–138 (2015) (Granger methodology may be problematic in analysis of position limits, because there may be nonlinear relationships between economic variables).

[1557] *Compare* Jörg Mayer, United Nations Conference on Trade and Development, *The Growing Interdependence Between Financial and Commodity Markets* (2009).

[1558] Those studies reflect the views of the individual economists, and, not necessarily of the Commission. *Compare* Mayer, *The Growing Interdependence Between Financial and Commodity Markets,* UN Conference on Trade and Development (discussion paper 2009) (finding financial investment in commodity trading Granger-cause price changes in soybeans, soybean oil, copper, crude oilTable 4) *with* IMF Global Financial Stability Report: *Financial Stress and Deleveraging: Macrofinancial Implications and Policy,* Annex 1.2, Financial Investment in Commodities Markets (October 2008) (not providing specifications or background on study, but reporting results finding an absence of Granger causation between position and price in all but the copper markets).

[1559] *See* Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market* (working paper 2009).

[1560] Celso Brunetti & Bahattin Buyuksahin, *Is Speculation Destabilizing?,* SSRN Electronic Journal. The Commission cited this study in particular in its December 2013 Position Limits Proposal. *See also* Letter from CME Group, Inc., to CFTC (Mar. 28, 2011).

[1561] *See, e.g.,*Irwin and Sanders, *The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data* (working paper 2014); Irwin and Sanders, *The Performance of CBOT Corn, Soybean, and Wheat Futures Contracts after Recent Changes in Speculative Limits* (working paper 2007); Sanders, Irwin, and Merrin, *Smart Money? The Forecasting Ability of CFTC Large Traders,* Journal of Agricultural and Resource Economics (2009); Sanders, Irwin, and Merrin, *A Speculative Bubble in Commodity Futures? Cross-Sectional Evidence,* Agricultural Economics (2010); Irwin, Sanders, and Merrin, *Devil or Angel: The Role of Speculation in the Recent Commodity Price Boom,* Journal of Agricultural and Applied Economics (2009); Sanders, Irwin, and Merrin, *The Adequacy of Speculation in Agricultural Futures Markets: Too Much of a Good Thing?,* Applied Economic Perspectives and Policy (2010). An additional paper is, for the most part, in accord with Irwin and Sanders' work. Aulerich, Irwin, and Garcia, *Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files* (NBER Conference 2012) (concluding overall that buying pressure from financial index investment in recent years did not cause massive price ''bubbles'' in agricultural futures prices, and any such evidence of price increase is weak evidence of small and fleeting price impact).

[1562] *See, e.g.,* Borin and Di Nino, *The Role of Financial Investments in Agricultural Commodity Derivatives Markets* (working paper 2012) (finding ''sparse'' evidence of Granger causation between traders' investment decisions and futures prices and also ''scarce evidence of hearing behavior except in the cotton market''); Grosche, *Limitations of Granger Causality Analysis to Assess the Price Effects From the Financialization of Agricultural Commodity Markets Under Bounded Rationality,* Agricultural and Resource Economics (2012); Gilbert, *How to Understand High Food Prices,* Journal of Agricultural Economics (2008); Robles, Torero, and von Braun, *When Speculation Matters* (working paper 2009) (speculative trading may have influenced agricultural commodity prices ''but the evidence is far from conclusive'').

[1563] *See, e.g.,* Algieri, *Price Volatility, Speculation and Excessive Speculation in Commodity Markets: Sheep or Shepherd Behaviour?* (working paper 2012) (''excessive speculation'' has driven price volatility for maize, rice, soybeans, and wheat for a particular timeframe); Cooke and Robles, *Recent Food Prices Movements: A Time Series Analysis* (working paper 2009) (concluding that financial activity in futures market and proxies for speculation can help explain observed changes in international food prices for corn, wheat, rice, and soybeans); Timmer, *Did Speculation Affect World Rice Prices?,* UN Food and Agricultural Organization (working paper 2009) (concluding that the price of rice was not affected by financial speculators, but run-ups in wheat and corn prices ''was almost certainly caused by financial speculators''); Varadi, *An Evidence of Speculation in Indian Commodity Markets* (working paper 2012) (inferring the unexplained price increases must be due to speculation).

[1564] Other limitations arise from fairly cryptic inferential reasoning that the cause of any price-run

Continued

Gilbert, in a 2008 paper, reaches a different result with respect to agricultural commodities.[1565] Gilbert performs Granger testing on other variables that could explain (in the sense of Granger-causing) run-ups in agricultural commodity futures prices. Specifically, he looks at macroeconomic and financial factors that affected the price of many commodities during the 2005–2008 time period.[1566] Gilbert obtains results suggesting that the main determinants in agricultural commodity futures prices during this time period are macroeconomic (such as GDP growth) and financial factors (such as the value of the dollar and interest rates).[1567] Gilbert concludes that (1) there is little Granger-causation evidence that speculation by commodity index funds caused the run-up in agricultural commodity prices during this time period; and (2) moreover, there is evidence that macroeconomic factors other than ''excessive speculation'' might have caused the price run-up. Gilbert's work does not purport to show that macroeconomic and financial factors account for all price changes. Moreover, his 2008 piece is difficult to reconcile with his 2010 work, which does find price impacts from speculation using Granger analysis for some agricultural commodities.[1568]

The work of Gilbert, as well as Irwin and Sanders, also suggest a cautious approach is warranted in concluding how sizeable or lasting any price impact associated with ''excessive speculation'' can be, at least when employing a Granger analysis. One paper authored by Irwin emphasized that the only evidence of Granger-causation between positions and price returns in the agricultural market was weak evidence of temporary changes in price.[1569]

The debate is hard to resolve, including for the fairly technical reasons provided in Grosche.[1570] Grosche observes that index trading and other financial investment may be based on a mixture of speculative and hedging motives in the agricultural sphere.[1571] The interaction between the physical and financial contracts in the agricultural commodity sphere is under-researched and the possible ''spillover'' effects from financial to agricultural markets is unknown.[1572]

b. Comovement, Cointegration and ''Financialization''

i. Description

These studies employ a statistical method that can be viewed mathematically as a special case of Granger causality, a method frequently referred to as comovement. This method looks for whether there is correlation that is contemporaneous and not lagged. (This is effectively similar to a Granger analysis where the type period of lag is set to zero.) Like Granger causality, this method employs linear regression to establish correlation between market prices or price returns and speculative positions. When the time step is set to zero, the economist can no longer seek to establish an inference of cause and effect between prices or price returns and positions. Instead, the economist is using a Granger-type analysis to establish whether there is a correlation that is contemporaneous. A subset of these comovement studies uses a technique called cointegration for testing correlation between two sets of data, to see if there is a statistical relationship notwithstanding the ''white noise'' of price data.[1573]

This technique can be used to ferret out unexpected divergences in prices. For example, many economists perform cointegration tests comparing futures and spot prices, which generally should constrain each other by staying within reasonable bands of each other. If they find a discrepancy, they consider whether excess speculation or a price ''bubble'' could explain this price discrepancy.

ii. Advantages and Disadvantages

Such approaches are useful to compare commodity markets with other markets in seeking a correlation over time between these sets of prices. For example, a study may look at a price index for commodities for one time series and a price index for equities for another time series. In rough terms, studying the linear regressions of these price data over time establishes whether there is a confluence of price trends in these two markets. It may capture correlations that a Granger causality approach may miss if the latter uses too large a time lag. In this way, comovement analyses may be stronger than Granger analyses at finding correlations, avoiding the problem of correlations being hidden by the improper selection of length of time lag.

But the complementary disadvantage is that a comovement result cannot establish even weak, Granger-style causation. In the particular context of position limits, this disadvantage is significant. As further explained below in the discussion of specific studies, correlations between prices or price returns and positions can be caused by external factors such as broad macroeconomic trends. In particular, using comovement to try to establish a ''price bubble'' over time ranges that are short-term (months) or medium-term (18 months to two years) is problematic because of the impact macroeconomic or other external factors (wars, recessions, etc.) can have on short-term prices. A comovement study showing a correlation between two sets of data—crude oil futures and spot prices—over just a year or two years is, all else being equal, a fairly weak basis to infer a price bubble. There can be other factors that cause decoupling of prices over such a time period.

iii. ''Financialization''

Many of the papers in this category focus on a documented correlation between returns to commodity futures and the financial (including equity) markets that has increased strongly in

up must be due to speculation. *See, e.g.,* Timmer, *Did Speculation Affect World Rice Prices?,* 38, UN Food and Agricultural Organization (working paper 2009) (regarding theory that financial speculators are the cause for price run-ups, the paper states that ''[t]hese conclusions are reached mostly by eliminating the other explanations and by logical reasoning''); Varadi, *An Evidence of Speculation in Indian Commodity Markets* (working paper 2012) (asserting author's ''estimations'' that speculation has played a ''decisive role'' in creating commodity price bubbles in Indian commodity markets, without provision of a theoretical framework to reach this conclusion).

[1565] Christopher J. Gilbert, *How to Understand High Food Prices,* Journal of Agricultural Economics (2008).

[1566] *Id.*

[1567] *Id.* at 27–28.

[1568] Gilbert, *Speculative Influences on Commodity Futures Prices, 2006–2008,* 24 (Table 4), UN Conference on Trade and Development (2010) (referencing price impacts in wheat, corn, and soybean).

[1569] Aulerich, Irwin, and Garcia, *Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files,* 22 (NBER Conference 2012) (finding some weak evidence of temporary changes in price Granger-caused by positions, but observing that the ''size of the estimated system impact is too small'' to be consistent with the commodity index funds causing a huge run-up in prices).

[1570] Grosche, *Limitations of Granger Causality Analysis to Assess the Price Effects from the Financialization of Agricultural Commodity Markets Under Bounded Rationality,* Agricultural and Resource Economics (2012).

[1571] *Id.* at 18.

[1572] *Id.* at 17. *See also* Williams, *Dodging Dodd-Frank: Excessive Speculation, Commodities Markets, and the Burden of Proof,* Law & Policy Journal of the University of Denver (2015).

[1573] Two time series of price data are said to be cointegrated if the error term in the modeling of their statistical correlation is a term that is, among other things, independent of time. In layperson's terms, the two streams of price data each roughly follow a random walk through time. (In more technical terms, cointegration means there is a linear connection between the two streams of data where the difference is ''white noise'' (Brownian motion) or a random walk. There is some cointegrating vector of coefficients that can be used to form a linear combination of the two time series.)

recent years.[1574] This is often called comovement between the commodity and financial markets. The many factors that have driven explosive growth in commodity derivatives trading in recent years are well-documented in a study by Basu and Gavin.[1575] There has been substantial growth in commodity index investments; this includes commodity exchange-traded funds and other commodity indices that fund managers and other financial investors use. Both the number of such indices, and the volume of trading involving them, has grown substantially in the last decade. There have also been significant changes in the long positions held in commodity futures index funds during the financial crisis:[1576]

Notional Long Positions Invested in Commodity Futures Index Funds

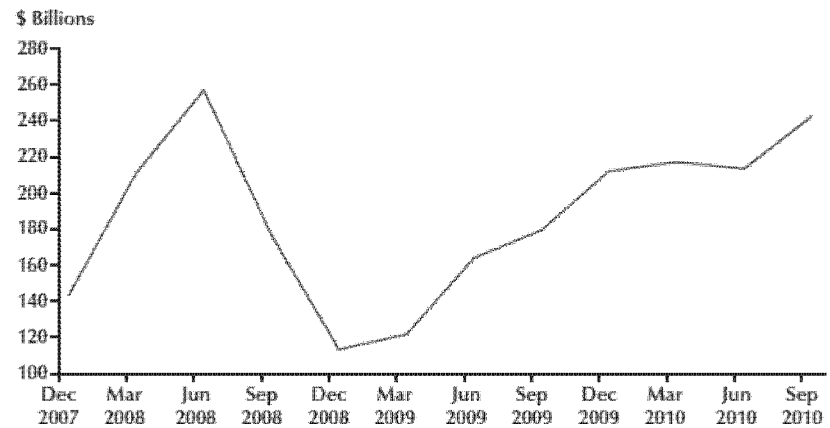
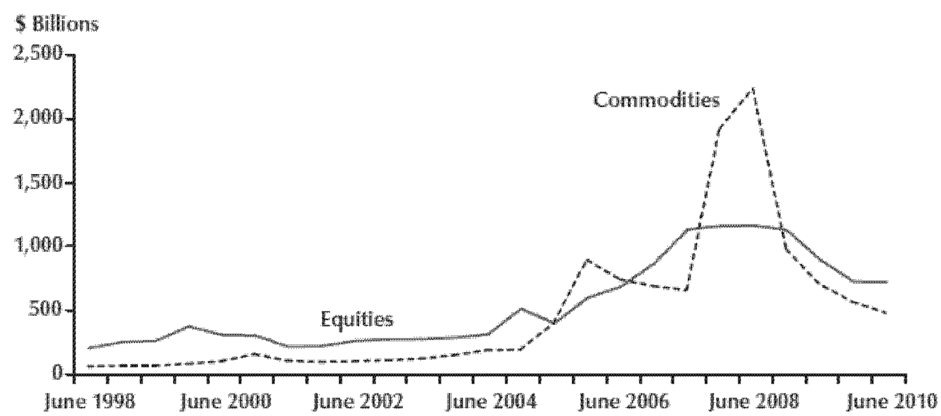


Figure 1B. Over-the-counter trading in commodity derivatives by swap dealers has also increased over time, with a pronounced spike during the 2007–2008 time period.[1577]

OTC Trading in Commodity and Equity Derivatives (gross market value)



SOURCE: Bank for International Settlements derivatives statistics.

Figure 2B. The factors driving this growth include the desire of institutional portfolio managers to hedge against stock risk, based on the belief by some academic and industry economics that there were negative correlations between returns on equity and commodity futures.[1578] This belief may not be economically justifiable.[1579] Investors also sought higher yields in a low-yield environment.[1580]

[1574] Tang and Xiong, *Index Investment and Financialization of Commodities,* Financial Analysts Journal (2012).

[1575] Basu and Gavin, *What Explains the Growth in Commodity Derivatives?,* Federal Reserve Bank of St. Louis (2011).

[1576] *Id.* at 40.

[1577] *Id.* at 41.

[1578] *Id.* at 38, 44–45.

[1579] *See id.* at 44 (however, following the collapse of commodity prices in the summer of 2008 and subsequent financial panic in September of 2008, the correlation between commodity prices and equities became highly and positively correlated). Use of commodities to hedge equity or business cycle risk is controversial. Basu and Gavin, *What Explains the Growth in Commodity Derivatives?,* at 44 Federal Reserve Bank of St. Louis (2011), *citing* Büyükşahin, Haigh, and Robe (2008) (unconditional correlation between equity and commodity futures returns is near zero).

[1580] *Id.* at 38, 44.

iv. The Masters Hypothesis

One variation on this financialization theme is the Masters ''hypothesis.'' Michael W. Masters, a hedge fund manager, is a leading proponent of the view that commodity index investments have been a major driver of increases in the commodity futures prices. In brief, his views are expressed in the following statement:

> Institutional Investors, with nearly $30 trillion in assets under management, have decided en masse to embrace commodities futures as an investable asset class. In the last five years, they have poured hundreds of billions of dollars into the commodities futures markets, a large fraction of which has gone into energy futures. While individually these Investors are trying to do the right thing for their portfolios (and stakeholders), they are unaware that collectively they are having a massive impact on the futures markets that makes the Hunt brothers pale in comparison. In the last 4½, years assets allocated to commodity index replication trading strategies have grown from $13 billion in 2003 to $317 billion in July 2008. At the same time, the prices for the 25 commodities that make up these indices have risen by an average of over 200%. Today's commodities futures markets are excessively speculative. . . .[1581]

Statements are not, in themselves, rigorous economic studies, nor do they purport to be. Several economists have attempted to formalize and study rigorously the ''Masters hypothesis'' or related conjectures using comovement or cointegration methods. These studies are discussed below.

v. Discussion of Specific Studies

There are 25 papers that use some form of comovement or cointegration analysis, broadly defined. Former and current economists within the Office of Chief Economist have used this method repeatedly (7 papers); [1582] several government and policy researchers deploy this method (4 papers); [1583] and other academicians have used this method (14 papers).[1584]

The Example of Oil Prices 2006–2008

One of the key challenges for application of the Masters hypothesis is reconciliation of a supposed speculative price with what is happening in the physical market. The debate within academia, practitioners and policymakers on this topic has been considerable, especially given the run-up in prices in certain commodities, such as the 2006–2008 rise in crude oil prices. ''Dramatic swings in crude oil prices have led Congress to examine the functioning of the markets where prices are set.'' [1585] The correlation of oil with economic trends is not necessarily evidence that they are causing increases in oil prices. As a Congressional Research Study observed, this might suggest that certain traders with ''better information on macroeconomic trends, which strongly influence energy demand, take more aggressive positions, which would then influence oil prices.'' [1586]

The economics of the crude oil market are a good example of the dangers of applying comovement or cointegration methods over short- and medium-term. Short-term crude oil prices are less elastic than longer-term prices. This means, in the short term, changes in price do not affect the supply of crude oil as much as long-term price changes do. There are many reasons why this is so, having to do with the cost of storing crude oil above ground and the cost of starting and stopping crude oil extraction. So it is unsurprising that there are short- and medium-term divergences in price between spot and longer-term futures contracts in the crude oil markets.

On the supply side of crude oil market economics, a short-term shock to supply (wars, embargoes, or other events) will not necessarily translate into a long-term change in prices, even though it may cause substantial short-term price changes and volatility. Similarly, on the demand side of crude oil market economics, short-term changes to demand can impact short-term crude oil prices without causing lasting long-term price impact.[1587]

For such reasons, comovement and cointegration studies of crude oil prices over medium time frames are unpersuasive.[1588] Büyükşahin and Robe showed that correlations between equity and energy commodity investments increased massively after Lehman's

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[1581] M.W. Masters, A.K. White, *The Accidental Hunt brothers: How Institutional Investors Are Driving up Food and Energy Prices, www.accidentalhuntbrothers.com* (2008). Mr. Masters, Portfolio Manager for Masters Capital Management, LLC, has often referred to these large investors as ''passive'' investors. ''Passive speculators are an invasive species that will continue to damage the markets until they eradicated.'' Masters Statement, CFTC March 2010 hearing at 5. According to Barclay's, index fund investment fund in commodities reached $431 billion as of July 2011. Algieri, *A Roller Coaster Ride,* 5 (working paper 2011).

[1582] *See, e.g.,* Boyd, Büyükşahin, and Haigh, *The Prevalence, Sources, and Effects of Herding* (working paper 2013); Büyükşahin and Robe, *Does it Matter Who Trades Energy Derivatives?,* Review of Env't, Energy, and Economics (2013); Büyükşahin and Robe, *Speculators, Commodities, and Cross-Market Linkages* (working paper 2012); Büyükşahin and Robe, *Does* ''*Paper Oil*'' *Matter?* (working paper 2011); Büyükşahin, Harris, and Haigh, *Fundamentals, Trader Activity, and Derivatives Pricing* (working paper 2008); Cheng, Kirilenko, and Xiong, *Convective Risk Flows in Commodity Futures Markets* (working paper 2012); and Haigh, Harris, and Overdahl, *Market Growth, Trader Participation and Pricing in Energy Futures Markets (*working paper 2007).

[1583] *See, e.g.,* Baffes and Haniotos, *Placing the 2006/08 Commodity Boom into Perspective,* World Bank Policy Research Working Paper 5371 (2010); Belke, Bordon, and Volz, *Effects of Global Liquidity on Commodity and Food Prices,* German Institute for Economic Research (2013); Kawamoto, Kimura, et al., *What Has Caused the Surge in Global Commodity Prices and Strengthened Cross-market Linkage?,* Bank of Japan Working Papers Series No.11–E–3 (May 2011); and Pollin and Heintz, *How Wall Street Speculation is Driving Up Gasoline Prices Today* (AFR working paper 2011).

[1584] *See, e.g.,* Adämmer, Bohl and Stephan, *Speculative Bubbles in Agricultural Prices* (working paper 2011); Algieri, A Roller Coaster Ride: An Empirical Investigation of the Main Drivers of Wheat Price (working paper 2013); Babula and Rothenberg, *A Dynamic Monthly Model of U.S. Pork Product Markets: Testing for and Discerning the Role of Hedging on Pork-Related Food Costs,* Journal of Int'l Agricultural Trade and Development (2013); Basu and Miffre, *Capturing the Risk Premium of Commodity Futures: The Role of Hedging Pressure,* Journal of Banking and Risk (2013); Hoff, Herding Behavior in Asset Markets, Journal of Financial Stability (2009); Tang and Xiong, *Index Investment and Financialization of Commodities,* Financial Analysts Journal (2012); Creti, Joets, and Mignon, *On the Links Between Stock and Commodity Markets' Volatility,* Energy Economics (2010); Bichetti and Maystre, *The Synchronized and Long-lasting Structural Change on Commodity Markets: Evidence from High Frequency Data* (working paper 2012); Bunn, Chevalier, and Le Pen, *Fundamental and Financial Influences on the Co-movement of Oil and Gas Prices* (working paper 2012); Coleman and Dark, *Economic Significance of Non-Hedger Investment in Commodity Markets* (working paper 2012); Dorfman and Karali, *Have Commodity Index Funds Increased Price Linkages between Commodities?* (working paper 2012); Korniotis, *Does Speculation Affect Spot Price Levels? The Case of Metals With and Without Futures Markets* (working paper, FRB Finance and Economic Discussion Series 2009) (*also submitted as a comment by CME*); Le Pen and Sévi, *Futures Trading and the Excess Comovement of Commodity Prices* (working paper 2012); and Windawi, *Speculation, Embedding, and Food Prices: A Cointegration Analysis* (working paper 2012).

[1585] Jickling and Austin, *Hedge Fund Speculation and Oil Prices* 1 (Congressional Research Service R41902 June 29, 2011).

[1586] *Id.* at 16, (Congressional Research Service R41902 June 29, 2011).

[1587] This is true for a variety of reasons, including the fact that refining production is expensive to change on short notice. *See generally* Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, at 17–23, Brookings Paper on Economic Activity (2009) (while oil prices may have been ''too high'' in July 2009, ''low price elasticity of demand, and the failure of physical production to increase'' are more likely the predominant causes than ''speculation per se'').

[1588] Pollin and Heintz, How Wall Street Speculation is Driving Up Gasoline Prices Today, at 10, Americans for Financial Reform (working paper 2011) (''Lagged values of both gasoline prices and crude oil prices can affect current gas prices. This implies that past speculative pressures are carried over, at least for several months, to current prices.''); Bunn, Chevalier, Le Pen, and Sevi, Fundamental and Financial Influences on the Co-movement of Oil and Gas Prices, at 18 (working paper 2012) (''we find significant evidence that speculation, with its focus on index trading, increases the correlation between oil and gas'').

collapse in 2008.[1589] As explained in another paper by Büyükşahin and Robe, this raises the question of whether hedge fund and index fund inflows are transmitting financial shocks to commodity prices.[1590] However, as Büyükşahin and Robe's survey of Granger and comovement economic literature demonstrate, it does not appear that index traders and hedge funds had an impact on crude oil prices during this time period.[1591] Further, Celso Brunetti and Bahattin Büyükşahin separately found that hedge funds exert a calming influence on crude oil prices by lowering oil price volatility.[1592]

Cointegration results suggest that financial traders' influence of crude oil futures prices is desirable. For example, then-CFTC economists, Büyükşahin, Harris, and Haigh show how the increased presence of swap dealers, hedge funds, and other financial traders have led to the cointegration of various crude oil futures contracts (the nearby contract, the one-year contract, and the two-year contract).[1593] This co-integration result by these economists suggests that there was a long-term relation between the strength of price cointegration and the market activities of financial traders,[1594] but this result does not suggest any harm to the marketplace or price discovery from the cointegration of various crude oil contracts. The authors conjecture that the greater market activity by these traders can ''enhance market quality'' through ''enhance[d] linkages among various futures prices'' that make these commodity markets ''more informationally efficient.'' [1595]

Both research papers [1596] are correct that, respectively, there is increased comovement between crude oil prices with financial investments and cointegration between nearby, one-year, and two-year crude oil futures contracts. At least for the crude oil market, these price linkages exist. However, one cannot obtain, using comovement and cointegration techniques, decisive evidence on whether this effect improves market efficiency; such a conclusion involves interpreting the informational linkages between the markets. To the extent that the paper by Büyükşahin, Harris, and Haigh moves beyond establishing the linkage to inferring that the linkage has salutary effects on commodity markets, that conclusion was not empirically tested, because it was not modelled explicitly. At most, these studies establish the existence of such price linkages.

Financialization Comovement Literature

Some studies have examined ''financialization'' by using comovement analysis to ask whether increased investment flows into commodity indices (typically composed with substantial long futures positions) are correlated with increases in futures prices or the volatility of commodity futures prices across many different types of studies. Some of these financializaton comovement studies have looked to whether these investment flows decrease the risk premium for holding a long futures contract, thereby causing a non-transient increase in the long futures contract price (which, in turn, may increase the price of the underlying commodity).

There is consensus in the economic literature that equities and commodities no longer exhibit the strong negative correlations that index fund investment managers may have sought in hedging their portfolios. In recent years there has been an increased positive correlation between equity and commodity prices since 2008.[1597] There is also substantial consensus among economists who study this issue that risk premiums for holding long futures contracts have decreased due to financialization.[1598]

However, there is a divergence of views among economists on the impacts, if any, on the large positions taken by index funds on commodity futures prices or price volatility.[1599] These hypothesized effects of financialization are debated among academics, practitioners, and policymakers. Results of studies that test for a bubble component in commodity futures prices—regardless of the cause—are decidedly mixed.[1600]

Commission-affiliated economists have confirmed a general decrease in volatility associated with financialization, a salutary effect associated with increased liquidity.[1601] In theoretical models outside the comovement methodology, competition from index investment reduces the risk premium that accrues to long position holders, and this can have the net effect of lowering the cost of hedging to traditional physical market participants.[1602] Some economists rely upon the efficient market hypothesis that market prices fully incorporate all the available public ''information'' into prices—in support of conclusion that financialization provides benefits such as better price discovery, liquidity, and transfer of risks to entities better

1589 Büyükşahin and Robe, *Does ''Paper Oil'' Matter?* (working paper 2011).

1590 Büyükşahin and Robe, *Does it Matter Who Trades Energy Derivatives?,* Review of Env't, Energy, and Economics (2013).

1591 *Id.* at 5.

1592 Celso Brunetti and Bahattin Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009). *See also* Haigh, Harris, and Overdahl, Market Growth, Trader Participation and Pricing in Energy Futures Markets (working paper 2007) (participation of swap dealers and arbitrageurs has assisted in improved price efficiency—price converge—in crude oil futures contracts, with nearby, one, and two-year crude oil futures contracts statistically cointegrated through the period studied, July 2004 to mid-2006).

1593 Büyükşahin, Harris, and Haigh, *Fundamentals, Trader Activity, and Derivatives Pricing* (working paper 2008).

1594 *Id.* at 3.

1595 *Id.* at 4–5.

1596 Büyükşahin and Robe, *Does it Matter Who Trades Energy Derivatives?,* Review of Env't, Energy, and Economics (2013); Büyükşahin, Harris, and Haigh, *Fundamentals, Trader Activity, and Derivatives Pricing* (working paper 2008).

1597 *E.g.,* Basu and Gavin, What Explains the Growth in Commodity Derivatives?, at 44 Federal Reserve Bank of St. Louis (2011) (commodity and equity prices highly and positively correlated in February 2010); Tang and Xiong, Index Investment and Financialization of Commodities, Financial Analysts Journal (2012); Inamura, Kimata, et al., Recent Surge in Global Commodity Prices (Bank of Japan Review March 2011).

1598 Hamilton and Wu, Risk Premia in Crude Oil Futures Prices, Journal of International Money and Finance (2013).

1599 *See* Irwin and Sanders, *Index Funds, Financialization, and Commodity Futures Markets,* at 15, Applied Economic Perspectives and Policy (2010) (surveying literature in support and against the idea of a speculative bubble in prices arising from commodity index fund participation in the futures market). *Compare* Gilbert, *Speculative Influences on Commodity Futures Prices,* 2006–2008, UN Conf. On Trade Development (2010); Einloth, *Speculation and Recent Volatility in the Price of Oil* (working paper 2009), and Tang and Xiong, *Index Investment and Financialization of Commodities,* Financial Analysts Journal (2012) *with* Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market* (working paper 2009); Brunetti and Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009); Stoll and Whaley, *Commodity index Investing and Commodity Futures Prices,* Journal of Applied Finance (2010), Irwin and Sanders (multiple studies).

1600 *See, e.g.,* Büyükşahin and Robe, *Speculators, Commodities, and Cross-Market Linkages* (working paper 2012); Irwin and Sanders, *Index Funds, Financialization, and Commodity Futures Markets,* at 15, Applied Economic Perspectives and Policy (2010), *citing, inter alia,* Phillips and Yu, *Dating the Timeline of Financial Bubbles During the Subprime Crisis,* Quantitative Economics (2011); and Kilian and Murphy, *The Role of Inventories and Speculative Trading in the Global Market for Crude Oil,* Journal of Applied Econometrics (2010).

1601 Brunetti and Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009) (finding that hedge funds in the commodity markets take the opposite position to other market participants, therefore providing liquidity to the market in various commodity market places studied, including crude oil, natural gas, corn, and two financial contracts).

1602 Acharya, Ramadorai, and Lochstoer, *Limits to Arbitrage and Hedging: Evidence from Commodity Markets,* Journal of Financial Economics (2013) (existence of financial commodity index trading will tend to decrease risk premium, thereby generally making it cheaper for producers to hedge through short futures contracts).

prepared to assume it.[1603] Comovement and cointegration analyses are some of the statistical tools used to test whether these purported benefits of greater market participation hold true under particular market conditions.

While competition and increased trading volume can generally help markets, inflows do not universally benefit market welfare. In a paper by Cheng, Kirilenko, and Xiong, the authors use comovement methodology to conclude that in times of distress, financial traders reduce their net long position, causing risk to flow from financial traders to commercial hedgers.[1604] ''[J]ust when the uncertainty in the economy was rising, the number of futures contracts used by commercial hedgers to hedge their risk was going down.'' [1605]

Cheng, Kirilenko, and Xiong argue that tests such as Granger, which look to whether financial traders' positions and futures prices are negatively correlated when they trade to accommodate hedgers, overlook an important lesson from the distressed financial literature.[1606] When financial entities trade in response to their own financial distress, their trades may be correlated positively to futures price changes. These correlations may net out, so that any significant correlation between their positions and price changes may be masked by trading during financial distress.[1607]

Using cointegration techniques and non-public trading data, then-CFTC economists, Büyükşahin and Robe demonstrate that the correlations between equity indices and commodities increase with greater participation by financial speculators.[1608] There is no such effect for other types of traders. In concert with the work of Cheng, Kirilenko, and Xiong, they find that this cointegration effect, the price linkages between equity indices and investible commodities, is lower during times market stress.

Another comovement study provided an empirical link between commodity index investment and futures price movements, including increased price volatility.[1609] Tang and Xiong find that the increasing presence of index traders in commodity futures markets improves risk sharing in these markets with concomitant volatility spillover from outside markets. This study finds evidence of volatility spillovers from the financial crisis in the 2006–2009 time period, spillovers that may have been a key driver of recent commodity price volatility.[1610]

This Tang and Xiong finding of volatility ''spillovers'' is frequently cited by commenters in support of position limits. However, some academics are skeptical of their results. Irwin and Sanders concede that the Tang and Xiong paper ''appears to offer concrete evidence'' of some form of financialization, but offers several reasons to view these findings with caution.[1611]

Tang and Xiong's results do not necessarily point to lasting difficulties associated with the integration of financial and commodity markets. Instead, they argue that commodity markets were not integrated with financial markets prior to the development of commodity index funds. In their paper, Tang and Xiong view financialization as a ''process'' which helps explain ''the synchronized price boom and bust of a broad set of seemingly unrelated commodities'' during the 2006–2008 time period.[1612]

A problem with this line of reasoning that critics have identified is that there could be other factors which lead to increased correlation between equities and futures during this time period. After all, 2006–2009 was an eventful time where broad macroeconomic factors held sway and could have led to large positive correlations between these markets. According to many, one of the factors leading to the influx of investment funds in during the 2006–2008 time period was negative correlations between commodities returns and equities returns. Yet this factor is less prevalent today. ''The positive correlation between the agriculture ETFs and S&P 500 suggests that the diversification benefits of using an agricultural index have decreased.'' [1613]

Some commenters have pointed to studies such as Tang and Xiong's in support of the position limits rule.[1614] However, most financial investors' exposure to commodities through commodity index funds or ETFs would not be prevented by position limits. Studies on the price returns or price volatility effect of commodity index funds are thus not directly relevant to the placement of position limits on individual commodities contract.[1615] Moreover, commodity index funds are not the only large investors whose activities may affect commodity futures prices.[1616]

A paper by Korniotis contains an important caveat in the financialization debate: The effects of financialization may vary widely depending on the type of commodity.[1617] Crude oil is an important component of the S&P Goldman-Sachs Commodity Index

[1603] Filimonov, Bicchetti, and Maystre, Quantification of the High Level of Endogeneity and of Structural Regime Shifts in Commodity Markets, at3 and citations therein (working paper 2013).

[1604] Cheng, Kirilenko, and Xiong, *Convective Risk Flows in Commodity Futures Markets* (working paper 2012).

[1605] Id. at 2 (citing papers on a growing body of theoretical work indicating that at times of financial crisis, funding and risk constraints may force financial traders to unwind positions, which, in turn, forces hedgers to reduce their hedging positions).

[1606] *Id.* at 3.

[1607] *Id. See also* Acharya, Ramadorai, and Lochstoer, *Limits to Arbitrage and Hedging: Evidence from the Commodity Markets,* Journal of Financial Economics (2013) (decreases in financial traders' risk capacity should lead to increases in hedgers' hedging cost, all else being equal).

[1608] Büyükşahin and Robe, *Speculators, Commodities, and Cross-Market Linkages* (working paper 2012).

[1609] Tang and Xiong, *Index Investment and Financialization of Commodities,* Financial Analysts Journal (2012).

[1610] Of course, the spillover effect may not be limited to domestic markets. Cf. UN Food and Agricultural Org., Price Volatility in Agricultural Markets. Economic and Social Perspectives Policy Brief 12 (2010) (citing financialization as a possible basis for short-term volatility and observing that international integration of markets can propagate price risks to domestic markets quicker than before).

[1611] Irwin and Sanders, *Index Funds, Financialization, and Commodity Futures Markets,* 15, Applied Economic Perspectives and Policy (2010) (questioning the small magnitude of correlation and suggesting that Tang and Xiong may not have adequately controlled for fundamental factors affecting price).

[1612] Tang and Xiong, *Index Investment and Financialization of Commodities,* Financial Analysts Journal (2012).

[1613] Tse, *The Relationship Among Agricultural Futures, EFTs, and the US Stock Market,* at 16, Review of Futures Markets (2012). Indeed, this decreased correlation may be due, in part, to ethanol, an economic substitute for gasoline as an additive to reformulated blend stock, being manufactured with corn and other grains.

[1614] *See generally* Henn Letter.

[1615] *See* December 2013 Position Limits Proposal at 75740 n.483 (''The speculative position limits that the Commission proposes apply only to transactions involving one commodity or the spread between two commodities . . . . They do not apply to diversified commodity index contracts involving more than two commodities . . . . [C]ommenters assert that such contracts, which this proposal does not address, consume liquidity and damage the price discovery function of the marketplace'').

[1616] Irwin and Sanders, *Index Funds, Financialization, and Commodity Futures Markets,* at 26, Applied Economic Perspectives and Policy (2010) (emergency evidence that ''other traders, such as broker-dealers and hedge funds, play key roles in transmitting shocks to commodity futures markets from other sectors''), *citing, inter alia* Büyükşahin and Robe, *Does it Matter Who Trades Energy Derivatives?,* Review of Env't, Energy, and Economics (2013); Haigh, Hranaiova, and Overdahl, *Hedge Funds, Volatility, and Liquidity Provisions in the Energy Futures Markets,* Journal of Alternative Investments (Spring 2007); Basu and Gavin, *What Explains the Growth in Commodity Derivatives?,* Federal Reserve Bank of St. Louis (2011) (documenting increased participation in commodity trading by swap dealers).

[1617] Korniotis, *Does Speculation Affect Spot Price Levels? The Case of Metals With and Without Futures Markets* (working paper, FRB Finance and Economic Discussion Series 2009).

(GSCI), more so than industrial metals. Federal Reserve Board economist George Korniotis found that there was cointegration between metals with and without futures contracts that did not weaken as financial speculation increased in the marketplace and the spot prices for industrial metals were unrelated to the GSCI.

With the exceptions discussed in detail above, many of the studies in this vein do not warrant detailed discussion. Even well-executed economic studies using comovement methodology that do not focus on position limits may be of little or marginal relevance.[1618]

Herding

There are other possible ways in which additional trading volume may not be an unalloyed benefit to the wellbeing of a marketplace. A few comovement studies attempt to test for the existence of ''herding.'' This is a formalized version of price trending. The idea here is that traders may initiate a trade with the expectation that positive-feedback traders will purchase the traded instruments at a higher price later.[1619] Some economists argue that financialization aggravates ''herding'' behavior and herding creates price bubbles.[1620] Others dispute any such effect.[1621]

Though the evidence for herding is meager, the underlying idea is consistent with accepted and theoretically plausible results on risk premia. Risk premiums rise with the volatility of the futures markets, and risk premiums depend in part on speculators' hedging pressure and inventory levels.[1622]

Agricultural Commodities and Financialization

Agricultural economists have reached similarly conclusions on the cointegration of financial speculators and food prices. While there are respectable empirical results suggesting that financial speculation have affected some recent agricultural commodity price dynamics, there is no unanimity in the academic community on conclusive empirical evidence of the causal dynamics, breadth, and magnitude of such effects.[1623]

c. Models of Fundamental Supply and Demand and Related Methods

i. Description

Some economists have developed economic models for the supply and demand of a commodity. These models often include theories of how storage capacity and use affect supply and demand, often a critical factor in the case of physical commodities and their inter-temporal price (that is, their price over time). Using models of supply and demand, the economists then attempt to arrive at a ''fundamental'' price (or price return) for commodity based on the model. Specifically, the economists look at where the model is in equilibrium with respect to quantities supplied and quantities demanded to arrive at this price. The fundamental price given by such a model is then compared with actual prices. The economists look for deviations between the fundamental price, based on the model, and the actual price of the commodity. When pursuing this method, economists look for whether the price deviations are statistically significant. When there are statistically significant deviations of the actual price from market fundamentals, they infer that the price is not driven by market fundamentals.

Many of these studies present a model for one particular commodity or set of commodities. Some looked at volatile markets. Others used at very predictable markets.

We group together for analysis a diverse set of studies that fall within this broad category of economic models of fundamental supply and demand. Some asserted that their models generally could explain prices. Some papers were neutral. And some papers reached the conclusion that market fundamentals could not explain certain price data in the markets they studied.

ii. Advantages

This methodology is well-recognized and accepted means for detecting price deviations. This is a centuries-old technique, as old as the quantification of economics. The model forces the economist to explain supply and demand. This requirement thus provides welcome transparency.

Moreover, the models are auditable: When the fundamental price deviates from the actual price, the economists may well be able to look at the model and see which aspects of supply and/or demand created the deviation. If the economist cannot ascertain the source of the deviation, (1) the economist may seek to add additional variables to the models for supply or demand to better model supply and demand or (2) conclude that this unexplained deviation is empirical support for the existence of a non-fundamental price.

Another advantage of this model is that the loose language of ''bubble'' is replaced by the term ''non-fundamental price.'' The model supplies an economically motivated specification for the price of a commodity. This feature permits deeper economic analysis and debate on whether a non-fundamental price exists without a digression into debates about what the term ''bubble'' means.[1624]

[1618] *See* Baffes and Haniotos, *Placing the 2006/08 Commodity Boom into Perspective,* World Bank Policy Research Working Paper 5371 (2010); Kawamoto, Kimura, et al., *What Has Caused the Surge in Global Commodity Prices and Strengthened Cross-market Linkage?,* Bank of Japan Working Papers Series No.11–E–3 (May 2011); Coleman and Dark, *Economic Significance of Non-Hedger Investment in Commodity Markets* (working paper 2012); Dorfman and Karali, *Have Commodity Index Funds Increased Price Linkages between Commodities?* (working paper 2012); Le Pen and Sévi, *Futures Trading and the Excess Comovement of Commodity Prices* (working paper 2012); Creti, Joets, and Mignon, *On the Links Between Stock and Commodity Markets' Volatility, Energy Economics* (2010); Bichetti and Maystre, *The Synchronized and Long-lasting Structural Change on Commodity Markets: Evidence from High Frequency Data* (working paper 2012).

[1619] Boyd, Büyükşahin, and Haigh, *The Prevalence, Sources, and Effects of Herding* (working paper 2013); Hoff, *Herding Behavior in Asset Markets,* Journal of Financial Stability (2009). *See also* Froot, Scharfstein, and Stein, *Herd on the Street: Informational Inefficiencies in a Market with Short Term Speculation* (working paper 1990) (theoretical paper discussing herding); Weiner, *Do Birds of A Feather Flock Together? Speculator Herding in the Oil Market* (working paper 2006) (doing a herding analysis to conclude that there are subgroups within speculators that act in parallel, and this amplifies their effect on crude oil prices).

[1620] Hoff, *Herding Behavior in Asset Markets,* Journal of Financial Stability (2009); Mayer, *The Growing Interdependence Between Financial and Commodity Markets,* UN Conference on Trade and Development (discussion paper 2009) (Granger analysis).

[1621] *E.g.,* Brunetti and Büyükşahin, *Is Speculation Destabilizing?,* at 5 n.3 (working paper 2009) (''the moderate level of herding in futures markets [among hedge funds] serves to stabilize prices'').

[1622] Basu and Miffre, *Capturing the Risk Premium of Commodity Futures: The Role of Hedging Pressure,* Journal of Banking and Risk (2013).

[1623] *See* Aulerich, Irwin, and Garcia, *Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files,* at 3 n.4, NBER Conference on Economics of Food Price Volatility (2012) (studies testing for the existence of price bubbles in agricultural futures markets have led to ''mixed results''). *See also.*Belke, Bordon, and Volz, *Effects of Global Liquidity on Commodity and Food Prices,* German Institute for Economic Research (2013); Adämmer, Bohl and Stephan, *Speculative Bubbles in Agricultural Prices* (working paper 2011); Algieri, *A Roller Coaster Ride: an Empirical Investigation of the Main Drivers of Wheat Price* (working paper 2013); Babula and Rothenberg, *A Dynamic Monthly Model of U.S. Pork Product Markets: Testing for and Discerning the Role of Hedging on Pork-Related Food Costs,* Journal of Int'l Agricultural Trade and Development (2013); Windawi, *Speculation, Embedding, and Food Prices: A Cointegration Analysis* (working paper 2012).

[1624] Nobel laureates in economics cannot agree on whether bubbles exist or what the proper definition of a bubble is. Studies that focus on the causes of price formation avoid these definitional uncertainties. *See* Easterbrook, Frank, Monopoly, Manipulation, and the Regulation of Futures Markets, at S117, Journal of Business (1986) (it is

Continued

iii. Disadvantages

As applied to position limits, this approach has several drawbacks as well.

First and foremost, the analyses and conclusions that flow from these studies are only as good as the models themselves. Specifically, the price benchmark is based on the model, and an analysis of deviation from the benchmark is only as strong as the model itself. These models incorporate many simplifying assumptions. Market behavior and the real world in general, are much more complicated.

Moreover, these models do not function well when there is a supply shock or when demand falls precipitously. Another disadvantage is model construction using variables that are highly correlated with the price. If the correlation between price and a variable is too high, then using the variable in the model may permit the variable to function as a proxy for price. This will hobble the model's ability to detect price deviations.

A substantial disadvantage of this model is the inherent difficulty of modelling fundamentals of supply and demand in a market of any complexity. Or even, in a model, in anticipating or measuring the impact of large macroeconomic trends. For example, economists have a notoriously bad track record of predicting economic recessions. Thus it is difficult to conclude that a model with a few variables, designed without this hindsight, would be successful in predicting how crude oil prices would behave during the advent of an economic recession. With hindsight, economists know now that September 2008 was at the outset of a substantial global recession, or at least a point of dramatic decrease in the output of the world economy. And with hindsight, it is apparent that the recession dramatically reduced the demand for crude oil. But at the outset of a recession, a model designed without knowledge of the recession (or of its severity) might confuse a statistically significant deviation of actual crude oil prices for the fundamental price derived from the model.

In addition, while this statistical method replaces the loose language of ''bubbles'' with a statistically derived fundamental price, studies offering economic analysis of the fundamentals of price and demand do not eliminate all subjectivity in determining whether a non-fundament price has occurred. An economist will often obtain from these models a ''price band,'' a band for which prices falling within that range remain reflective of fundamental supply and demand. Prices outside the price band are non-fundamental prices. Determining the height of the band depends on what is viewed as a statistically significant deviation, by definition. But determining what a statistically significant deviation is requires the economist to make an assumption that can be quite consequential. The economist must set a level of price changes that his or her model will ignore as attributable merely to chance. Nothing in underlying statistics of the price data will provide the economist with this level. If the level is fixed so that the price band is relatively tall, less prices are likely to be labelled statistically significant deviation by the test.

iv. Analysis of Specific Papers Using Fundamental Models

Crude Oil Models

Even before 2007, there were suspicions about prices in the crude oil market. The Governor of the Federal Reserve Board said in 2004: ''The sharp increases and extreme volatility of oil prices have led observers to suggest that some part of the rise in prices reflects a speculative component arising from the activities of traders in the oil markets.'' [1625] Then the price of crude oil doubled from June 2007 to June 2008, and then rapidly declined in the second-half of 2008. Many economists thereafter published papers saying that the increase in demand up to June 2008 and/or the decrease in demand for September 2008 crude oil could not be explained by market fundamentals. Many attempted to infer from this fact that speculative trading was causing changes in crude oil prices or price volatility.

To understand these papers' strengths and weaknesses, it is important to appreciate a critical factor about crude oil market economics—storage.[1626] Data on storage is often used to study crude oil prices for speculative price influences.

Crude oil is storable, and so its price reflects, in particular, the demand for crude oil inventory. Speculators influence the spot price of crude oil by placing physical crude oil into storage when future prices are anticipated to be higher and out of storage when future prices are anticipated to be lower. Given this, some economists have studied crude oil storage to determine whether crude oil inventories could be contributing to the boom and bust in crude oil prices during the 2007–2008 time period. Specifically, using models of fundamental supply and demand, they study the elasticity of crude oil prices to determine whether the effect of speculators' trading on crude oil inventories could affect crude oil prices.

Several economists have examined above-ground oil inventories in the United States during this 2007–2008 timeframe and examined the interplay of crude oil inventories and prices. They concluded that the short-term elasticity of crude oil demand would have had to have been unusually low—quite inelastic—for inventory demand to fully explain the unusual crude oil prices in 2007–2008. (Price inelasticity of demand means that the price of crude oil is sensitive to changes in quantity demand: A small decrease in demand is likely to cause a large drop in price, for example, when the short-term elasticity of demand is inelastic, all else being equal.) From this, they conclude that speculative traders' effect on inventory demand was unlikely to be a complete explanation for the 2007–2008 crude oil price swings. That is, it would be unlikely for speculators to be able to (at least easily) cause substantial movements in crude oil prices by speculators' influence on the amount of crude oil stored in above-ground crude oil inventories.[1627]

Nonetheless, inventories may still explain part of the unusual price behavior of crude oil in 2007–2008. Even if the short-term elasticity of demand would have to have been very small in absolute value, speculation may have also affected below-ground inventories.[1628]

Many economists conclude that there was a substantial demand shock to crude oil during this time period, a

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not necessarily market manipulation to exploit an advantageous position in the marketplace in anticipation of changes in supply and demand.'')

[1625] Ben S. Bernake, Oil and the Economy, Remarks by then Governor Bernake at the Distinguished Lecture Series, Darton College, Albany, Georgia (2004).

[1626] Brennan and Schwartz, *Arbitrage in Stock Index Futures* (Journal of Business 1990).

[1627] Byun, *Speculation in Commodity Futures Market, Inventories and the Price of Crude Oil* (working paper 2013); Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009); Kilian and Lee, *Quantifying the Speculative Component in the Real Price of Oil: The Role of Global Oil Inventories* (working paper 2013); Kilian and Murphy, *The Role of Inventories and Speculative Trading in the Global Market for Crude Oil,* Journal of Applied Econometrics (2010); Knittel and Pindyck, *The Simple Economics of Commodity Price Speculation* (working paper 2013).

[1628] Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009) (below-ground inventories should also be considered and are not included in the data) (concluding that speculative trading did affect both the speed and magnitude of the price decline in 2008).

demand arising from the onset of a global recession. As the deep recession of 2008 and 2009 began to set in, there was a decrease in demand for September 2008 crude oil in the crude oil futures market. It is unlikely that a demand shock associated with the recession was anticipated by the marketplace, including speculators, given the notorious difficulty of predicting recessions. Kilian and Murphy [1629] assert, if a global recession causes the demand shock, the economics of the crude oil market suggests that there is little policymakers can do to prevent this kind of price bubble from appearing in the crude oil market at the outset of the recession.[1630]

Several economists wrote papers suggesting that their results indicated that crude oil price changes during this time period reflected uneconomic or ''bubble-like'' behavior. Generally, these authors find that their models of supply and demand could not track well the run up in crude oil prices to around $145 in mid-2008 or the bust to close to $30 a barrel just a few weeks later, and they concluded that activity by speculators in these markets was or might be affecting the rapid crude oil price changes.[1631]

These studies do not, in total, lead to consensus. There are distinctive differences and disagreement in the papers on the existence of excessive speculation in the crude oil market during 2007–2009. Even within the Federal Reserve system, there is disagreement, for instance, Plante and Yücel, in *Did Speculation Drive Oil Prices? Futures Market Points to Fundamentals,*[1632] and Juvenal and Petrella, in *Speculation in the Oil Market.*[1633]

The methodology of fundamentals of supply and demand does not zero in precisely on causation and leaves room for interpretation of why a price does not follow modelled supply and demand behavior. Labelling prices ''bubbles'' caused by speculation simply because one does not understand or cannot otherwise account for price movements is problematic. One explanation for the failure of these models to track such fast-moving prices that is speculative activity is at work. But there are other explanations. On some level, there is a tautological error in labelling price changes as ''bubble-like'' simply because economists could not, as of a certain time and with certain model, otherwise explain or predict price movements. These models are trying to explain very complex phenomena and make difficult choices on how to use imperfect data.

Some models performed better at modelling the real-world crude oil prices, using models of fundamental supply and demand, by selecting one of the stronger proxies for crude oil, such as the Dry Baltic Index or macroeconomic variables such as global gross domestic product as explanatory variables.[1634]

One of the best studies in this area is Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008.*[1635] He concludes that fundamentals of supply and demand are responsible for most of the run-up in prices, while speculative trading may have increased both the speed and absolute magnitude of the mid-2008 decline in prices. As to the first point, he concludes that while oil prices may have been ''too high'' in July 2008, ''low price elasticity of demand, and the failure of physical production to increase'' are more likely the predominant causes than ''speculation per se.'' [1636] He acknowledges, however, that the speed and magnitude of the price decline in mid-2008 may have been induced, in part, by speculative trading.

Given this mixed result, both proponents and opponents of position limits cite various aspects of this Hamilton study. His study follows the data closely; his model discusses key issues such as inventory. He does not leap to strained interpretations based on theoretical model assumptions. When his model does not provide a full explanation for price behavior based on supply and demand, he does not simply jump to the conclusion that speculation is at work. Instead, he offers measured

[1629] Kilian and Murphy, The Role of Inventories and Speculative Trading in the Global Market for Crude Oil, Journal of Applied Econometrics (2010).

[1630] *See id.* at 6 & n. 8 (economic theory suggests a link between cyclical fluctuations in global real activity and the real price of oil).

[1631] *E.g.,* Cifarelli and Paladino, Oil Price Dynamics and Speculation: A Multivariate Financial Approach, at p.1, Energy Economics (2010) (''Despite the difficulties, we identify a significant role played by speculation in the oil market, which is consistent with the observed large daily upward and downward shifts in prices—a clear evidence that it is not a fundamental-driven market''); Einloth, Speculation and Recent Volatility in the Price of Oil (working paper 2009) (using convenience yields to conclude that speculation did not play a major role in rise of crude oil to $100 a barrel in March of 2008, did play a role in its subsequent rise to $140 a barrel, and did not play a role in subsequent decline); Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, Brookings Paper on Economic Activity (2009) (speculative trading increased the speed and magnitude of mid-2008 price collapse). Papers using this methodology reach a broad range of conclusions. *See also* Eckaus, The Oil Price Really is a Speculative Bubble (working paper 2008) (reject the hedging pressure hypothesis that inventory positions are an important determinant of risk premiums, and concludes that oil prices are speculative because he cannot perceive a reason for the prices based on supply and demand); Morana, Oil Price Dynamics, Macro-finance Interactions and the Role of Financial Speculation, at 206–226, Journal of Banking & Finance, Vol. 37, Issue 1 (Jan. 2013) (concluding that there is excessive speculation in the crude oil market that did lead to a substantial price impact in 2007–2008); Sornette, Woodard and Zhou, The 2006–2008 Oil Bubble and Beyond: Evidence of Speculation, and Prediction, Physica A. (2009) (find evidence of a bubble, but only based upon an undocumented model largely presented by graphs); Stevans and Sessions, Speculation, Futures Prices, and the U.S. Real Price of Crude Oil, American Journal of Social and Management Science (2010) (contending that there is ''hoarding'' in the crude oil market and that elimination of the longer-term futures contracts would curb excessive speculation); Weiner, Speculation in International Crises: Report from the Gulf, Journal of Int'l Business Studies (2005) (a combination of political and market events, not speculation, was behind the price volatility in 1990–1991); Breitenfellner, Crespo, and Keppel, Determinants of Crude Oil Prices: Supply, Demand, Cartel, or Speculation?, at 134, Monetary Policy and the Economy (2009) (concluding ''it is conceivable'' that interaction between crude oil production and financial markets exacerbated pressure on crude oil prices, but finding no proof of this).

[1632] Plante and Yücel, Did Speculation Drive Oil Prices? Futures Market Points to Fundamentals (working paper Federal Reserve of Dallas 2011) (crude oil data for the 2007–2009 time period ''are consistent with how a well-functioning futures market would behave,'' and if speculation had been to blame, there would have been ''very large positive spreads . . . followed by significant increases in inventory'').

[1633] Juvenal and Petrella, Speculation in the Oil Market (working paper of Federal Reserve Bank of St. Louis 2012) (concluding that speculation played a ''significant role'' in both the price increases in 2008 and the subsequent collapse, but they did not carefully model ''excess speculation.'' Instead, they interpreted the second principle component as being ''excess speculation'' even though the second component may be assigned many other interpretations or even be deemed uninterpretable.).

[1634] *E.g.,* Kilian and Murphy, The Role of Inventories and Speculative Trading in the Global Market for Crude Oil, Journal of Applied Econometrics (2010). In the construction of his study, Kilian used a shipping index, the Dry Baltic Index. In shipping, a predominant factor in the cost of shipping is the cost of crude oil. By using the Dry Baltic Index to attempt to compose a model to explain crude oil prices, the economist chose a variable which would naturally be highly correlated to crude oil prices. However, by using a proxy, the effectiveness of the model is lessened. It is unclear whether the results are attributable to fundamentals driving crude oil prices or crude oil prices driving the Dry Baltic Index. *See also* Morana, Oil Price Dynamics, Macro-finance Interactions and the Role of Financial Speculation, pp. 206–226, Journal of Banking & Finance, Vol. 37, Issue 1 (Jan. 2013) (careful, large-scale modeling of the oil market macro-finance interface, finding the existence of ''excess speculation'' in these markets using Workings T and other tests, and concluding that financial factors may have up to a 30 percent contribution to oil price fluctuations). *Id.* at p.220 (using Working's T and model to conclude that there is a significant liquidity effect associated with non-fundamental financial shocks in the oil market, leading to a higher real oil price without affecting inventories); *id.* at 223–224 (macro-finance factors played a larger role than ''financial factors'' in the 2007–2009 crude oil ''price shock,'' but ''excessive speculation'' did have a price impact).

[1635] Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, Brookings Paper on Economic Activity (2009).

[1636] *See id.* at 17–23.

judgments on the possibility that speculation may have affected the precipitous mid-2008 crude oil price decline and presents statistical evidence that this *may have* occurred.

Other Studies Based on Supply and Demand Models

A discussion of crude oil prices during the 2007–2008 timeframe is illustrative of other commodities during this time period. For example, there is considerable comovement between the real price of crude oil and the real price of other industrial commodities during times of major fluctuation in global real activity (such as global recessions).[1637] All commodities during this time period were buffeted by macroeconomic factors, including a global recession, and a deep one at that during 2008 and 2009.

Outside of the crude oil context, there are some noteworthy studies of fundamental supply and demand that bear on the position limits rulemaking.

Allen, Litov, and Mei, in *Large Investors, Price Manipulation, and Limits to Arbitrage: An Anatomy of Market Corners,*[1638] examine historical corners and squeezes in security and commodity markets and conclude that a corner or squeeze may induce arbitragers to exit the market, since arbitragers will only take short positions when the prospect of profits is high enough. Two papers, Gorton, Hayashi, Rouwenhorst, *The Fundamentals of Commodity Futures Returns,*[1639] and Ederington, Dewally, and Fernando, *Determinants of Trader Profits in Futures Markets,*[1640] offer empirical support for the hedging pressure hypothesis: That the returns on long futures positions vary inversely with inventory and price volatility.[1641] Haigh, Hranaiova, and Overdahl, in *Hedge Funds, Volatility, and Liquidity Provisions in the Energy Futures Markets,*[1642] suggest that hedge funds supply liquidity and that there is little linkage between price volatility and hedge fund position change. They claim that hedge fund participation in futures markets, at least as of 2007, was not injecting unwarranted volatility into futures prices.[1643]

Other papers on the fundamentals of supply and demand do not bear directly on position limits. Some discuss matters far afield from the impact of positions on price or other matters bearing on position limits.[1644] Others rest on unreliable model assumptions.[1645]

[1637] Kilian and Murphy, The Role of Inventories and Speculative Trading in the Global Market for Crude Oil, at p.7 n. 9, Journal of Applied Econometrics (2010).

[1638] Allen, Litov, and Mei, Large Investors, Price Manipulation, and Limits to Arbitrage: An Anatomy of Market Corners, Review of Finance (2006).

[1639] Gorton, Hayashi, Rouwenhorst, The Fundamentals of Commodity Futures Returns, Review of Finance (2013).

[1640] Ederington, Dewally, and Fernando, Determinants of Trader Profits in Futures Markets (working paper 2013).

[1641] All else being equal, the more inventory available for delivery the less costly it is for shorts to hedge their exposure. Similarly, the more volatile the commodity prices are, the more price risk is being accepted by the longs (all else being equal). This means that in volatile markets hedgers that are short will pay higher risk premia to hedge.

[1642] Haigh, Hranaiova, and Overdahl, Hedge Funds, Volatility, and Liquidity Provisions in the Energy Futures Markets, Journal of Alternative Investments (2007).

[1643] *See also* Harrison and Kreps, Speculative Investor Behavior in a Stock Market With Heterogeneous Expectations, Quarterly Journal of Economics (1978) (differences in subjective beliefs induce trading and speculation); Manera, Nicolini and Vignati, Futures Price Volatility in Commodities Markets: The Role of Short-Term vs Long-Term Speculation (working paper 2013) (short-term speculation, as estimated by daily volume divided by open interest, increases volatility while long term speculation, using a Working's T analysis, decreases it); Trostle, Global Agricultural Supply and Demand: Factors Contributing to the Recent Increase in Food Commodity Prices, USDA Economic Research Service (2008) (surveying supply and demand fundamentals explain a lot of the futures prices and price volatility: Slow growth in production relative to demand for biofuels, declining US dollar, rising oil prices, bad weather 2006 to 2007, growing holdings by foreign countries, and increased cost of production for agriculture in general).

[1644] Chan, Trade Size, Order Imbalance, and Volatility-Volume Relation, Journal of Financial Economics (2000) (studying the equity market to determine the role that trade size has on volatility for equities); Chordia, Subrahmanyam and Roll, Order imbalance, Liquidity, and Market Returns, Journal of Financial Economics (2002) (show that order imbalances in either direction for equity markets affect daily returns after controlling for aggregate volume and liquidity); Doroudian and Vercammen, First and Second Order Impacts of Speculation and Commodity Price Volatility (working paper 2012) (claiming a ''second order'' price distortion caused by institutional investors); Frankel and Rose, Determinants of Agricultural and Mineral Commodity Prices (working paper 2010) (two macroeconomic fundamentals—global output and inflation—have positive effects on real commodities, but microeconomic variables have greatest overall effects, including volatility, inventories, and spot-forward spread); Girardi, Do Financial Investors Affect Commodity Prices? (working paper 2011) (during the late 2000s there was a positive, statistically significant and substantial correlation between hard red winter wheat price and the U.S. equity market, as well as a substantial correlation between hard red winter wheat prices and crude oil prices); Hong and Yogo, Digging into Commodities (working paper 2009) (investors use commodities to hedge market fluctuations, as evidenced by yield spread analysis); Kyle and Wang, Speculation Duopoly with Agreement to Disagree: Can Overconfidence Survive the Market Test?, Journal of Finance (1997) (theoretical model explaining how overconfidence by fund managers can lead to a persistence in market prices); Plato and Hoffman, Measuring the Influence of Commodity Fund Trading on Soybean Price Discovery (working paper 2007) (''finding that the price discovery performance of the soybean futures market has improved along with the increased commodity fund trading''); Westcott and Hoffman, Price Determination for Corn and Wheat: The Role of Market Factors and Government Programs (working paper 1999) (analysis of supply and demand fundamentals for wheat and corn that does not include position data); and Wright, International Grain Reserves and Other Instruments to Address Volatility in Grain Markets, World Bank Research Observer (2012) (about price limits, not position limits).

[1645] Bos and van der Molen, A Bitter Brew? How Index Fund Speculation Can Drive Up Commodity Prices, Journal of Agricultural and Applied Economics (2010) (most of the changes in spot prices can be attributed to shifts in demand and supply, and failure to account properly for these inputs in the coffee price generation process may lead to serious overestimation of the effects of speculation; nevertheless, asserting without detailed analysis that speculation is an important part of the coffee price generation process), Gupta and Kamzemi, Factor Exposures and Hedge Fund Operational Risk: The Case of Amaranth (working paper 2009) (trying to explain the behavior of Amaranth on the mistaken notion that a hedge fund should be diversified); Henderson, Pearson and Wang, New Evidence on the Financialization of Commodity Markets (working paper 2012) (analysis founded on questionable assumption that commodity link note investors are uninformed investors); Van der Molen, Speculators Invading the Commodity Markets (working paper 2009) (data handling problems: Dataset which covers twenty years, while the variable index speculators is only available for two to three years, and assumes that net position is in indication of index speculators).

d. Switching Regressions

i. Switching Regression Analysis Described

In a switching regression analysis, an economist poses the existence of a model with more than one state. In the particular context of position limits, there are typically two states: (1) A normal state—where prices are viewed as what they theoretically should be following market fundamentals and (2) a second state—often described as a ''bubble'' state in these papers. Using price data, authors of these studies calculate the probability of a transition between these two states. The point of transition between the two states under this methodology is called a structural ''breakpoint.'' Examination of these breakpoints permits the researcher to date and time the existence of a second state, such as a bubble state.

These authors sometimes find empirical support in the data for the existence of a second state by calculating the probability of breakpoints. When the probability is high enough, the research will say that there is evidence for a second state.

ii. Advantages

A variant of this method was first published in 1973. It is fairly well-credentialed within academia. If there are two states of the world, it makes sense that distinct states would have different economic models. Because switching regressions uses at least a two-state regression, this method satisfies the economist's view that different states would be better described using different models. A one-size-fits-all model, applied to varying economic states, could potentially be compromised in order to accommodate disparate states.

This model is flexible, allowing for many different specifications (of model design) as explanatory variables of speculative positions and futures prices.

When using this method, the economic researcher permits the data itself to choose the structural breakpoints. This differs from some other statistical methods, where the economic researcher may choose exogenously, based on interpretation of the data or historical knowledge, where and when a transition to a supposed bubble state occurs. The model's selection of the breakpoint permits data to be tested against known historical events and thus lend a measure of credence to the model's choices for structural breaks.

The model also permits close study of particular time periods. An economist may well be aware of historical events that were market-transition events such as ''bubbles,'' and this method permits the economist to zero-in on that time period and to investigate potential causes and/or confounding events associated with a suspected market transition.[1646]

iii. Disadvantages

This method has a significant disadvantage that is highlighted in the position limit context. This statistical technique tests for a second state. There could, however, be reasons for a non-normal state other than a ''bubble'' state. This method leaves quite a bit to economic interpretation of the model, not raw data analysis, to reach their inference that the second state is a ''bubble'' state.

While the existence of a second state may indicate a ''bubble'' state and may indicate a problem with excessive speculation, this statistical method cannot definitively prove these inferences, even if position data were used in the analysis. The probability of the existence of second state in these studies in only circumstantial evidence of (1) a ''bubble'' state and (2) a ''bubble'' state caused by excessive speculation.

Consider an example of why data alone cannot explain why a deviation from a normal market state is a bubble state: The case of feeder cattle. If there is a drought and feed becomes scarce and expensive, the cattlemen may sell off part of their herd. Prices of feeder cattle may then drop in the short term as well, because cattleman may sell young calves, too. But subsequently, because so many cattle have been slaughtered, there is a shortage of feeder cattle the next season and the prices of feeder cattle rise. So in this case, there is theoretical and empirical support for two states, but they correspond to non-drought and drought states and not normal and ''bubble'' state. Switching regression analysis if applied to feeder cattle prices during a time period encompassing both drought and non-drought state would not establish the existence of what we could typically view as a ''bubble'' in the post-drought price rise.[1647] In any event, none of this price phenomenon can be viewed as a problem of ''excessive speculation.'' One could still use the ill-defined word ''bubble'' to describe the second state, but it would be a dearth of rainfall, not excessive speculation, which created this second state.

The theoretical level of the analysis, and in particular the lack of firm empirical data linking non-normal states to speculative ''bubble'' markets, are weaknesses of this statistical method. The studies following this method do not provide categorical proof of the existence of speculative ''bubble'' markets and they do not provide statistical evidence of whether positions limits would be effective in ameliorating ''bubble'' markets.[1648]

iv. Analysis of Studies Reviewed That Used Switching Regression

Five studies used a standard form of switching regressions analysis.[1649]

[1646] This method is particularly good at ''accommodating'' abrupt shifts in market data. Some statistic methods, such as those based on linear regression, may have difficulty with volatile data or data discontinuity. This method is also particularly well-suited for studying policy changes. For example, if the Federal Reserve makes a policy change that is expected to have a long-term, but not necessarily an immediate, impact, this method will permit an economist to infer, based on the model, the duration of the lag before the policy change begins to affect the markets.

[1647] This example is taken from an academic paper not within the administrative record that found non-fundamental (or ''bubble'') prices in crude oil and feeder cattle markets. Brooks et al, Boom and Busts in Commodity Markets: Bubbles or Fundamentals? (working paper 2014).

[1648] These models are difficult to design well in this context for several other reasons. The economist is making an informed, probabilistic inference that a transition has occurred. This inference is more than a seat-of-the-pants determination, but it is less than a mathematical certainty. The result of this statistical method is also highly dependent upon what set of data the econometrician selects for analysis. An economic model founded on this method should be given more credence when it is applied to more than one dataset and the results are replicated with different data. Selection of controlling variables that would account for position data is a difficult task with this statistical model. The data-driven nature of the model does not help in selection of proper controlling and explanatory variables. Ingenuity is required to design explanatory variables that would account well for position data.

[1649] These are: Cifarelli and Paladino, Commodity Futures Returns: A non-linear Markov Regime Switching Model of Hedging and Speculative Pressures (working paper 2010) (concluding that speculation, not supply and demand factors, drive some daily price swings in certain energy futures); Chevallier, Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data, Environmental Economics and Policy Studies (2012) (the influence of financial investors through the S&P GSCI Energy Spot may have contributed to price changes in the crude oil market) (discussed in ensuing text); Hache and Lantz, Speculative Trading & Oil Price Dynamic: A Study of the WTI Market, Energy Economics, Vol. 36, 340 (March 2013) (cannot reject hypothesis that variations in the positions of non-commercial players may have played a ''destabilising role in petroleum markets'' and ''speculative trading can be considered an important factor during market instability and 'oil bubbling' process''); Lammerding, Stephan, Trede, and Wifling, Speculative Bubbles in Recent Oil Price Dynamics: Evidence from a Bayesian Markov Switching State-Space Approach, Energy Economics Vol. 36 (2013) (claims to find robust evidence of ''bubbles'' in oil prices associated with speculation); and Sigl-Grüb and Schiereck,

Continued

Three studies used a related methodologies, multi-state regressions or conditional correlations.[1650]

Most of these studies are not helpful because they do not use position data or because they have technical issues.[1651] It is difficult to perform these types of studies well. A study finding the existence of transitions between states can be unconvincing if it does not have solid theoretical and economic justifications for the data selected and the model's design. Many of the disadvantages of this methodology, discussed above, find expression in these papers.

However, there is one switching regression study worthy of further discussion in our view. It is well-executed and employs position data: Chevallier, *Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data.*[1652] Of course, it inherits all the difficulties of speculative position data, such as the difficulty separating hedgers from speculators. Yet Chevallier's effort does persuasively suggest the existence of two states in price structure during 2008 crude oil market price swings. His paper suggests that with highly inelastic supply and demand, the influence of financial investors through the S&P GSCI Energy Spot may have contributed to price changes in the crude oil market.

Using switching regressions, Chevallier attempts to reconcile two strands of economic literature: Papers that posit the predominance of supply and demand fundamentals and other papers that investigate speculative trading. Chevallier employs macroeconomic variables, proxies for supply and demand fundamentals, and speculative positions (net open position of speculators) in his model specifications. Using switching regression analysis, he concludes that one cannot eliminate the possibility of speculation (a reason why the physical commodity may move into and out of storage) as one of the main reasons behind the 2008 oil price swings.

This is an important result. Other economic studies using models of supply and demand purport to explain the 2008 price swings in crude oil without incorporating speculation into demand. Chevallier's paper suggests that speculation cannot be ruled out as a cause. Specifically, using net speculative positions as one of his variables in his test, he found that this variable was statistically significant on crude oil futures natural logarithm of price returns during the 2008 time period.[1653]

This result posits that speculation may have played some role during the 2008 crude oil futures price swings. It suggests that studies that look only to supply and demand without incorporating speculative demand to explain the crude oil market in 2008 may be overlooking an important factor. The switching regression methodology in this context functions as a cross-check to determine whether models of fundamental supply and demand can, in fact, account for all the price swings in crude oil during this time. In at least this particular commodity market and timeframe, Chevallier's finding that net speculative positions are correlated with crude oil future prices suggests a price effect from net speculative positions.

e. Eigenvalue Stability

i. Description

Some economists have run regressions on price and time-lagged values of price. They estimate the time-lagged regression over short time internals. They do this to detect, through examination of specific terms in their lagged price model, unusual price changes. In technical terms, they use a difference equation for lagged price with different estimated values (*i.e.,* coefficients) for different time-lagged price variables. They then solve for the roots of that characteristic equation and look for the eigenvalues (latent values) with absolute value greater than one. They conclude that eigenvalue indicates that the price of the commodity is in an ''exploding'' state or a ''bubble.'' [1654]

ii. Advantages and Disadvantages

This method can be applied after-the-fact to historical data to try to ascertain whether past price changes constituted a ''bubble.'' Or it can be applied to real-time data to predict whether a current state of affairs is a ''bubble.'' For these reasons, some economists perceive, as an advantage of this method, the ability through statistical means to date and time ''bubbles'' in prices.

On the other hand, this method is based on a model and the results of any analysis are only as strong as the model. The model is limited to price data and a constant. Models using this technique do not permit the study authors to include other explanatory variables. This is a disadvantage because it is likely that there are variables of interest other than lagged prices when considering whether price instability exists. For example, someone interested in position limits would want to include an explanatory variable such as speculative positions in the regressions, but this technique does not permit this.

Further, the model allows for wide discretion in the number of lagged prices used. The studies' authors often look at ''goodness of fit'' results to determine how many lags to select, seeking to set the model based upon the data. This step may make the model uniquely tailored to a particular dataset but not easily applicable to another. Put another way, selecting an important model feature based on testing of the data runs the risk of a selection that is not based on any theoretical or economic fact, but instead on ad hoc assumptions made by the modelers and any idiosyncrasies of the dataset.[1655]

iii. Analysis

Economists using this methodology attempt to find the existence of price ''bubbles'' using eigenvalue stability methods. Three such papers were

Speculation and Nonlinear Price Dynamics in Commodity Futures Markets, Investment Management and Financial Innovations, Vol. 77, pp. 59–73 (2010) (''short-run autoregressive behavior'' of commodity markets is driven not only by fundamentals but also by trading of speculators).

[1650] These are: Fan and Xu, What Has Driven Oil Prices Since 2000? A Structural Change Perspective, Energy Economics (2011) (multi-state); Baldi and Peri, Price Discovery in Agricultural Commodities: The Shifting Relationship Between Spot and Futures Prices (working paper 2011) (multi-state); Silvernnoinen and Thorp, Financialization, Crisis and Commodity Correlation Dynamics, Journal of Int'l Financial Markets, Institutions, and Money (2013) (conditional correlations). All three of these papers are of mixed methodology, applying switching regression analysis to relationships between prices that are viewed by the papers' authors as cointegrated.

[1651] For example, the study by Sigl-Grüb and Schiereck employs a smooth transition (as opposed to an abrupt change) between states. Unfortunately, the study's model does not have a high goodness-of-fit values (all adjusted-R^2 are below 0.05 and most are below 0.01), nor fundamental economic explanatory variables (only lagged prices and speculative positions in the transition component between states). These are shortcomings. In particular, the latter omission may overstate the importance of speculative positions.

[1652] Chevallier, *Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data,* Environmental Economics and Policy Studies (2012).

[1653] Specifically, Chevallier found that in the first state, the coefficient of the logarithmic returns of net speculative positions is positive and significant (1 percent level). In the second state, this coefficient is negative and mildly significant (10 percent level). Chevallier's results show statistically significant relationships between the volume of speculative positions in particular and logarithmic price returns.

[1654] *See, e.g.,* Goyal and Tripathi, Regulation and Price Discovery: Oil Spot and Futures Markets at 15–16 (working paper 2012) (describing methodology in more detail).

[1655] Even if there were not such problems, the methodology has an insurmountable theoretical difficulty. The use of the ''unit root'' test, as a part of this eigenvalue methodology, is an inherently suspect way of identifying explosive price behavior. That is because the unit root tests rely upon a small a set of observations to approximate long-term price behavior.

submitted.[1656] All the authors find ''evidence'' of various ''bubbles.'' However, in none of these studies is there reasonable empirical evidence to support the inferential leap between instability, ''bubbles,'' and excess speculation. In particular, for all of these studies, there is no link made in the data between price instability and positions. These studies do not use position data. The problem inheres in the method, which, while purporting to detect the existence of ''bubbles,'' does not permit the research to link supposed bubble to speculative positions.

In modern markets, prices can change rapidly for many reasons. The ''explosion'' of a price over a short time interval does not necessarily reflect uneconomic behavior or a price ''bubble.'' It could simply represent a ''shock.'' That shock need not come from speculative activity. The price path may not be smooth. For this reason, these models are conceptually flawed when applied to commodity prices and commodity futures prices.

For example, in Gilbert, *Speculative Influences on Commodity Futures Prices,*[1657] Gilbert uses a variant of this methodology in an early section of his paper to find ''clear evidence'' of ''bubble periods'' for copper and soybeans lasting days and weeks.[1658] He finds unexplained price increases in crude oil for periods of time that are ''insufficient to qualify as bubbles.'' [1659] Using just price data, and not positions, Gilbert's attribution of lingering price spikes cannot be attributed to speculative positions.[1660]

There is a subtler disadvantage that inheres in the inference between the identification of price growth without bound and the existence of a bubble. To examine intervals where a price series is appearing to grow without bound and to infer that that implies a bubble is problematic. A time series for price of an asset is unlikely to tend to infinity because, eventually, this would likely lead to infeasible prices (generally, in the absence of hyperinflation). We do not expect the real price of an asset, which is the price is adjusted for inflation, to grow without bound.

2. Theoretical Models

Some economic papers cited in this rulemaking perform little or no empirical analysis and instead, present a general theoretical model that may bear, directly or indirectly, on the effect of excessive speculation in the commodity marketplace. Within the 26 theoretical model papers in the administrative record, there is a subset of papers which may be viewed as generally supportive or disapproving of position limits. Because these papers do not include empirical analysis, they contain many untested assumptions and conclusory statements. In the specific context of academic analysis of position limits (as opposed to policy formulation) theories are useful but must be tested empirically.

Theoretical Papers Directly or Indirectly Support Position Limits

Two studies presented theoretical models establishing the risk of price manipulation in the derivatives markets, including cash-settled contracts, suggesting that position limits might be particularly helpful in cash-settled contracts.[1661] A few studies presented theoretical reasons why financial investors might increase or ''destabilize'' commodity futures prices [1662] or the spot price.[1663]

Theoretical Studies Indirectly Criticizing at Least Some Position Limits

On the other hand, there were theoretical papers that reached conclusions which could be helpful to position limit skeptics, such as the power of the marketplace to ''self-discipline'' would-be excessive speculators.[1664] Some papers offer theoretical grounds for the concern that more restrictive or ''extreme'' position limits might increase price volatility.[1665]

Even these papers are not firm in their opposition. In *The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation,* Journal of Law and Economics (1995),[1666] Craig Pirrong (an economic expert for ISDA/SIFMA in the position limits rulemaking) argues that there ''is no strong theoretical or empirical reason to believe that self-regulating exchanges effectively deter corners.'' [1667] He simply disagrees that other forms of regulation such as position limits ''could do better.'' [1668] Pirrong does not discount the harm of price manipulation. Pirrong's *Manipulation of the Commodity Futures Market Delivery Process,*[1669] documents these harms.[1670]

Other Theoretical Papers

A set of papers suggest that there can be excessive speculation in oil without

[1656] These are: Phillips and Yu, Dating the Timeline of Financial Bubbles During the Subprime Crisis, Quantitative Economics (2011); Czudaj and Beckman, Spot and Futures Commodity Markets and the Unbiasedness Hypothesis—Evidence from a Novel Panel Unit Root Test, Economic Bulletin (2013); Gutierrez, Speculative Bubbles in Agricultural Commodity Markets, European Review of Agricultural Economics (2012) (Monte Carlo variant of eigenvalue stability approach).

[1657] Gilbert, Speculative Influences on Commodity Futures Prices, 2006–2008, UN Conference on Trade and Development (2010).

[1658] *Id.* at 9 at ¶ iii.

[1659] *Id.* at ¶ ii.

[1660] This is perhaps why he proceeds to a Granger-based analysis using position data in the second half of his paper.

[1661] Kumar and Seppi, Futures Manipulation with ''Cash Settlement'', Journal of Finance (1992) (while, without physical delivery, corners and squeezes are infeasible, cash-settled contracts are still susceptible to cash-to-futures price manipulation, and this price manipulation transfers liquidity from futures to cash markets); Dutt and Harris, Position Limits for Cash-Settled Derivative Contracts, Journal of Futures Markets (2005) (arguing that cash settled contracts appear to be particularly susceptible to manipulation, but appearing to conflate SEC options with CFTC-regulated commodity contracts).

[1662] Lombardi and van Robays, Do Financial Investors Destabilize the Oil Price? (working paper, European Central Bank, 2011) (giving theoretical grounds for the ability of financial investors in futures to destabilize oil prices, but only in the short run); Vansteenkiste, What is Driving Oil Price Futures? Fundamentals Versus Speculation (working paper, European Central Bank, 2011); Liu, Financial-Demand Based Commodity Pricing: A Theoretical Model for Financialization of Commodities (working paper 2011).

[1663] Schulmeister, Torero, and von Braun, Trading Practices and Price Dynamics in Commodity Markets (working paper 2009) (finding that price movements in crude oil and wheat are lengthened and strengthened by ''speculation'' in respective futures prices).

[1664] Pirrong, Manipulation of the Commodity Futures Market Delivery Process, Journal of Business (1993); Pirrong, The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation, Journal of Law and Economics (1995); Ebrahim and ap Gwilym, Can Position Limits Restrain Rogue Traders?, at 832 Journal of Banking & Finance (2013) (''Our results illustrate that excess speculation, with or without the intent to manipulate the futures markets, is not worthwhile for the speculator'' and concluding that position limits are ''counterproductive'' because excessive speculation enriches other market players at the expense of the speculator).

[1665] Pliska and Shalen, The Effects of Regulation on Trading Activity and Return Volatility in Futures Markets, at 148, Journal of Futures Markets (2006) (''[W]ell-meaning regulatory policies can be counterproductive by reducing the liquidity which is characteristic of futures markets,'' including policies such as ''extreme margins and position limits''); Lee, Cheng and Koh, An Analysis of Extreme Price Shocks and Illiquidity Among Systematic Trend Followers (working paper 2010) (using an agent-based model and assuming trend-followers in the market, finds no reason to believe position limits will help as opposed to leading to erratic price behavior).

[1666] Pirrong, The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation, Journal of Law and Economics (1995).

[1667] *Id.* at 143.

[1668] *Id.* (asserting that position limits are ''excessively costly'' and concluding that self-regulation, along with after-the-fact civil and criminal penalties for manipulation, may be more efficient, but this assertion is unaccompanied by quantitative analysis or a detailed qualitative cost-benefit analysis).

[1669] Pirrong's Manipulation of the Commodity Futures Market Delivery Process, Journal of Business (1993).

[1670] *Id.* at 363 (futures market manipulations ''distorts prices and creates deadweight losses;'' ''causes shorts to utilize real resources to make excessive deliveries;'' and ''distorts consumption'').

a significant increase in crude oil inventories.[1671] The remaining theoretical papers in the administrative record focus on useful economic background on price manipulation; [1672] comovement effects in the equity or options markets,[1673] high-frequency trading,[1674] or other matters of marginal relevance.[1675]

3. Surveys and Opinions

The remaining 73 papers are survey pieces. Some of these papers provide useful background material.[1676] But on the whole, these survey pieces offer opinion unsupported by rigorous empirical analysis. These papers, if they presented statistics at all, presented descriptive statistics. An inherent difficulty with this approach is that the facts that the author presents to support the author's theory may be incomplete and not fully representative of economic reality.

While they may be useful for developing hypotheses, they often exhibit policy bias and are not neutral, reliable bases for judgments in the academic context (again, as opposed to the judgments of policymakers).[1677]

We have reviewed all 73 papers in this category and discuss below only those few that add marginal value to the empirical analyses discussed above.

a. Frenk and Turbeville (Better Markets)

Frenk and Turbeville, in *Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices,*[1678] present a survey of economic literature that incorporates some empirical testing for the price impact of index fund ''rolling'' of commodity index fund positions. Rolling refers to the time when commodity index funds, such as those tracking a popular commodity index such as the Standard & Poor's Goldman Sachs Commodity Index (GSCI), must roll forward their expiring futures contracts to maintain their (typically long) positions.[1679] Frenk and Turbeville argue that the index fund roll ''systematically distorts forward commodities futures price curves toward a contango [1680] state, which is likely to contribute to speculative 'boom/bust' cycles. . . .'' [1681]

This set of inferences is problematic for several reasons. First, it depends on the current existence of a price impact from rolling. Yet the roll price impact is a market phenomenon that may no longer be as substantial as it once was. The market now has general knowledge of the influx of commodity index traders and their established rolling behavior. Moreover, many ETFs announce in their prospectus how they will trade, and most large exchange-traded funds now ''sunshine'' their rolls: To announce to the market in advance when and how they will roll.[1682] These trends have lessened the price impact of the rolls.

Moreover, the Frenk and Turbeville article ascribes the contango state of commodity futures prices to the price impact of roll without empirical analysis to support a causal link. There has historically been an alternation between contango and backwardation in the crude oil commodity market: This phenomenon has been attributed to changes in short-term supply or demand, increased market participation on the long side to earn the risk premium associated with going long, and other reasons, but not the technical aspects of commodity index rolls.[1683] Frenk and Turbeville's article is unpersuasive in ascribing large boom/bust cycles in price to waning and temporary price impacts of rolls.

Several other survey papers posit the existence of a speculative bubble in price due to speculation along the lines of the Frenk and Tuberville article. But these studies also do not present an empirical analysis to support this conclusion.[1684]

[1671] Avriel and Reisman, *Optimal Option Portfolios in Markets with Position Limits and Margin Requirements,* Journal of Risk (2000) (a theoretical model suggesting that speculation may push crude oil prices above the price level is justified by physical-market fundamentals without necessarily resulting in a significant increase in oil inventories); Pierru and Babusiaux, *Speculation without Oil Stockpiling as a Signature: A Dynamic Perspective* (working paper 2010); Routledge, Seppi, and Spatt, *Equilibrium Forward Curves for Commodities,* Journal of Finance (2000) (important work on the theory of storage). *See* Parsons, *Black Gold & Fool's Gold: Speculation in the Oil Futures Market* at 82, 106–107 (Economia 2009) (not a theoretical model paper, but a survey piece, that indicates that if oil prices were driven above the level determined by fundamental factors of supply and demand by forces such as speculation, storage would not necessarily increase; an argument that this would occur ''overlooks how paper oil markets have been transformed'' and ''successful innovations in the financial industry made it possible for paper oil to be a financial asset in a very complete way'').

[1672] Kyle and Viswanathan, How to Define Illegal Price Manipulation, American Economic Review (2008); Westerhoff, Speculative Markets and the Effectiveness of Price Limits, Journal of Economic Dynamics and Control (2003) (discussing when price limits can be welfare-improving).

[1673] Dai, Jin and Liu, Illiquidity, Position Limits, and Optimal Investment (working paper 2009); Edirsinghe, Naik, and Uppal, Optimal Replication of Options with Transaction Costs and Trading Restrictions, Journal of Financial and Quantitative Analysis (1993); Shleifer and Vishney, The Limits of Arbitrage, Journal of Finance (1997).

[1674] Schulmeister, Technical Trading and Commodity Price Fluctuations (working paper 2012).

[1675] Morris, Speculative Investor Behavior and Learning, Quarterly Journal of Economics (1996); Kyle and Wang, Speculation Duopoly with Agreement to Disagree: Can Overconfidence Survive the Market Test?, Journal of Finance (1997); Leitner, Inducing Agents to Report Hidden Trades: A Theory of an Intermediary, Review of Finance (2012); Sockin and Xiong, Feedback Effects of Commodity Futures Prices (working paper 2012); Froot, Scharfstein, and Stein, Herd on the Street: Informational Inefficiencies in a Market with Short Term Speculation (working paper 1990) (theoretical paper discussing herding); Dicembrino and Scandizzo, The Fundamental and Speculative Components of the Oil Spot Price: A Real Option Value (working paper 2012).

[1676] Basu and Gavin, What Explains the Growth in Commodity Derivatives?, Federal Reserve Bank of St. Louis (2011), provides an excellent analysis of the factors driving rapid increases in volume in commodity derivatives trading. *See* also Easterbrook, Monopoly, Manipulation, and the Regulation of Futures Markets, Journal of Business (1986); Pirrong, Squeezes, Corners, and the Anti-Manipulation Provisions of the Commodity Exchange Act, Regulation (1994).

[1677] For example, a CME Group white paper, Excessive Speculation and Position Limits in Energy Derivatives Markets (undated), lacks empirical data or other economically valid supporting analysis. It also uses confusing terminology. For example, CME quotes a Wall Street Journal survey of economists, which in turn summarily concludes: ''[t]he global surge in food and energy prices is being driven primarily by fundamental market conditions, rather than an investment bubble.'' *Id.* at p.5. Even economists who find some price impact from outsized speculative positions would not disagree that, in the main, prices remain determined ''primarily'' by market fundamentals. And many of these economists finding price impact would not ascribe the result to an ''investment bubble.''

[1678] Frenk and Turbeville, Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices (Better Markets 2011).

[1679] *See id.* at 8–9 for a description of the mechanics of the roll. *See also* Mou, Limits to Arbitrage and Commodity Index Investment: Front-Running the Goldman Roll (working paper 2011).

[1680] *See id.* at 5–6 for a description of contango, an upward-sloping forward price curve for a commodity. Market participants may view contango as evidence that commodity prices will increase in the future.

[1681] *Id.* at 2. *See id.* at 4 (focusing on crude oil and wheat price spreads before, during, and after the role from January 1983 to June 2011).

[1682] Otherwise, other market participants may assume that the rolling activity reflects an informed trader reacting to market fundamentals and the roll could well impair the price discovery function of the commodities market. See Urbanchuk, Speculation and the Commodity Markets, at p. 12 (working paper 2011) (''traders can misinterpret an index inflow as a bullish statement by a trader with superior information''). While not every large institutional trader has to ''sunshine,'' those that announce their rolling timing in their prospectus are bound by SEC rules to follow their prospectus procedures.

[1683] *See* Parsons, Black Gold & Fool's Gold: Speculation in the Oil Futures Market, at 99–101, Economia (2009) (discussing crude oil market economics that explain why crude oil futures prices are sometimes in contango); id. at 101 (''Although oil futures fluctuate between backwardation and contango, on average they have been backwarded'').

[1684] *See, e.g.,* Cooper, Excessive Speculation and Oil Price Shock Recessions: A Case of Wall Street ''Déjà vu all over again'', Consumer Federation of America (2011); Berg, The Rise of Commodity Speculation: From Villainous to Venerable (UN FAO 2011); Eckaus, The Oil Price Really Is a

b. Senate Reports

i. Senate Report on Oil and Gas Prices

The U.S. Senate staff report on oil prices concludes that increased participation by speculators in the energy commodity futures markets has had an effect on energy prices.[1685] Other survey pieces assert that market fundamentals fully explain commodity price spikes.[1686] These survey articles do not present rigorous statistical models to support their competing conclusions.

The Senate report points out that fundamental supply and demand were factors increasing energy prices.[1687] But it determines that these factors ''do not tell the whole story.'' [1688] It asserts that the large purchases of crude oil futures contractors by financial speculators ''have, in effect, created an additional demand for oil. . . .'' [1689] The report acknowledges that the price effect is ''difficult to quantify,'' and cites unspecified analysts on estimated price impact.[1690]

But in the general economics of the futures market, demand for futures contracts does not necessarily increase the demand for, or price of, the physical commodity. In the particular context of the crude oil markets, as discussed above, demand for ''paper oil'' may not directly translate into spot price impact due to storage economics.[1691]

Regarding price effect, the Senate report relies on anecdotal evidence because of the difficulty in quantification. The Senate report cites reports from energy industry participants that financial speculators have caused the price of oil to rise.[1692] The report also acknowledges that analyses of the effect of speculation on these energy markets have reached divergent conclusions.[1693]

The Senate Report does not analyze how position limits would ameliorate the problem it identifies. While not all the speculators referenced in this report would be affected by a position limit rule, the Senate Report does list Brian Hunter, then a trader in natural gas for Amaranth Advisors hedge fund, among the top 2005 energy traders.[1694] These reports, which include factual recitation and anecdotal evidence, contain no models or methods that can be audited by economists.

ii. Senate Report on Wheat

The Senate staff report concerning wheat [1695] surveys economic literature and certain market data, but, like the Senate Report on oil and gas prices, this report does not use statistical or theoretical models to reach an economically rigorous conclusion. The Senate wheat report does include anecdotal evidence: Virtually all of the commercial traders interviewed by the Senate staff ''identified the large presence of index traders in the Chicago market as a major cause'' of a problem with price convergence in wheat in 2008.[1696] The staff report states that the demand for wheat futures contracts has itself increased the price of wheat futures contracts relative to the cash market for wheat:

> These index traders, who buy wheat futures contracts and hold them without regard to the fundamentals of supply and demand in the cash market for wheat, have created a significant additional demand for wheat futures contracts that has as much as doubled the overall demand for wheat futures contracts. Because this significant increase in demand in the futures market is unrelated to any corresponding supply or demand in the cash market, the price of wheat futures contracts has risen relative to the price of wheat in the cash market. The very large number of index traders on the Chicago exchange has, thus, contributed to ''unwarranted changes'' in the prices of wheat futures relative to the price of wheat in the cash market. These ''unwarranted changes'' have, in turn, significantly impaired the ability of farmers and other grain businesses to price crops and manage price risks over time, thus creating an undue burden on interstate commerce. The activities of these index traders constitute the type of excessive speculation that the CFTC should diminish or prevent through the imposition and enforcement of position limits as intended by the Commodity Exchange Act.[1697]

However, there are other reasons that can also explain this 2008 price divergence. The CME wheat contract was poorly designed to account for the cost of storage, and this has been cited as a reason for the price divergence between futures and spot wheat contracts during the 2008 time period. When CME revised its wheat contract, this price divergence dissipated.[1698]

That said, the more formal statistical studies discussed throughout establish rationales for concern with index traders that are grounded in more rigorous economic reasoning. There are circumstances when a large volume of financial index investment flows may causes market prices to deviate from fundamental values.[1699] Alternatively, a

Speculative Bubble, at p.8, MIT Center for Energy and Env'l Research (2008) (''there is no reason based on current and expected supply and demand that justifies the current price of oil''); Parsons, Black Gold & Fool's Gold: Speculation in the Oil Futures Market, Economia (2009) (explaining why, on a theoretical level, the absence of large crude oil inventories does not preclude a crude oil price bubble); Tokic, Rational destabilizing speculation, positive feedback trading, and the oil bubble of 2008, Energy Economics (2011) (survey with theoretical model adjunct). *See also* Urbanchuk, Speculation and the Commodity Markets, at 8–9 (working paper 2011) (observing that the share of corn futures held by commercial traders has fallen from more than 70 percent in January 2005 to about 40 percent in August 2011); id. at 12 (arguing that speculators are a major factor behind the sharp increase in the level and volatility of corn prices in 2011 because ''traders can misinterpret an index inflow as a bullish statement by a trader with superior information''); Inamura, Kimata, et al., Recent Surge in Global Commodity Prices (Bank of Japan Review March 2011) (contending that global monetary policies have tended to boost commodity prices).

[1685] The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat, Permanent Subcommittee on Investigations of the U.S. Senate Committee on Homeland Security and Governmental Affairs at pp. 19–32 (June 27, 2006) (''Senate Report on oil and gas prices'').

[1686] *See, e.g.,* Plante and Yücel, Did Speculation Drive Oil Prices? Futures Market Points to Fundamentals (Federal Reserve Bank of Dallas Econ. Ltr. Oct. 2011) (if speculating were the cause of crude oil spokes, it would ''leave telltale signs in certain data, such as inventories'').

[1687] The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat at p.12.

[1688] *Id.* at 13.

[1689] *Id.*

[1690] *Id.* at 14. *See id.* at 23.

[1691] *See* Parsons, Black Gold & Fool's Gold: Speculation in the Oil Futures Market, Economia (2009); n.1491, supra. *Contra* Senate Report on oil and gas prices at 13 (''As far as the market is concerned, the demand for a barrel of oil that results from the purchase of a futures contract by a speculator is just as real as the demand for a barrel that results from a purchase of a futures contract by a refiner'').

[1692] Senate Report on oil and gas prices at 22 (claiming that financial investors have created ''runaway demand''), 24 n. 128 (traders assert cross-market arbitrage in energy between futures and over-the-counter markets may be driving speculative pressure).

[1693] *Id.* at 24, 26 (observing that Goldman Sachs issued a report concluding that speculators were impacting crude oil prices, peaking at $7 per barrel in the spring of 2004, and that industry traders and CFTC staff in a 2005 analysis disagreed as to whether a speculative price was caused by financial speculators).

[1694] *Id.* at p.30.

[1695] Excessive Speculation in the Wheat Market, Majority and Minority Staff Report, Permanent Subcommittee on Investigations of the U.S. Senate, Committee on Homeland Security and Governmental Affairs (June 24, 2009).

[1696] Excessive Speculation in the Wheat Market at 11–12.

[1697] *Id.* at 12.

[1698] See supra note 1547. When CME revised its wheat contract, this price divergence dissipated. The futures wheat contract, at expiration, had a valuable real option to store the wheat at a below-market price. This may have been a primary reason why it was more valuable at expiration than spot wheat.

[1699] *See* Aulerich, Irwin, and Garcia, Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files, at pp.2–3, NBER Conference on Economics of Food Price Volatility (2012) (summarizing that this could happen when (1) the futures market is insufficiently liquid to absorb large order flow, (2) the index traders are in effect noise traders who make arbitrage risky, or (3) large order flow on the long

Continued

classical economist would argue that prices are still determined by supply and demand, but that the aggregate risk appetite for financial assets affects the demand for commodities through a more complicated process than previously envisioned.

For reasons similar to the Senate Report on Oil and Gas Prices, the Senate Report on Wheat is less useful to an academic than it may be to policymakers.

iii. Senate Report on Natural Gas

A similar analysis applies to the Senate report on natural gas, *Excessive Speculation in the Natural Gas Market.* The report, which focuses at length on Amaranth's natural gas trading, does not include a statistical analysis of empirical data and, as the minority report notes, some '' facts . . . support the conclusion that Amaranth's trading activity was the primary cause of'' natural gas price spikes,'' but other facts point to market fundamentals.[1700]

The report does argue that if Amaranth's large-scale speculative trading was causing ''large jumps in the price differences'' and prices that were ''ridiculous,'' [1701] the current regulatory regime would be unable to prevent this price disruption.[1702]

4. Comments That Consist of Economic Studies or Discuss Economics in Depth

Several comment letters perform substantial summary analysis of other economic studies bearing on position limits, present original economic analysis or formal economic studies. These submissions thus warrant individual analysis. The following submissions are summarized and analyzed in this section:

(A) the February 10, 2014, comment letter by Markus Henn of World Economic, Ecology & Development, including, as an attachment, a November 26, 2013, list of studies entitled ''Evidence on the Negative Impact of Commodity Speculation by Academics, Analysis and Public Institutions'' (''Henn Letter''); [1703]

(B) the analysis of Philip K. Verleger of the economic consulting firm PKVerleger LLC, attached as Annex A to the February 10, 2014 comment letter by the International Swaps and Derivatives Association (ISDA) and the Securities Industry and Financial Markets Association (SIFMA) (''2/10/14 ISDA/SIFMA Comment Letter'');

(C) the analysis of Craig Pirrong, Professor of Finance at the University of Houston Business School, attached as Annex B to the 2/10/14 ISDA/SIFMA Comment Letter;

(D) two studies by Sanders and Irwin, *The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data* (working paper 2014), and *Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data* (working paper 2014);

(E) two studies by Hamilton and Wu, *Effects of Index-Fund Investing on Commodity Futures Prices,* International Economic Review, Vol. 56, No. 1 (February 2015), and *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013) (submitted as second paper in the same electronic comment submission); and

(F) materials that CME Group submitted for inclusion in the administrative record, include 3 sets of materials submitted on March 28, 2011 (first set, second set, and third set); an undated CME study on conditional spot-month limits; and a CME Group's white paper, *Excessive Speculation and Position Limits in Energy Derivatives Markets.*[1704]

a. The Markus Henn List of Studies

Markus Henn's February 10, 2014, comment letter acknowledges that there is an ongoing debate about whether speculators can dominate a marketplace and exacerbate market volatility and market prices. He nonetheless asks the Commission to take into account a list of studies he submits with his letter. He then presents numerous economic studies as well as media articles.

As a group, this list of studies, opinion pieces, and news articles documents the existence of concern and suspicion about large speculative positions in commodity markets. Many of the studies cited by the Henn Letter look for evidence of financialization and in this sense suffer from interpretational bias.[1705] As a group, these opinion pieces and studies do not consistently seek alternative explanations for their conclusions. As Markus Henn acknowledges in his cover letter, these papers are part of an ongoing debate among economists, not conclusive evidence of the harmful effects of excessive speculation.

Three of the most persuasive papers, persuasive insofar as they employ well-accepted, defensible, scientific methodology, document and present facts and results that can be replicated, and are on point regarding issues relevant to position limits, cited in the Henn Letter involve the crude oil market during the financial crisis: Singleton, *Investor Flows and the 2008 Boom/Bust in Oil Prices* (March 23, 2011 working paper); [1706] Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013) (an earlier working paper version is cited by Henn); and Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009). The first two conclude that there is a statistical link between the volume of speculative positions and a component of price, risk premium, at least for some commodities in some timeframes. Hamilton's *Causes and Consequences of the Oil Shock of 2007–2008* concludes that the oil price run-up was caused by strong demand confronting stagnating world production, but the price collapse was perhaps not driven by fundamentals.

side of the market is seen erroneously as traders taking bullish positions based on valuable information about market fundamentals). *See id.* at pp.3–4 (observing contrasting findings depending on impact of index trading depending on liquidity of the agricultural commodity market); Singleton, Investor Flows and the 2008 Boom/Bust in Oil Prices, at 5–8 (March 23, 2011 working paper) (learning about economic fundamentals with heterogeneous information may induce excessive price volatility, drift in commodity prices, and a tendency towards booms and busts); Tang and Xiong, Index Investment and Financialization of Commodities, at p.30, Financial Analysts Journal (2012) (''the price of an individual commodity is no longer simply determined by its supply and demand''); *id.* at 29–30 (''Instead, prices are also determined by a whole set of financial factors such as the aggregate risk appetite for financial assets'').

[1700] *Id.* at 135 (while price of natural gas declined after Amaranth's demise, ''this alone does not prove Amaranth's ability to elevate prices above supply and demand fundamentals'').

[1701] *Id.* at 3.

[1702] *Id.* at 3 (NYMEX exchange did not have routine access to Amaranth's trading positions on ICE, and therefore NYMEX could not have a complete and accurate view of whether ''a trader's position . . . is too large.'' In addition, there were no accountability limits on the ICE exchange).

[1703] *See* Letter from Markus Henn, World Economic, Ecology & Development, to CFTC (Feb. 10, 2014), available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59628&SearchText=henn. See also,* Markus Henn, Evidence on the Negative Impact of Commodity Speculation by Academics, Analysis and Public Institutions, (Nov. 26, 2013), available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59628&SearchText=henn.*

[1704] The CME white paper, while technically not submitted formally by CME in the administrative record, warrants individualized analysis. It is cited in the Commission's December 2013 Position Limits Proposal; it is posted on the CME Group's Web site; and it is cited in arguments by such commenters as MFA. (MFA February 9, 2014 comment letter at 11–12, n.26).

[1705] *Id.*

[1706] Markus Henn cites the 2011 version of the Singleton paper, which is the only version of this paper in the administrative record. A subsequent May 2012 version is available from Professor Singleton's Stanford Web site at *http://web.stanford.edu/~kenneths/.*

b. Verleger's Analysis, Attached to ISDA/SIFMA Comment Letter

Philip K. Verleger provided an analysis as a retained expert for ISDA. Annex A to the 2/10/14 ISDA/SIFMA Comment Letter. He contends, without quantitative modelling or empirical evidence, that in the energy markets ''unwarranted price fluctuations'' have historically been due to ''confluence of contributing factors'' such as weather, geopolitical events, or changes in industry structure. 2/10/14 ISDA/SIFMA Comment Letter, Annex A at pp. 2–3. In passing, he opines, without analysis or citation, that the high energy prices in 2008 ''are attributable to environmental regulation.'' *Id.* Verleger also asserts that his expertise is in the energy markets, yet opines (contrary to many comment letters from other energy market participants) that the energy markets are ''subject to conditions and dynamics'' of other commodity markets. *Id.* at p.2. For these reasons, we view Verleger's analysis as weak and conclusory and lacking in economic rigor and empirical data.

By way of further example, Verleger contends that if the position limits rule had been in effect in 2013, oil prices would have been $15 per barrel higher and the cost to American consumers would have been roughly $100 billion. Annex A at p.3. He provides no quantitative reasoning in support of these numbers.[1707]

Verleger also asserts that exploration for sources of energy has resulted in a large increase in oil supply in recent years, and states that these companies use swaps and futures to hedge their position. *Id.* at p.7. He then summarily asserts that independent companies exploring for and developing oil and gas production would ''not have achieved this success without hedging'' and that hedging would not have occurred if the Commission's position limits had been in place. *Id.* at p.8. Verleger overlooks several critical facts.

First, companies actively engaged in oil and gas exploration might either qualify for bona fide hedging treatment or fall within the position limit. As to non-spot month limits, Verleger concedes that ''it may be argued that the initial non-spot month position limits are high enough (109,000 contracts for crude as an example)'' to avoid liquidity impacts. *Id.* at 12.[1708]

Second, he argues that these exploration companies have ''benefited indirectly because passive investors such as retirement funds have taken long positions in commodities through the swap markets,'' and suggests that with position limits there would be an absence of non-commercials to take positions opposite oil and gas development companies. *Id.* at 9. To the contrary, with the Commission's disaggregation exemption for managed funds (the independent account controller exemption), there is no basis to believe that there will be a shortage of long positions in the market. He presents no empirical evidence to support his thesis that position limits could thus ''adversely affect[ ] investment in the oil and gas industry.'' [1709]

Third, the way energy derivatives markets work, if there is demand on the short side of the market, this may create liquidity on the long side of the market to transact with at some price. Verleger himself notes the diversity of market participants—commodity-based exchange-traded funds, hedge funds, retirement funds, and the like—and does not document that the exclusion of a particular long would reduce liquidity from the marketplace. For example, commodity-based exchange-traded funds trade intermediate long positions for their investors, and if the funds themselves could not take long positions in the market, there is no reason to assume that the investors might through other vehicles take long positions. Verleger has an expressed fear, not an analysis, that liquidity in markets will be harmed by position limits.[1710]

c. Pirrong's Analysis, Attached to ISDA/SIFMA Comment Letter

Professor Pirrong agrees that the nation's commodity markets have been subject to significant and disruptive corners and squeezes, such as the Hunt Silver episode of 1979–1980.[1711] He concedes that the ''ability of position limits to prevent corners and squeezes could provide a justification for application of these limits during the spot month,'' at least in theory.[1712] He concedes that in theory there is such a thing as ''sudden and unwarranted price fluctuations.'' [1713] Subject to these concessions, Pirrong opposes many aspects of the rule. Overall, Pirrong argues that position limits are an undesirable solution to an economic problem that has not been proven to exist.[1714] We analyze below his objections only when and to the extent that they rest on economic arguments.

i. Amaranth and the Possible Utility of Position Limits in Non-Spot Months

Pirrong states that the possibility of a corner or a squeeze ''provides no justification of the necessity of imposing position limits outside the spot month.'' [1715] Pirrong argues that Amaranth's market activity in 2006 is not evidence of the utility of position limits in the non-spot month. *Id.* at p.2, ¶ 7. In this context, Pirrong discusses corners and squeezes as the rationale for non-spot month position limits. *Id.* However, the Commission's December 2013 Position Limits Proposal discusses rationales other than corners and squeezes: Economic factors such as outsized market power, disorderly liquidation, and the ability to manipulate prices.

In the context of non-spot month position limits, Pirrong focusses just on corners and squeezes. If that were the only regulatory concern, his analysis on this, *see id.* at ¶¶ 27–30, would be largely correct. Many traders exit futures contracts before the spot month because they are there for the exposure, for price risk transfer, not to make or take delivery.

One key reason why ETFs ''sunshine-trade'' their rolls—announcing in their prospectus when they will roll—is because rolling these large positions in non-spot months can have a price impact, apart from corners and squeezes.[1716]

A good example of the risk of price impact in non-spot months from outsized positions, apart from corners

[1707] Verleger argues that limits in the non-spot month would have an especially chilling effect, ''very likely leading to, among other things, higher energy prices;'' and that position limits should not apply to cash-settled markets because traders holding cash-settled contracts do not have any ability to influence the physical market prices of commodities. *Id.* at 2–3. Pirrong also makes these arguments but provides further analysis, so we discuss this critique in subsection C below.

[1708] *See* Berg, The Rise of Commodity Speculation: From Villainous to Venerable, at p.263 (UN FAO 2011) (former CBOT trader suggests that spot month limit positions should be in place for at least a few days in the non-spot months to lesson price distortions from the roll).

[1709] *Id.*

[1710] *See, e.g.,* id. at 12 (after observing that non-spot month limits are high enough to perhaps not impact the market, stating that non-spot limits will ''adversely affect the ability of commercial participants to use some futures market'').

[1711] CL–ISDA/SIFMA–59611, Annex B, at 2, ¶¶ 6–9.

[1712] *Id.* at ¶ 7.

[1713] *Id.* at 6, ¶ 27.

[1714] *Id.* at pp. 3–10.

[1715] CL–ISDA/SIFMA–59611, Annex B, at p.2.

[1716] Sanders and Irwin, The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data, at p.19 (working paper 2014) (preannounced trades can have a ''sunshine trading'' effect of increasing liquidity and lowering trading costs). *See, e.g.,* Frenk and Turbeville, Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices (Better Markets 2011) (very large institutional players rolls have had a temporary price impact that is expensive to the ETF investors).

and squeezes, is Amaranth. Amaranth's position was so large that it may have impacted price by virtue of its outsized market position in not just the spot month, but other months. Amaranth may have influenced prices not just upon liquidation, not just when banging the close in the spot month, but also well before then, according to a congressional study cited in the Commission's December 2013 Position Limits Proposal.[1717]

An economist could argue that because the commodity futures price should reflect all demand, Amaranth's very large positions in the non-spot month was appropriately incorporated in market prices. After all, at a given point in time and price, demand is defined as the quantity desired by all those who are willing and able to hold a commodity futures position. Prof. Pirrong's approach does conceive of the possibility that outsized market power in the non-spot month or the price impact of Amaranth's positions could have deleterious effects on the marketplace. From a classical economical perspective, Amaranth's outsized market position in the non-spot months is just an input into price demand.

However, outsized market power may have economic outcomes that are undesirable. Outsized market power permits a player to do more than ''bang the close,'' and Amaranth's natural gas trading is an example of this. One could influence prices in the swaps market through such aggregation of market powers or one could manipulate related markets. Amaranth's exercise of market power may have been real and substantial. Even after it left the natural gas market, its activities may have left a lasting price effect. That is, prices of the underlying commodity, natural gas, may have been higher when Amaranth was in the market (including in the non-spot months), and prices were substantially less for a substantial time period after Amaranth left the market.[1718] Pirrong's discussion of Amaranth does not address this economic history or its possible relevance to non-spot position limits. Although Pirrong criticizes the Commission for not engaging in a ''rigorous empirical analysis'' of Amaranth (2/10/14 ISDA/SIFMA Comment Letter, Annex B, at p.2, ¶ 10), the establishment of outsized market power in economics is more straight forward in the case of Amaranth. The question is whether the disappearance of an Amaranth from the market with its formerly outsized position led to a significant decline in price.

By focusing simply on Amaranth's activities in the spot month, Prof. Pirrong does not discuss the potential for harm arising from Amaranth's outsized positions in the non-spot month. If someone is exerting market power, they can cause a negative externality for other purchases of natural gas if they, for example, bid up the price of natural gas. A higher price for a natural gas purchaser due to another entity's trading may simply be an example of a healthy market at work. However, there is definite harm to purchasers of natural gas if the price they pay is higher for reasons that are associated with another market participant's price influence though the exertion of market power.

Pirrong does not provide a direct factual rebuttal to the Senate investigative report finding that Amaranth's speculative activity affected overall price levels in natural gas. He argues that the Commission's reliance upon a Senate investigatory report would not be ''accepted as evidence of causation in any peer reviewed academic work.'' [1719] *Id.* at 2, ¶ 9. Prof. Pirrong is correct that the Commission has not, in the case of Amaranth, shown causation: That it was Amaranth's departure from the markets that caused the natural gas price decline in substantial part, as opposed to confounding factors (such as, in the case of natural gas, evidence that the upcoming winter would be warmer than expected). However, proof of causation is not required for publication in peer reviewed journals in a case such as this.

To establish evidence of causation, one would need a theoretical model and empirical evidence to support it. There have been peer-reviewed studies on Amaranth such as one cited in the Commission's December 2013 Position Limits Proposal.[1720] That study observed that not just a Senate investigatory committee, but one of the exchanges that Amaranth was trading on, was alarmed by their exercise of market power in months prior to the spot months. The New York Mercantile Exchange (NYMEX) on August 9, 2006: [1721]

> called Amaranth with continued concern about the September 2006 contract and warned that October 2006 was large as well and they should not simply reduce the September exposure by shifting contracts to the October contract. In fact, by the close of business that day, Amaranth increased their October 2006 position by 17,560 positions and their ICE positions by 105.75

This study documents that even though many of the Amaranth positions were not with NYMEX, and instead with ICE, these positions were extremely large relative to the average daily trading volume of the largest natural gas futures exchange. ''In some cases, the positions are hundreds of times the 30-day average daily trading volume.'' [1722]

Pirrong also argues as a normative matter that the costs exceed the benefits. While he concedes that it is ''plausible'' that a sudden liquidation of a large position by a trader facing distress'' could ''cause sudden and unwarranted price fluctuations,'' he argues that there is ''no evidence that this problem occurs with sufficient frequency, or has sufficiently damaging effects, to warrant continuously imposed constraints on risk transfer.'' *Id.* at 6, ¶ 27. The Commission considers the costs and benefits formally elsewhere in this release.

ii. The Possible Harms of Corners and Squeezes

Pirrong also questions the extent of harm associated with activities such as the Hunt brothers. 2/10/14 ISDA/SIFMA Comment Letter, Annex B, at pp. 2–3. He downplays the harms of corners and squeezes. *Id.* at ¶¶ 11–12, 38–43.

Prof. Pirrong is incorrect in asserting that the Commission's view was groundless. In the December 2013 Position Limits Proposal, the Commission did ground its concern about outsized speculative positions in particular examples. The Commission did present evidence of inefficient resource allocation with respect to the Hunt brothers. It is as much a public

[1717] There have been other examples of price manipulations that extended over a period of months. See CFTC staff, A Study of the Silver Market, Report To The Congress In Response To Section 21 Of The Commodity Exchange Act, Part One at 2–4, 9–10 (May 29, 1981) (price of silver rose and fell over a period of months, with long futures positions in silver held by members of the Hunt family in the summer and fall of 1979 and prices peaking in late January 1980, and prices falling though the first quarter of 1980); *id.,* Part Two at p.100 (''behavior of silver prices during 1979–80 appears consistent with, but is not entirely explained by, fundamental developments in the silver market over this period''); p.112 (Hunt family acquired actual and potential control of approximately 18 percent of world silver market and stood for delivery on a significant portion of their futures contracts, causing silver prices to rise significantly).

[1718] This observation presumes no other confounding events such as the occurrence of warmer winter. Unfortunately, we do not know whether or not the lower price resulted from the exit of Amaranth, the warmer winter, something else, or some combination of the preceding.

[1719] *Id.* at 2, ¶ 9.

[1720] *See* Ludwig Chincarini, Natural Gas Futures and Spread Position Risk: Lessons from the Collapse of Amaranth Advisors LLC, Journal of Applied Finance (2008).

[1721] *Id.* at p.24.

[1722] *Id.* at p.22.

policy matter as an economic matter how position limits fare as a solution to the question of these negative externalities. Even if one assumes away the existence of market imperfections, as Pirrong does, one is still left to contend with the consequences of what Pirrong assumes to be natural market events. In the case of the Hunt brothers, the Commission gave multiple examples of negative externalities in the broader economy. People sold their silverware which was melted down into silver bars. A photo supply company dependent on silver supply went out of business.[1723]

Pirrong's assumption that persons act optimally at any given moment does not mean, across time, that resources have been allocated efficiently. While much of economic analysis is static, dynamic effects over time can have inefficient allocation of resources, intertemporally. It may have been optimal for a possessor of silverware to melt down their silver into silver bars during the Hunt silver market disruption, but just a few months later a possessor of silverware would likely prefer silverware to silver bars. *See* Pirrong's *Manipulation of the Commodity Futures Market Delivery Process,* at p. 383, Journal of Business (1993) (futures market manipulations ''distorts prices and creates deadweight losses;'' ''causes shorts to utilize real resources to make excessive deliveries;'' and ''distorts consumption'').

Pirrong thus errs in asserting that the Commission does not provide an ''empirical basis'' for ''inefficient allocation of resources.'' 2/10/14 ISDA/SIFMA Comment Letter, Annex B, at p.3.

iii. Claim That the Spot-Month Limits Are Arbitrary

Pirrong claims that spot month limits are set too low at 25 percent of deliverable supply. *Id.* at p.8, ¶¶ 38–40. He contends that a single long trader has to control over 50 percent of deliverable supply to perfect a corner. *Id.* at ¶ 40. He is incorrect. Assuming, quite reasonably, that long commercials are going to stay in the market and consume, because it would be very expensive for them to leave the market, a certain percentage of deliverable supply is ''locked up'' in this sense. For example, a natural gas utility needs to deliver natural gas for its customers to heat their homes (among other things) and would therefore still take delivery of a substantial percentage of the deliverable supply of natural gas.

Pirrong says that ''[f]ive or more perfectly colluding traders each with positions at the 25 percent level might be able to manipulate the market.'' *Id.* at p.8, ¶ 41. However, these five traders do not all need to collude in order to permit one of them to manipulate price. Some of these traders may simply be those who value the commodity highly, much higher than the market price, and therefore will not let go of their contractual right to delivery. Such commercials may be willing to stay and pay a higher price, even when a corner is in effect, because the cost, for example, of not providing natural gas to customers to heat their homes is substantially more.

Many exchanges, including CME, set position limits lower than 25 percent. It is hard for Pirrong to argue that 25 percent is excessively low when it is higher than CME limits for all of the 19 CME-traded commodities covered by the proposed CFTC position limits.

Pirrong's final critique of spot month limits is his assertion that application of the same limits to short and long positions is arbitrary. *Id.* at p.9, ¶¶ 42–43. The reasons he gives for this are problematic and not well-developed. Pirrong states that for storable commodities, manipulation by long traders is more likely than with short traders. *Id.,* ¶ 42. It may well be more difficult to manipulate price through a corner or squeeze as a short because there is generally a fixed limit for deliverable supply (unless one creates the impression that there is more deliverable supply than there is). Moreover, shorts may well have a bona fide hedging exemption anyway. However, for shorts as well as longs, position limits help to ensure an orderly exit and a smoother delivery process. For example, a short trader with a large position might take a partially offsetting long position in an illiquid market in the spot month; this might cause unwarranted price volatility due to the price impact of establishing the offsetting long position.

Pirrong criticizes the depth of the Commission's basis for treating short and long positions symmetrically, he also does not suggest an alternative or explain how a proper ratio should be calculated.[1724]

iv. Whether Position Limits Cause Economic Harm

Pirrong contends that commodity ETFs, pension funds, and other ''real money'' investors would be harmed by position limits and that this is unfair because not all such market participants impose the same risks. 2/10/14 ISDA/SIFMA Comment Letter, Annex B, at pp.3–4, ¶¶ 16–18. The claim that it is ''unfair'' to impose limits on all market players uniformly is a policy argument, not an economic argument.

d. Hamilton/Wu Papers on Risk Premia and Effects of Index Fund Investing

Professors James Hamilton and Jing Cynthia Wu of the University of California at San Diego and University of Chicago Business School, respectively, authored a well-executed set of papers (well-executed because they used reasonably defensible models with relatively transparent assumptions and data sources) that examine the effect of positions on prices.

Their paper, Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013), is a well-reasoned explanation for how outsized speculative futures positions could impact risk premium, the return for accepting undiversifiable risk, a component of the return of holding a commodity futures contract. Examining the crude oil futures market, they find that crude oil risk premia fundamentally changed in response to financial investor flows into the crude oil market. *Id.* at p.31.

Hamilton and Wu found that, for crude oil futures, risk premiums, post-2005, were smaller than they were in the pre-2005 sample. This study contains an important conclusion founded in the interplay of positions and prices in the crude oil markets:

> While traders taking the long position in near contracts earned a positive return on average prior to 2005, that premium decreased substantially after 2005, becoming negative when the slope of the futures curve was high. This observation is consistent with the claim that historically commercial producers paid a premium to arbitrageurs for the privilege of hedging price risk, but in more recent periods financial investors have become natural counterparties for commercial hedgers.

Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* at p.10, Journal of International Money and Finance (2013).

Their paper tests the idea that risk premia have been bid down by long, speculative investments in the crude oil market. That is, they test the idea that the futures price has become higher as

[1723] December 2013 Position Limits Proposal 78 FR at 75680, 75689.

[1724] Pirrong argues that the Commission's cost-benefit analysis fails to identify, let alone analyze, important potential costs. 2/10/14 ISDA/SIFMA Comment Letter, Annex B, at 4–6. The Commission addresses all commenter criticisms in the cost-benefit section of this release. Pirrong also argues that the Commission's bona fide hedging exemptions are unnecessarily narrow and critiques the Commission's decision to establish different position limits for cash-settled (as opposed to delivery-settled) contracts. The Commission addresses such comments in the relevant sections of this release.

it has been bid up by long speculators, so the return from holding the long futures contract has been lowered. In theory, this phenomenon would make hedging cheap for the short side of the market, but would also increase the price of the futures, all else being equal.

Hamilton and Wu use a two-factor model for price: The futures contract price less the rational expectation of the futures price equals the risk premium, the component of price associated with holding the price risk of the futures contract. A commodity that is more likely to be affected by long passives in this way is crude oil, because (1) crude oil as a commodity dominates these indices—substantial portion of the GSFI for example; (2) the economics of storage.

All else being equal, if outsized market positions affect price, we should expect risk premium to be the component of price that would be affected when market participants take outsized positions. That is because risk premium is a return for taking on undiversifiable risk. A risk premium does not include that portion of risk that can be easily diversified through other instruments. Through the workings of market, a participant who takes on a price exposure will expect to be compensated through a premium for bearing this risk. For a futures commodity contract, there are many components of the return, and the risk premium is only one of them. It can be a fairly small component, although the fraction depends on the commodity and other the market conditions.

Hamilton and Wu construct a theoretical price return: The return of holding a long futures contract based on a rational expectations model. Hamilton and Wu, *Risk Premia in Crude Oil Futures Prices,* Journal of International Money and Finance (2013). Their risk premium is the difference between futures return and theoretical price return. They find that risk premiums for crude oil decreased over time and became more volatile. While Hamilton and Wu listed many assets in the paper's introductory discussion of the theoretical model, in their empirical analysis they use two factors, that involve only futures price data. This omission fails to take into account potentially relevant data about the level of various commodities in storage [1725] and observations about other financial assets.[1726] Consequently, there may be some disconnect between their theoretical and their empirical model. This may mean that the study's theoretical price return is on less sound theoretical footing than it may first appear. Nevertheless, the benchmark rational expectation return may still be a suitable approximation.

In a second paper, *Effects of Index-Fund Investing on Commodity Futures Prices, International Economic Review,* (February 2015), Hamilton and Wu were able to replicate Singleton's result for the crude oil market during the 2006–2009 period. They found an effect from speculative positions of index investors on risk premium in crude oil.[1727] Hamilton and Wu also did not find evidence of speculative positions influencing risk premia in crude oil after 2009. Nor did they find evidence that speculative positions affected the risk premia in the agricultural commodities markets. ''Our conclusion is that although in principle index-fund buying of commodity futures could influence pricing of risk, we do not find confirmation of that in the week-to-week variability of the notional value of reported commodity index trader positions.'' *Id.* at p.193; *see id.* at p.195 (no persuasive evidence that changes in index trader positions is related to risk premium in agricultural commodities, whether the data is studied for change on a weekly or 13-week basis). Consequently, they find only limited evidence for a theoretically reasonable version of the Master's hypothesis, *i.e.,* that long speculators bid down the risk premia and as a result induce a higher futures price in various commodity futures markets. ''Overall,'' Hamilton and Wu conclude, their work indicates that ''there seems to be little evidence that index-fund investing is exerting a measurable effect on commodity futures prices.'' *Id.* at p.204 (adding that it is ''difficult to find much empirical foundation for a view that continues to have a significant impact on policy decisions'').

e. Sanders/Irwin on the ''Necessity'' of Limits and Energy Futures Prices

Professors Dwight Sanders and Scott Irwin submitted two working papers: (1) One paper arguing that new limits on speculation in agricultural futures markets are unnecessary; [1728] and (2) a paper on energy futures prices, using high frequency daily position data for energy markets and concluding that there is no compelling evidence of predictive links between commodity index investment and changes in energy futures prices.[1729]

i. The ''Necessity'' of New Position Limits

In Sanders and Irwin, *The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data* (working paper 2014), the authors use price and position data shared by an unnamed large investment company.[1730] They do various statistical analyses to concluding that the large investment company's roll of its position does not have any lasting price impact on the market. The find that the price impact of the roll is, at most, a small and temporary price impact; there is not a day-over-day impact and the impact is smaller than the bid/ask spread.

This result does not disprove, generally, the possibility that the fund's long, speculative positions impact price because it focuses only on one aspect of the fund's trading: Its rolling of positions. The firm data used is from a large commodity index fund that is registered investment company, and such a firm is likely put into their prospectus how they are going to roll their positions. This pre-announcement of when the commodity index fund will roll may dampen the price impact of these particular changes in position. *See* n.1682 and associated text, *supra;* Aulerich, Irwin, and Garcia, *Bubbles, Food Prices, and Speculation: Evidence from the CFTC's Daily Large Trader Data Files, id.* at p.29 (NBER Conference

[1725] Risk premia may vary based on the amount of a commodity in storage at any given time. While discussing storage as a component of risk premia seems overly technical, in many of these papers, including the Hamilton and Wu paper, it might play an import role. One could go long a crude oil futures contract, or one could buy crude oil and storage it. If you do the latter, you could draw down the physical commodity available for near-term use. Also, the storing of the physical commodity has a real option component to it (one can take the crude oil out of storage and consume it relatively quickly). The value of the real option depends on how much society might need crude oil in storage, and that value depends on how much crude oil is stored elsewhere.

[1726] The papers discussed in the financialization section suggest that the returns of financial assets may affect commodity returns and vice versa.

[1727] Professor Kenneth Singleton found evidence that speculative positions Granger-causing risk premium on weekly time intervals during the 2007 to 2009 period when studying the crude oil futures markets. Singleton, Investor Flows and the 2008 Boom/Bust in Oil Prices (March 23, 2011 working paper).

[1728] Sanders and Irwin, *The ''Necessity'' of New Position Limits in Agricultural Futures Markets: The Verdict from Daily Firm-Level Position Data* (working paper 3/13/2014), comment letter at 1–46.

[1729] Sanders and Irwin, *Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data* (working paper 2/17/2014), comment letter at 47–89.

[1730] *Id.* at 4–5. They argue that this dataset will be more comprehensive than the CFTC's commitment of trader data, but they did not test to verify this assumption. They correctly observe that prior work using CFTC data suffers from limitations in the frequency of data and the availability of swaps data. *Id.* at 3, 5.

2012) (firms preannounce their rolls, and thus these position changes can be anticipated by the marketplace and thus lead to less price impact). Sanders and Irwin's result thus is not obviously extensible to any price impact of this large index fund's positions apart from its positions and trading at the time of roll.

This fund did have days of heavy trading, apart from rolling, but Sanders and Irwin did not study the price impact arising from these changes in position. The fund traded cotton contracts representing 5.8% of average daily trading in cotton and wheat trades constituting 3.5% of average daily volume in the MGEX wheat contract. Sanders and Irwin did not attempt to study price impact on these un-announced trades. They stated that because the sizes of the roll transactions are ''larger than changes in outright position,'' ''investigating the impact of rolling on market spreads'' is ''particularly interesting.'' *Id.* at p.10. On the other hand, the non-roll position changes are presumptively not preannounced to the marketplace, so studying this rich dataset for price impacts from those position changes might also be interesting.

This paper by Sanders and Irwin thus has a limitation of scope based on its focus on just the rolling of positions. This large commodity index fund presumptively pre-announced its rolling of positions in its prospectus. However, this leaves open the question of what would be the effect if this same fund did not pre-announce in the future. The analysis by Sanders and Irwin, if credited as true within a reasonable degree of certainty, would address whether regulators should employ position limits prophylactically to diminish the price impact of any future, non-announced rolls. At least prior to sunshine trading of rolls, there is evidence of a price impact associated with rolling. Frenk and Turbeville, *Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices* (Better Markets 2011).[1731]

Moreover, not all large players pre-announce their rolls. The fact that Sanders and Irwin found no price impact with respect to rolls that were (assumedly) pre-announced does not mean that unannounced rolls might be mistaken for informed trading by the marketplace and cause a price impact.[1732]

Despite these limitations in scope, Sanders and Irwin's article is one of the more useful Granger analysis papers for several reasons.

First, it does present a working definition of ''excessive speculation:'' speculation that is ''causing'' price fluctuations that are ''sudden'' or ''unreasonable'' or ''unwarranted.'' Sanders and Irwin correctly state that their ''definition of excessive speculation seemingly excludes speculation that cannot be shown to *cause* price changes. . . .'' *Id.* at p.3. It is important to note, however, that Sanders and Irwin repeatedly use the word ''necessary'' to analyze the desirability of position limits, which elevates the requirements for establishing causation of price fluctuations to a very high level. High quality economic studies often use empirical data, typically the tools of statistics, to achieve reasonable certainty within a specified degree of error.

Second, the data source is a novel and fairly comprehensive data set. It includes both swaps and futures, and encompasses many different commodities. The data does indicate the volume and nature of this large commodity fund's positions in the market place. All positions taken by the firm during the 2007–2012 time period were long positions, not short positions. *Id.* at p.5. The fund's total position size (including futures and swaps) grew from under $4 billion in 2007 to $12 billion in 2011. *Id.*

Third, with respect to the paper's conclusion on rolling of positions, the statistical result of Sanders and Irwin—concluding that there was no price impact from positions—is stronger than many other studies in some respects. Unlike Hamilton and Wu's work on just a component of the return from holding a futures contract (risk premium), Sanders and Irwin consider the entire return from holding the futures contract. They studied data over a long time period. If their model is correct, they have found evidence against (at least their formulation of) the Masters hypothesis. There is a potential concern, however, with their statistical result. The price equation used for their Granger analysis uses both lagged returns and changes in positions. *See id.* at p.16 (''R_{t-i}'' are lagged returns and ''Positions'' are changes in position in Equation 5a). To the extent that lagged returns and position changes are correlated with each other, their price equation may mask correlations between price returns and position changes.

ii. Energy Futures Prices

Using the same commodity index fund data, Sanders and Irwin examine energy contracts: Crude oil, heating oil, natural gas, and reformulated blend stock gas (with ethanol added). Sanders and Irwin, *Energy Futures Prices and Commodity Index Investment: New Evidence from Firm-Level Position Data* (working paper 2014). This paper attempts to challenge the findings of an impact on price from positions by Singleton, Hamilton and Wu. Sanders and Irwin contend that their richer data source compels a conclusion that positions in commodity energy markets do not impact price.

This paper also has a potential problem with the price return equation. The equation, *see id.* at p. 15 (Equation No. 7), uses lagged returns and positions to test against a correlation with price. Sometimes they use multiple lagged returns. For example, for their natural gas analysis, they used two sets of lagged returns. *Id.* at p.35 (Table 5). Again, use of lagged returns in the price equation can mask a possible correlation.

Sanders and Irwin argue that their results from a richer data source indicate that Singleton and Hamilton and Wu's results may be ''artifacts'' of poor data. They contend that these authors' use of agricultural data as proxy for energy positions was problematic. *Id.* at p.3. They suggest this may explain the differing results of Singleton, as well as Hamilton and Wu.

But there are other explanations for this difference in results. Singleton, Hamilton and Wu focus on risk premium, not, as Sanders and Irwin do, on price returns. This distinction can be quite important in this context. If positions impact price by impacting risk premium, that effect will not necessarily reveal itself in a study of just price returns. Perhaps more fundamentally, Sanders and Irwin and are asking a

[1731] An example of a study that is, in part, forward-looking, is Cheng, Kirilenko, and Xiong, Convective Risk Flows in Commodity Futures Markets (working paper 2012). The authors use comovement methodology to conclude that in times of distress, financial traders reduce their net long position, causing risk to flow from financial traders to commercial hedgers. *See also* Acharya, Ramadorai, and Lochstoer, Limits to Arbitrage and Hedging: Evidence from the Commodity Markets, Journal of Financial Economics (2013) (decreases in financial traders' risk capacity should lead to increases in hedgers' hedging cost, all else being equal).

[1732] Sanders and Irwin's piece does not directly test the effect of pre-existing position limits in these markets. Examining agricultural markets for whether there can be price impact on positions generally is complicated by the fact that the agricultural markets have been subject to federal position limits since 1920s. On the other hand, in the case of a commodity index fund, they may well not be carrying substantial positions into the spot month, and so even their large source of firm data may not be useful for testing the impact or effectiveness of position limits during the spot month.

slightly different question than Hamilton and Wu or Singleton. Sanders and Irwin are attempting to measure speculative position changes impact on price returns over a long time period, February of 2007 to May 2012. Hamilton and Wu, and also Singleton, use narrower timeframes in their papers and find a component of return, the risk premium, during a narrow time window, during a period of economic stress.

f. CME Group Study Submissions

The CME Group filed in the administrative record several studies and reports on March 28, 2011. It did so in three sets, all filed on March 28, 2011.

In the first set, CME filed: *Tackling the Challenges in Commodity Markets and Raw Materials,* European Commission (2011) (2.2.2011); Issues Involving the Use of the Futures Market to Invest in Commodity Indexes, Government Accountability Office Letter to the Hon. Collin Peterson, Chair, House Committee on Agriculture (June 30, 2009); and Korniotis, *Does Speculation Affect Spot Price Levels? The Case of Metals With and Without Futures Markets,* Working Paper of the Finance and Economic Discussion Series, Federal Reserve Board (2009).

In a second set, CME filed: Stoll and Whaley, *Commodity Index Investing and Commodity Futures Prices,* Journal of Applied Finance (2010); and Irwin and Sanders, *The Impact of Index and Swap Funds on Commodity Markets: Preliminary Results* (OECD Food, Agriculture and Fisheries Working Papers, No. 27 2010).

In a third set, CME filed: Celso Brunetti and Bahattin Büyükşahin, *Is Speculation Destabilizing?* (working paper 2009); Bahattin Büyükşahin and Jeffrey H. Harris, *The Role of Speculators in the Crude Oil Futures Market* (working paper 2009); and Interagency Task Force on Commodity Markets, *Interim Report on Crude Oil* (July 2008).

Finally, CME submitted an undated CME study on conditional spot-month limits and CME Group's white paper, *Excessive Speculation and Position Limits in Energy Derivatives Markets.*

As a group, these studies are not new to the Commission. All of these papers, except the CME undated submission on conditional spot limits and the European Commission publication, were cited by the Commission in its December 2013 Position Limits Proposal and so are covered in the above analysis of various studies.[1733]

Conclusion

Economists debate whether ''excessive speculation'' meaning, as an economic matter, a link between large speculation positions and unwarranted price changes or price volatility, exists in these regulated markets, and if so to what degree. The question presented is a surprisingly difficult one to answer. All the empirical studies on this question have drawbacks, and none is conclusive. This inconclusivity is not surprising. It is inevitable, given the economic uncertainties that inhere in the data and the complexity of the question. There are many theoretical and empirical assumptions and leaps, that are needed to transform and interpret raw market data into meaningful and persuasive results. There is no decisive statistical method for establishing evidence for or against position limits in the commodity.

Those studies that use Granger causality methodology tend to conclude that there is no evidence of excessive speculation or its consequences on price returns and price volatility, and many industry commenters opposed to position limits used this methodology. But that methodology is peculiarly sensitive to model design choices, and this review has highlighted the modelling decisions that may have affected the ultimate conclusions of these studies. Moreover, there are countervailing Granger studies showing a link between large speculative positions and price volatility. And studies such as Cheng, Kirilenko, and Xiong, *Convective Risk Flows in Commodity Futures Markets* (working paper 2012), indicate that some Granger studies may mask the impact of speculation in times of financial stress.

Those studies that use comovement and cointegration methods tend to conclude there is evidence of deleterious effects of ''excessive speculation.'' Yet comovement tests for correlation, not causation, and a correlation between large financial trading in the commodity markets and price changes and volatility could be driven by a common causal agent such as macroeconomic factors.

Those studies that use models of fundamental supply and demand reach a whole host of divergent opinions on the subject, each opinion only as strong as the many modelling choices.

In this way, the economic literature is inconclusive. Even clearly written, well-respected papers often contain nuances. It is telling that Hamilton, *Causes and Consequences of the Oil Shock of 2007–2008,* Brookings Paper on Economic Activity (2009), has been cited by both proponents and opponents of position limits.

What can be said with certainty is summarized in the Commission's Notice of Proposed Rulemaking: That large speculative positions and outsized market power pose risks to a well-functioning marketplace. These risks may very well differ depending on commodity market structure, but can in some markets cause real-world price impacts through a higher risk premium as a component of total price. There are also economic studies indicating some correlation between increased speculation and price volatility in times of financial stress, but this correlation does not imply causation.

Comment letters on either side declaring that the matter is settled in their favor among respectable economists are simply incorrect. The best economists on both sides of the debate concede that there is a legitimate debate. This analysis concludes that the academic debate amongst economists about the effects of outsized market positions has reputable and legitimate standard-bearers for opposing positions.

B. Appendix B—List of Comment Letters Cited in this Rulemaking

1. Agri-Mark, Inc.; (CL–Agri–Mark–59609, 2/10/2014)
2. Airlines for America (''A4A''); (CL–A4A–59714, 2/10/2014); (CL–A4A–59686, 2/10/2014)
3. Alternative Investment Management Association (''AIMA''); (CL–AIMA–59618, 2/10/2014); (CL–AIMA–59619, 2/10/2014)
4. American Bakers Association (''Bakers''); (CL–Bakers–59691, 2/10/2014)
5. American Benefits Council (''ABC''); (CL–ABC–59670, 2/10/2014)
6. American Cotton Shippers Association (''ACSA''); (CL–ASCA–59667, 2/10/2014)
7. American Farm Bureau Federation (''AFBF''); (CL–AFBF–59730, 2/10/2014)
8. American Feed Industry Association (''AFIA''); (CL–AFIA–60955, 7/13/2016)
9. American Gas Association (''AGA''), (CL–AGA–59632, 2/10/2014); (CL–AGA–

[1733] The undated CME study on conditional spot-month limits is the only empirical work submitted by CME in is opposition to the position limits rulemaking. It has been proven wrong. The Commission has previously explained that CME made technical data errors in doing its analysis. Position Limits for Futures and Swaps, 76 FR 71626, 71635 nn. 100–101 (Nov. 18, 2011). The European Commission publication in CME's first set of submissions, *Tackling the Challenges in Commodity Markets and Raw Materials,* European Commission (2011) (2.2.2011), is simply a discussion of policy initiatives. It concedes that it is difficult to know which way causation forms between financial and physical markets and states that ''the debate . . . is still open'' on whether financial inflows have affected prices. *Id.* at 2, 7.

59633, 2/10/2014); (CL–AGA–60382, 3/30/2015); (CL–AGA–60943, 7/13/2016)

10. American Petroleum Institute (''API''); (CL–API–59694, 2/10/2014); (CL–API–59944, 8/4/2014); (CL–API–60939, 7/13/2016)
11. American Public Gas Association (''APGA''); (CL–APGA–59722, 2/10/2014)
12. American Sugar Refining, Inc.; (CL–ASR–59668, 2/10/2014); (CL–ASR–60933, 7/13/2016)
13. Americans for Financial Reform (''AFR''); (CL–AFR–59711, 2/10/2014); (CL–AFR–59685, 2/10/2014); (CL–AFR–60953, 7/13/2016)
14. Archer Daniels Midland Company (''ADM''); (CL–ADM–59640, 2/10/2014); (CL–ADM–60300, 1/22/2015); (CL–ADM–60934, 7/13/2016)
15. Armajaro Asset Management; (CL–Armajaro–59729, 2/10/2014)
16. Atmos Energy Holdings, Inc. (''Atmos''); (CL–Atmos–59705, 2/10/2014)
17. Better Markets, Inc.; (CL–Better Markets–59715, 2/10/2014); (CL–Better Markets–59716, 2/10/2014); (CL–Better Markets–60325, 1/22/2015); (CL–Better Markets–60401, 3/30/2015); (CL–Better Markets–60928, 7/13/2016)
18. BG Energy Merchants, LLC (''BG Group''); (CL–BG Group–59656, 2/10/2014); (CL–BG Group–59937, 8/4/2014); (CL–BG Group–60383, 3/30/2015)
19. Cactus Feeders, Inc., et al.; (CL–Cactus–59660, 2/10/2014)
20. Calpine Corporation; (CL–Calpine–59663, 2/10/2014)
21. Cargill, Incorporated; (CL–Cargill–59638, 2/10/2014)
22. Castleton Commodities International LLC (''CCI''); (CL–CCI–60935, 7/13/2016)
23. Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (''Chamber''); (CL–Chamber–59684, 2/10/2014); (CL–Chamber–59721, 2/10/2014)
24. Chairman, U.S. Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs; (CL–Sen. Levin–59637, 2/10/2014)
25. Citadel LLC; (CL–Citadel–59717, 2/10/2014); (CL–Citadel–59933, 8/1/2014)
26. CME Group Inc. (''CME''); (CL–CME–59719, 2/10/2014); (CL–CME–59718, 2/10/2014); (CL–CME–59970, 8/4/2014); (CL–CME–59971, 8/4/2014); (CL–CME–60307, 1/22/2015); (CL–CME–60406, 3/30/2015); (CL–CME–60926, 7/13/2016)
27. Coalition of Physical Energy Companies (''COPE''); (CL–COPE–59662, 2/10/2014); (CL–COPE–59653, 2/10/2014); (CL–COPE–59950, 8/4/2014); (CL–COPE–60388, 3/30/2015); (CL–COPE–60932, 7/13/2016)
28. Commercial Energy Working Group; (CL–Working Group–59647, 2/10/2014)
29. Commodities Working Group of GFMA (''GFMA''); (CL–GFMA–60314, 1/22/2015)
30. Commodity Markets Council (''CMC''); (CL–CMC–59634, 2/10/2014); (CL–CMC–59925, 7/25/2014); (CL–CMC–60318, 1/22/2015); (CL–CMC–60391, 3/30/2015); (CL–CMC–60950, 7/13/2016)
31. Commodity Markets Oversight Coalition (''CMOC''); (CL–CMOC–59720, 2/10/2014); (CL–CMOC–60324, 1/22/2015); (CL–CMOC–60400, 3/30/2015)
32. Committee on Capital Markets Regulation (''CCMR''); (CL–CCMR–59623, 2/10/2014)
33. Copperwood Asset Management LP (''CAM''); (CL–CAM–60097, 12/22/2014)
34. Cota, Sean; (CL–Cota–59706, 2/10/2014); (CL–Cota–60322, 1/22/2015)
35. CSC Sugar, LLC (''CSC''); (CL–CSC–59676, 2/10/2014); (CL–CSC–59677, 2/10/2014)
36. Dairy Farmers of America (''DFA''); (CL–DFA–59621, 2/10/2014); (CL–DFA–59948, 8/4/2014); (CL–DFA–60309, 1/22/2015); (CL–DFA–60927, 7/13/2016)
37. Darigold; (CL–Darigold–59651, 2/10/2014)
38. Davis Wright Tremaine LLP on behalf of Dairy America, Inc.; (CL–Dairy America–59683, 2/10/2014)
39. DB Commodity Services LLC (''DBCS''); (CL–DBCS–59569, 2/6/2014)
40. Duke Energy Utilities; (CL–DEU–59627, 2/10/2014)
41. Ecom Agro Industrial, Inc.; (CL–Ecom–60308, 1/22/2015)
42. EDF Trading North America, LLC (''EDF''); (CL–EDF–59961, 8/4/2014); (CL–EDF–60398, 3/30/2015); (CL–EDF–60944, 7/13/2016)
43. Edison Electric Institute (''EEI''); (CL–EEI–59945, 8/4/2014); (CL–EEI–Sup–60386, 3/30/2015)
44. Electric Power Supply Association (''EPSA''); (CL–EPSA–55953, 8/4/2014); (CL–EPSA–59999, 11/12/2014); (CL–EPSA–60381, 3/30/2015)
45. EEI and EPSA, jointly (''EEI–EPSA''); (CL–EEI–EPSA–59602, 2/7/2014); (CL–EEI–EPSA–60925, 7/13/2016)
46. Energy Transfer Partners, L.P. (''ETP''); (CL–ET–59958, 8/4/2014); (CL–ETP–60915, 7/12/2016)
47. FC Stone LLC; (CL–FCS–59675, 2/10/2014)
48. Fonterra Co-operative Group Limited (''Fonterra''); (CL–Fonterra–59608, 2/9/2014)
49. Futures Industry Association (''FIA''), (CL–FIA–59595, 2/7/2014); (CL–FIA–59566, 2/6/2014); (CL–FIA–59931, 7/31/2014); (CL–FIA–60303, 1/22/2015); (CL–FIA–60392, 3/30/2015); (CL–FIA–60937, 7/13/2016)
50. Grain Service Corporation (''GSC''); (CL–GSC–59703, 2/10/2014)
51. HP Hood LLC (''Hood''), (CL–Hood–59582, 2/7/2014)
52. ICE Futures U.S., Inc.; (CL–ICE–59645, 2/10/2014); (CL–ICE–59649, 2/10/2014); (CL–ICE–59938, 8/4/2014); (CL–ICE–60310, 1/22/2015); (CL–ICE–60311, 1/22/2015); (CL–ICE–60378, 3/30/2015)
53. Industrial Energy Consumers of America; (CL–IECA–59671, 2/10/2014); (CL–IECA–59713, 2/10/2014); (CL–IECA–59964, 8/4/2014); (CL–IECA–60389, 3/30/2015)
54. Innovation Center for US Dairy; (CL–US Dairy–59952, 8/4/2014)
55. Institute for Agriculture and Trade Policy (''IATP''); (CL–IATP–59701, 2/10/2014); (CL–IATP–59704, 2/10/2014); (CL–IATP–60394, 3/30/2015); (CL–IATP–60951, 7/13/2016)
56. IATP and AFR, jointly; (CL–IATP–60323, 1/22/2015)
57. Intercontinental Exchange, Inc. (''ICE''); (CL–ICE–59669, 2/10/2014); (CL–ICE–59962, 8/4/2014); (CL–ICE–59966, 8/4/2014); (CL–ICE–60387, 3/30/2015); (CL–ICE–60929, 7/13/2016)
58. International Dairy Foods Association (''IDFA''); (CL–IDFA–59771, 2/10/2014)
59. International Energy Credit Association; (CL–IECAssn–9679, 2/10/2014); (CL–IECAssn–59957, 8/4/2014); (CL–IECAssn–60395, 3/30/2015); (CL–IECAssn–60949, 7/13/2016)
60. International Swaps and Derivatives Association, Inc. (''ISDA''); (CL–ISDA–60370, 3/26/2015); (CL–ISDA–60931, 7/13/2016)
61. Investment Company Institute (''ICI''); (CL–ICI–59614, 2/10/2014)
62. ISDA and SIFMA, jointly; (CL–ISDA/SIFMA–59611, 2/10/2014); (CL–ISDA/SIFMA–59917, 7/7/2014)
63. Just Energy Group Inc.; (CL–Just–59692, 2/10/2014)
64. Leprino Foods Company; (CL–Leprino–59707, 2/10/2014)
65. Louis Dreyfus Commodities LLC; (CL–LDC–59643, 2/10/2014)
66. Managed Funds Association (''MFA''); (CL–MFA–59600, 2/7/2014); (CL–MFA–59606, 2/9/2014); (CL–MFA–60385, 3/30/2015)
67. MidAmerican Energy Holdings Company; (CL–MidAmerican–59585, 2/7/2014)
68. Minneapolis Grain Exchange, Inc. (''MGEX''); (CL–MGEX–59610, 2/10/2014); (CL–MGEX–59932, 8/1/2014); (CL–MGEX–60301, 1/22/2015); (CL–MGEX–60380, 3/30/2015); (CL–MGEX–60936, 7/13/2016); (CL–MGEX–60938, 7/13/2016)
69. Morgan Stanley; (CL–MSCGI–59708, 2/10/2014)
70. National Association of Wheat Growers; (CL–NAWG–59687, 2/10/2014)
71. National Cattlemen's Beef Association (''NCBA''); (CL–NCBA–59624, 2/10/2014)
72. National Corn Growers Association & American Soybeans Association, jointly; (CL–NCGA–ASA–60917, 7/12/2016)
73. National Corn Growers Association & Natural Gas Supply Association, jointly; (CL–NCGA–NGSA–60919, 7/13/2016)
74. National Cotton Council of America, American Cotton Shippers Association, and Amcot, jointly; (CL–NCC–ACSA–60972, 7/18/2016)
75. National Council of Farmer Cooperatives; (CL–NCFC–59613, 2/10/2014); (CL–NCFC–59942, 8/4/2014); (CL–NCFC–60930, 7/13/2016)
76. National Energy Marketers Association; (CL–NEM–59586, 2/7/2014); (CL–NEM–59620, 2/10/2014)
77. National Grain and Feed Association; (CL–NGFA–59681, 2/10/2014); (CL–NGFA–59956, 8/4/2014); (CL–NGFA–60267, 1/17/2015); (CL–NGFA–60312, 1/22/2015); (CL–NGFA–60941, 7/13/2016)
78. National Milk Producers Federation; (CL–NMPF–59652, 2/10/2014); (CL–NMPF–60956, 7/13/2016)

79. National Rural Electric Cooperative Association, American Public Power Association, and the Large Public Power Council, jointly (the ''NFP Electric Associations''); (CL–NFP–59690, 2/10/2014); (CL–NFP–59934, 8/1/2014); (CL–NFP–60393, 3/30/2015); (CL–NFP–60942, 7/13/2016)
80. Natural Gas Supply Association; (CL–NGSA–59673, 2/10/2014); (CL–NGSA–59674, 2/10/2014); (CL–NGSA–59900, 6/26/2014); (CL–NGSA–59941, 8/4/2014); (CL–NGSA–60379, 3/30/2015)
81. Nebraska Cattlemen Inc.; (CL–NC–59696, 2/10/2014)
82. New York State Department of Agriculture & Markets; (CL–NYS Agriculture–59657, 2/10/2014)
83. Nodal Exchange, LLC; (CL–Nodal–59695, 2/10/2014); (CL–Nodal–60948, 7/13/2016)
84. NRG Energy, Inc.; (CL–NRG–60434, 1/20/2015)
85. Occupy the SEC (''OSEC''); (CL–OSEC–59972, 8/7/2014)
86. Olam International Limited; (CL–Olam–59658, 2/10/2014); (CL–Olam–59946, 8/4/2014)
87. Pedestal Commodity Group, LLC; (CL–Pedestal–59630, 2/10/2014)
88. Petroleum Marketers Association of America and the New England Fuel Institute; (CL–PMAA–NEFI–60952, 7/13/2016)
89. Plains All American Pipeline, L.P.; (CL–PAAP–59664, 2/10/2014); (CL–PAAP–59951, 8/4/2014)
90. Private Equity Growth Capital Council (''PEGCC''); (CL–PEGCC–59650, 2/10/2014); (CL–PEGCC–59913, 7/3/2014); (CL–PEGCC–59987, 10/24/2014)
91. Public Citizen, Inc.; (CL–Public Citizen–59648, 2/10/2014); (CL–Public Citizen–60390, 3/30/2015); (CL–Public Citizen–60313, 1/22/2015); (CL–Public Citizen–60940, 7/13/2016)
92. Rice Dairy LLC; (CL–Rice Dairy–59601, 2/7/2014); (CL–Rice Dairy–59960, 8/4/2014)
93. RightingFinance; (CL–RF–60372, 3/28/2015)
94. Risk Management Work Group, Globalization Operating Committee, Innovation Center for US Dairy; (CL–US Dairy–59597, 2/7/2014)
95. Rutkowski, Robert; (CL–Rutkowski–60961, 7/14/2016); (CL–Rutkowski-60962, 7/14/2016)
96. Sempra Energy; (CL–SEMP–59926, 7/25/2014); (CL–SEMP–60384, 3/30/2015)
97. SIFMA AMG (''SIFMA''); (CL–AMG–59709, 2/10/2014); (CL–AMG–59710, 2/10/2014); (CL–AMG–59935, 8/1/2014); (CL–AMG–60946, 7/13/2016)
98. Southern Company Services, Inc.; (CL–SCS–60399, 3/30/2015)
99. Sutherland Asbill & Brennan LLP on behalf of The Commercial Energy Working Group; (CL–Working Group–59693, 2/10/2014); (CL–Working Group–59955, 8/4/2014); (CL–Working Group–59959, 8/4/2014); (CL–Working Group–60396, 3/30/2015); (CL–Working Group–60947, 7/13/2016)
100. T.C. Jacoby & Company, Inc.; (CL–Jacoby–59622, 2/10/2014)
101. Texas Cattle Feeders Association (''TCFA''); (CL–TCFA–59680, 2/10/2014); (CL–TCFA–59723, 2/10/2014)
102. The Andersons, Inc.; (CL–Andersons–60256, 1/15/2015)
103. The McCully Group LLC; (CL–McCully–59592, 2/7/2014)
104. Thornton, Pamela; (CL–Thornton–59702, 2/10/2014)
105. Traditum Group LLC; (CL–Traditum–59655, 2/10/2014)
106. Tri-State Coalition for Responsible Investment, et al.; (CL–Tri-State–59682, 2/10/2014)
107. United States Commodity Funds LLC (''USCF''); (CL–USCF–59644, 2/10/2014)
108. Vectra Capital LLC; (CL–Vectra–60369, 3/26/2015)
109. Wholesale Markets Brokers Association, Americas (''WMBA''); (CL–WMBA–60945, 7/13/2016)
110. World Economy, Ecology & Development (''WEED''); (CL–WEED–59628, 2/10/2014)
111. World Gold Council (''WGC''); (CL–WGC–59558, 2/6/2014)

List of Subjects

17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 17

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 19

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 37

Registered entities, Registration application, Reporting and recordkeeping requirements, Swaps, Swap execution facilities.

17 CFR Part 38

Block transaction, Commodity futures, Designated contract markets, Reporting and recordkeeping requirements, Transactions off the centralized market.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

17 CFR Part 150

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

17 CFR Part 151

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

§ 1.3(z) [Removed and Reserved]

■ 2. Remove and reserve § 1.3(z).

§ 1.47 [Removed and Reserved]

■ 3. Remove and reserve § 1.47.

§ 1.48 [Removed and Reserved]

■ 4. Remove and reserve § 1.48.

PART 15—REPORTS—GENERAL PROVISIONS

■ 5. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 6. In § 15.00, revise paragraph (p) to read as follows:

§ 15.00 Definitions of terms used in parts 15 through 19, and 21 of this chapter.

* * * * *

(p) *Reportable position* means:

(1) For reports specified in parts 17 and 18 and in § 19.00(a)(2) and (a)(3) of this chapter any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 of this part in either:

(i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market; or

(ii) Long or short put or call options that exercise into the same future of any commodity, or long or short put or call options for options on physicals that have identical expirations and exercise into the same physical, on any one reporting market.

(2) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any position in commodity derivative contracts, as defined in § 150.1 of this chapter, that exceeds a position limit in § 150.2 of this chapter for the particular commodity.

* * * * *

■ 7. In § 15.01, revise paragraph (d) to read as follows:

§ 15.01 Persons required to report.

* * * * *

(d) Persons, as specified in part 19 of this chapter, who either:

(1) Hold or control commodity derivative contracts (as defined in § 150.1 of this chapter) that exceed a position limit in § 150.2 of this chapter for the commodities enumerated in that section; or

(2) Are merchants or dealers of cotton holding or controlling positions for future delivery in cotton that equal or exceed the amount set forth in § 15.03.

* * * * *

■ 8. Revise § 15.02 to read as follows:

§ 15.02 Reporting forms.

Forms on which to report may be obtained from any office of the Commission or via the Internet (*http://www.cftc.gov*). Forms to be used for the filing of reports follow, and persons required to file these forms may be determined by referring to the rule listed in the column opposite the form number.

Form No.	Title	Rule
40	Statement of Reporting Trader	18.04
71	Identification of Omnibus Accounts and Sub-accounts	17.01
101	Positions of Special Accounts	17.00
102	Identification of Special Accounts, Volume Threshold Accounts, and Consolidated Accounts	17.01
204	Statement of Cash Positions of Hedgers	19.00
304	Statement of Cash Positions for Unfixed-Price Cotton “On Call”	19.00
504	Statement of Cash Positions for Conditional Spot Month Exemptions	19.00
604	Statement of Pass-Through Swap Exemptions	19.00

(Approved by the Office of Management and Budget under control numbers 3038–0007, 3038–0009, and 3038–0103.)

PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

■ 9. The authority citation for part 17 continues to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 6t, 7, 7a, and 12a, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 10. In § 17.00, revise paragraph (b) to read as follows:

§ 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

* * * * *

(b) *Interest in or control of several accounts.* Except as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.

* * * * *

■ 11. In § 17.03, revise paragraph (h) to read as follows:

§ 17.03 Delegation of authority to the Director of the Office of Data and Technology or the Director of the Division of Market Oversight.

* * * * *

(h) Pursuant to § 17.00(b), and as specifically provided in § 150.4 of this chapter, the authority shall be designated to the Director of the Office of Data and Technology to instruct a futures commission merchant, clearing member or foreign broker to consider otherwise than as a single account for the purpose of determining special account status and for reporting purposes all accounts one person holds or controls, or in which the person has a financial interest.

* * * * *

■ 12. Revise part 19 to read as follows:

PART 19—REPORTS BY PERSONS HOLDING POSITIONS EXEMPT FROM POSITION LIMITS AND BY MERCHANTS AND DEALERS IN COTTON

Authority: 7 U.S.C. 6g, 6c(b), 6i, and 12a(5), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 19.00 General provisions.

(a) *Who must file series ‘04 reports.* The following persons are required to file series ‘04 reports:

(1) *Persons filing for exemption to speculative position limits.* All persons holding or controlling positions in commodity derivative contracts, as defined in § 150.1 of this chapter, in excess of any speculative position limit provided under § 150.2 of this chapter and for any part of which a person relies on an exemption to speculative position limits under § 150.3 of this chapter as follows:

(i) *Conditional spot month limit exemption.* A conditional spot month limit exemption under § 150.3(c) of this chapter for any commodity specially designated by the Commission under § 19.03 for reporting;

(ii) *Pass-through swap exemption.* A pass-through swap exemption under § 150.3(a)(1)(i) of this chapter and as defined in paragraph (2)(ii)(B) of the definition of *bona fide hedging position* in § 150.1 of this chapter, reporting separately for:

(A) *Non-referenced-contract swap offset.* A swap that is not a referenced contract, as that term is defined in § 150.1 of this chapter, and which is executed opposite a counterparty for which the swap would qualify as a bona fide hedging position and for which the risk is offset with a referenced contract; and

(B) *Spot-month swap offset.* A cash-settled swap, regardless of whether it is a referenced contract, executed opposite a counterparty for which the swap would qualify as a bona fide hedging position and for which the risk is offset with a physical-delivery referenced contract in its spot month;

(iii) *Other exemption.* Any other exemption from speculative position limits under § 150.3 of this chapter, including for a bona fide hedging position as defined in § 150.1 of this chapter or any exemption granted under § 150.3(b) or (d) of this chapter; or

(iv) *Anticipatory exemption.* An anticipatory exemption under § 150.7 of this chapter.

(2) *Persons filing cotton on call reports.* Merchants and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to § 15.00(p)(1)(i) of this chapter; or

(3) *Persons responding to a special call.* All persons exceeding speculative position limits under § 150.2 of this chapter or all persons holding or controlling positions for future delivery that are reportable pursuant to § 15.00(p)(1) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Persons subject to a special call shall file CFTC Form 204, 304, 504, or 604 as instructed in the special call. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Market Oversight, or to such other person designated by the Director, authority to issue calls for series '04 reports.

(b) *Manner of reporting.* The manner of reporting the information required in § 19.01 is subject to the following:

(1) *Excluding certain source commodities, products or byproducts of the cash commodity hedged.* If the regular business practice of the reporting person is to exclude certain source commodities, products or byproducts in determining his cash positions for bona fide hedging positions (as defined in § 150.1 of this chapter), the same shall be excluded in the report, provided that the amount of the source commodity being excluded is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position. Such persons shall furnish to the Commission or its designee upon request detailed information concerning the kind and quantity of source commodity, product or byproduct so excluded. *Provided however,* when reporting for the cash commodity of soybeans, soybean oil, or soybean meal, the reporting person shall show the cash positions of soybeans, soybean oil and soybean meal.

(2) *Cross hedges.* Cash positions that represent a commodity, or products or byproducts of a commodity, that is different from the commodity underlying a commodity derivative contract that is used for hedging, shall be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity as provided for on the appropriate series '04 form.

(3) *Standards and conversion factors.* In computing their cash position, every person shall use such standards and conversion factors that are usual in the particular trade or that otherwise reflect the value-fluctuation-equivalents of the cash position in terms of the commodity underlying the commodity derivative contract used for hedging. Such person shall furnish to the Commission upon request detailed information concerning the basis for and derivation of such conversion factors, including:

(i) The hedge ratio used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging; and

(ii) An explanation of the methodology used for determining the hedge ratio.

§ 19.01 Reports on stocks and fixed price purchases and sales.

(a) *Information required*—(1) *Conditional spot month limit exemption.* Persons required to file '04 reports under § 19.00(a)(1)(i) shall file CFTC Form 504 showing the composition of the cash position of each commodity underlying a referenced contract that is held or controlled including:

(i) The as of date;

(ii) The quantity of stocks owned of such commodity that either:

(A) Is in a position to be delivered on the physical-delivery core referenced futures contract; or

(B) Underlies the cash-settled core referenced futures contract;

(iii) The quantity of fixed-price purchase commitments open providing for receipt of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract;

(iv) The quantity of unfixed-price sale commitments open providing for delivery of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract;

(v) The quantity of unfixed-price purchase commitments open providing for receipt of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract; and

(vi) The quantity of fixed-price sale commitments open providing for delivery of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract.

(2) *Pass-through swap exemption.* Persons required to file '04 reports under § 19.00(a)(1)(ii) shall file CFTC Form 604:

(i) *Non-referenced-contract swap offset.* For each swap that is not a referenced contract and which is executed opposite a counterparty for which the transaction would qualify as a bona fide hedging position and for which the risk is offset with a referenced contract, showing:

(A) The underlying commodity or commodity reference price;

(B) Any applicable clearing identifiers;

(C) The notional quantity;

(D) The gross long or short position in terms of futures-equivalents in the core referenced futures contract; and

(E) The gross long or short positions in the referenced contract for the offsetting risk position; and

(ii) *Spot-month swap offset.* For each cash-settled swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging position and for which the risk is offset with a physical-delivery referenced contract held into a spot month, showing for such cash-settled swap that is not a referenced contract the information required under paragraph (a)(2)(i) of this section and for such cash-settled swap that is a referenced contract:

(A) The gross long or short position for such cash-settled swap in terms of futures-equivalents in the core referenced futures contract; and

(B) The gross long or short positions in the physical-delivery referenced contract for the offsetting risk position.

(3) *Other exemptions.* Persons required to file '04 reports under § 19.00(a)(1)(iii) shall file CFTC Form 204 reports showing the composition of the cash position of each commodity hedged or underlying a reportable position in units of such commodity and in terms of futures equivalents of the core referenced futures contract, including:

(i) The as of date, the commodity derivative contract held or controlled, and the equivalent core referenced futures contract;

(ii) The quantity of stocks owned of such commodities and their products and byproducts;

(iii) The quantity of fixed-price purchase commitments open in such cash commodities and their products and byproducts;

(iv) The quantity of fixed-price sale commitments open in such cash commodities and their products and byproducts;

(v) The quantity of unfixed-price purchase and sale commitments open in such cash commodities and their products and byproducts, in the case of offsetting unfixed-price cash commodity sales and purchases; and

(vi) For cotton, additional information that includes:

(A) The quantity of equity in cotton held, by merchant, producer or agent, by the Commodity Credit Corporation under the provisions of the Upland Cotton Program of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture;

(B) The quantity of certificated cotton owned; and

(C) The quantity of non-certificated stocks owned.

(4) *Anticipatory exemptions.* Persons required to file '04 reports under § 19.00(a)(1)(iv) shall file CFTC Form 204 monthly on the remaining unsold, unfilled and other anticipated activity for the Specified Period that was reported on such person's most recent initial statement or annual update filed on Form 704, pursuant to § 150.7 (e) of this chapter.

(b) *Time and place of filing reports*—(1) *General.* Except for reports specified in paragraphs (b)(2) or (b)(3) of this section, each report shall be made monthly:

(i) As of the close of business on the last Friday of the month, and

(ii) As specified in paragraph (b)(4) of this section, and not later than 9 a.m. Eastern Time on the third business day following the date of the report.

(2) *Spot month reports.* Persons required to file '04 reports under § 19.00(a)(1)(i) for special commodities as specified by the Commission under § 19.03 or under § 19.00(a)(1)(ii)(B) shall file each report:

(i) As of the close of business for each day the person exceeds the limit during a spot period up to and through the day the person's position first falls below the position limit; and

(ii) As specified in paragraph (b)(4) of this section, and not later than 9 a.m. Eastern Time on the next business day following the date of the report.

(3) *Special calls.* Persons required to file '04 reports in response to special calls made under § 19.00(a)(3) shall file each report as specified in paragraph (b)(4) of this section within one business day of receipt of the special call unless otherwise specified in the call.

(4) *Electronic filing.* CFTC '04 reports must be transmitted using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

§ 19.02 Reports pertaining to cotton on call purchases and sales.

(a) *Information required.* Persons required to file '04 reports under § 19.00(a)(2) shall file CFTC Form 304 reports showing the quantity of call cotton bought or sold on which the price has not been fixed, together with the respective futures on which the purchase or sale is based. As used herein, call cotton refers to spot cotton bought or sold, or contracted for purchase or sale at a price to be fixed later based upon a specified future.

(b) *Time and place of filing reports.* Each report shall be made weekly as of the close of business on Friday and filed using the procedure under § 19.01(b)(3), not later than 9 a.m. Eastern Time on the third business day following the date of the report.

§ 19.03 Reports pertaining to special commodities.

From time to time to facilitate surveillance in certain commodity derivative contracts, the Commission may designate a commodity derivative contract for reporting under § 19.00(a)(1)(i) and will publish such determination in the **Federal Register** and on its Web site. Persons holding or controlling positions in such special commodity derivative contracts must, beginning 30 days after notice is published in the **Federal Register**, comply with the reporting requirements under § 19.00(a)(1)(i) and file Form 504 for conditional spot month limit exemptions.

§ 19.04 Delegation of authority to the Director of the Division of Market Oversight.

(1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in § 19.01 to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§§ 19.05–19.10 [Reserved]

Appendix A to Part 19—Forms 204, 304, 504, 604, and 704

BILLING CODE 6351–01–P

CFTC FORM 204

Statement of Cash Positions of Hedgers

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[2] and the regulations thereunder,[3] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR § 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see*, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] This Appendix includes representations of the proposed reporting forms, which would be submitted in an electronic format published pursuant to the proposed rules, either via the Commission's web portal or via XML-based, secure FTP transmission.

[2] 7 U.S.C. section 1, et seq.

[3] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR § 19.00(a)(1)(iii) and (iv) specify who must file Form 204.
- 17 CFR § 19.00(b) specifies the manner of reporting on series '04 reports, including Form 204.
- 17 CFR § 19.01(a)(3) and (4)(ii) specifies the information required on Form 204.
- 17 CFR § 19.01(b)(1) specifies the frequency (**monthly**), the as of report date (close of business on the last Friday of the month), and the time (9 a.m. Eastern Time on the third business day following the date of the report), for filing Form 204.

As appropriate, please follow the instructions below to generate and submit the required report or filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 204 as follows:

The trader identification fields should be completed by all filers. This updated Form 204 requires traders to identify themselves using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 204. This number is provided to traders who have previously filed Forms 40 and 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), he should also identify himself using those numbers. Form 204 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 204.

Section A of Form 204 must be completed by all filers who hold stocks and fixed-price cash positions in the cash commodity. Section A contains the following fields:

Date…………………………………	As-of date for reported position
RC or CDC………………………….	Referenced Contract (§ 150.1) used for hedging or Commodity Derivative Contract (§ 150.1) as required by, e.g., a special call (§ 19.00(a)(3))
CRFC………………………………..	Corresponding Core Referenced Futures Contract (§ 150.2(d))
Futures Equivalent in CRFC………..	Quantity of cash commodity hedged, converted to futures equivalents of the CRFC. Short positions should be represented with a minus sign, e.g. 2,000 contract equivalents short = "-2,000"
Cash commodity hedged……………	Cash commodity hedged by the CDC positions, e.g. "crude oil"
Units…………………………………	Units of measure for cash commodity being hedged, e.g. "barrels"
Stock………………………………..	Stocks (§ 19.01(a)(3)(ii))
Fixed Price Purchases ………………	Fixed-price purchase commitments (§ 19.01(a)(3)(iii))
Fixed Price Sales……………………	Fixed-price sale commitments (§ 19.01(a)(3)(iv))
Remaining Anticipated Activity……	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704 (§ 150.7(g) and § 19.01(a)(4))

Section B of Form 204 must be completed by all filers who hold unfixed-price cash positions in the cash commodity. Section B contains the following fields:

Date…………………………………..	As-of date for reported position
RC or CDC………………………….	Referenced Contract (§ 150.1) used for hedging or Commodity Derivative Contract (§ 150.1) as required by, e.g., a special call (§ 19.00(a)(3))
CRFC………………………………..	Corresponding Core Referenced Futures Contract (§ 150.2(d))

Futures Equivalent in CRFC………....	Futures Contract Equivalent in terms of CRFC. Short positions should be represented with a minus sign, e.g. 2,000 contract equivalents short = "-2,000"
Cash commodity hedged……………	Cash commodity hedged by the CDC positions, e.g. "crude oil"
Units………………………………….	Units of measure for cash commodity being hedged, e.g. "barrels"
Unfixed-price purchases……………	Unfixed-price purchases (§ 19.01(a)(3)(v))
Unfixed-price sales……………….....	Unfixed-price sales (§ 19.01(a)(3)(v))

Section C of Form 204 must be completed in addition to Sections A and B of Form 204 by filers who hold cotton stocks. Section C contains the following fields:

Equity Stocks………………………. Equity stock in hundreds of 500-lb. bales. Traders must report separately equity stocks held in the trader's capacity as a merchant, producer, and/or agent. (§ 19.01(a)(3)(vi))

Certificated Stocks…………………. Certificated stock in hundreds of 500-lb. bales. (§ 19.01(a)(3)(vi))

Non-certificated Stocks…………….. Non-certificated stock in hundreds of 500-lb. bales. (§ 19.01(a)(3)(vi))

The signature/authorization page must be completed by all filers. This page must include the name and position of the natural person filing Form 204 as well as the name of the reporting trader represented by that person. The trader certifying this Form 204 on the signature/authorization page should note that filing a report that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 204: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Public Trader ID No. [provided by CFTC]	OMB No. 3038-0013

COMMODITY FUTURES TRADING COMMISSION
FORM 204:
STATEMENT OF CASH POSITIONS OF HEDGERS

Identifying Information			
Identification Codes:			
NFA ID	Legal Entity Identifier (LEI)		
Name of Reporting Trader or Firm:			
Name of Person to Contact Regarding This Form:			
First Name	Middle Name	Last Name	Suffix
Contact Information:			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

A. Cash positions pursuant to the following paragraphs of § 19.01(a)(3)(i), (ii), (iii), (iv), and (4)(ii).

Date	Referenced Contract (RC) Used for Hedging or Commodity Derivative Contract (CDC)	Core Referenced Futures Contract (CRFC)	Quantity of Cash Commodity Hedged in terms of futures equivalents of the CRFC	Cash Commodity Hedged	Units for Cash Commodity (Specify: e.g. tons, cwt, lbs., bu., bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704

CFTC Form 204 (XX-XX)
Previous Editions Obsolete

B. Offsetting Unfixed-Price Purchases and Sales pursuant to § 19.01(a)(3)(v).

Date	Referenced Contract (RC) Used for Hedging or Commodity Derivative Contract (CDC)	Core Referenced Futures Contract (CRFC)	Quantity of Cash Commodity Hedged in terms of futures equivalents of the CRFC	Cash Commodity Hedged	Units for Cash Commodity (Specify: e.g. tons, cwt, lbs., bu., bbls., etc.)	Unfixed-Price Purchases	Unfixed-Price Sales

C. Cotton Stocks owned in Section A above pursuant to § 19.01(a)(3)(vi). Report in hundreds of bales (500-lb. bales).

Equity Stock ('00 bales) as Merchant	Equity Stock ('00 bales) as Producer	Equity Stock ('00 bales) as Agent	Certificated Stocks ('00 bales)	Non-certificated Stocks ('00 bales)

CFTC Form 204 (XX-XX)
Previous Editions Obsolete

Please sign/authenticate the Form 204 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking “submit,” “send,” or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 204, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 204 (XX-XX)
Previous Editions Obsolete

<u>Form 204, Example A</u>- A commercial entity has inventory of 10,000,000 barrels of crude oil, 5,000,000 barrels of crude oil fixed-price sales contracts, and 20,000,000 barrels of crude oil fixed-price purchase contracts. The commercial entity could claim a bona fide hedging exemption for a short position of up to 25,000 contracts in the NYMEX light sweet crude oil futures contract, equivalent to 30,000,000 barrels of crude oil. The commercial entity has other short speculative positions in the futures contract that, absent the bona fide hedging exemption, would cause it to exceed the speculative position limit.

A. Cash positions pursuant to the following paragraphs of § 19.01 (a) (3) (i), (ii), (iii), (iv), and (4)(ii).									
Date	Referenced Contract (RC) Used for Hedging or Commodity Derivative Contract (CDC)	Core Referenced Futures Contract (CRFC)	Quantity of Cash Commodity Hedged in terms of futures equivalents of the CRFC - = short	Cash Commodity Hedged	Units for Cash Commodity (Specify: e.g. tons, cwt, lbs., bu., bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704
5/6/2017	CL-NYMEX	CL-NYMEX	25,000	Crude oil	Bbls	10,000,000	20,000,000	5,000,000	0

<u>Form 204, Example B</u>- A commercial entity has filed unfilled anticipated requirements in an initial statement on form 704, Section A, in the amount of 120,000,000 MMBtu of natural gas. The current remaining unfilled anticipated requirements are 70,000,000 MMBtu. The person owns stocks of 20,000,000 MMBtu and has entered into fixed-price purchases of 30,000,000 MMBtu. The combined long cash position is long 50,000,000 MMBtu. The total position being hedged, i.e., the remaining unfilled anticipatory requirements of 70,000,000 MMBtu and the long cash position of 50,000,000 MMBtu, equals a long position of 120,000,000 MMBtu in the cash commodity. The commercial entity reports a futures equivalent short position of 10,000 contracts in the CRFC as a hedge, equivalent to short 100,000,000 MMBtu, which is less than the combined long cash position and the remaining unfilled anticipated requirements. Hence, the cash position is partially hedged.

A. Cash positions pursuant to the following paragraphs of § 19.01 (a) (3) (i), (ii), (iii), (iv), and (4)(ii).									
Date	Referenced Contract (RC) Used for Hedging or Commodity Derivative Contract (CDC)	Core Referenced Futures Contract (CRFC)	Quantity of Cash Commodity Hedged in terms of futures equivalents of the CRFC - = short	Cash Commodity Hedged	Units for Cash Commodity (Specify: e.g. tons, cwt, lbs., bu., bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704
5/6/2017	HH-NYMEX	NG-NYMEX	50,000	Natural gas	MMBtu	20,000,000	30,000,000	0	70,000,000

Form 204, Example C- A commercial entity has entered into offsetting unfixed-price purchase and sale contracts in the amount of 25,000,000 MMBtu of natural gas. The hedging position is a futures equivalent long position of 10,000 contracts and a futures equivalent short position of 10,000 contracts.

B. Offsetting Unfixed-Price Purchases and Sales pursuant to § 19.01(a)(3) (v).

Date	Referenced Contract (RC) Used for Hedging or Commodity Derivative Contract (CDC)	Core Referenced Futures Contract (CRFC)	Quantity of Cash Commodity Hedged in terms of futures equivalents of the CRFC	Cash Commodity Hedged	Units for Cash Commodity (Specify: e.g. tons, cwt, lbs., bu., bbls., etc.)	Unfixed-Price Purchases	Unfixed-Price Sales
5/6/2017	HH-NYMEX	NG-NYMEX	25,000	Natural Gas	MMBtu	25,000,000	
	HH-NYMEX	NG-NYMEX	-25,000	Natural Gas	MMBtu		25,000,000

Form 204, Example D– A merchant reportable in cotton futures has the following inventory: no equity stock, 100 bales of certificated stock, and 500 bales of non-certificated stock.

C. Cotton Stocks owned in Section A above pursuant to § 19.01(a)(3)(vi). Report in hundreds of bales (500-lb. bales).

Equity Stock ('00 bales)	Certificated Stocks ('00 bales)	Non-certificated Stocks ('00 bales)
0	1	5

CFTC FORM 304
Statement of Cash Positions for Unfixed-Price Cotton "On Call"

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") [1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 USC 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4i and 8 of the CEA and related regulations (see, e.g., 17 CFR § 19.02). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see*, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR § 19.00(a)(2) specifies who must file Form 304.
- 17 CFR § 19.00(b) specifies the manner of reporting on series '04 reports, including Form 304.
- 17 CFR § 19.02(a) specifies the information required on Form 304.
- 17 CFR § 19.02(b) specifies the frequency (**weekly**), the as of report date (close of business on Friday), and the time (9 a.m. Eastern Time on the third business day following the date of the report), for filing the Form 304.

As appropriate, please follow the instructions below to generate and submit the required report or filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 304 as follows:

The trader identification fields should be completed by all filers. This updated Form 304 requires traders to identify themselves using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 304. This number is provided to traders who have previously filed Forms 40 and 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), he should also identify himself using those numbers. Form 304 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 304.

Merchants and dealers of cotton must report on Form 304. Report in hundreds of 500-lb. bales unfixed-price cotton "on-call" pursuant to § 19.02(a). Include under "Call Purchases" stocks on hand for which price has not yet been fixed. For each listed stock, report the delivery month, delivery year, quantity of call purchases, and quantity of call sales.

The signature/authorization page must be completed by all filers. This page must include the name and position of the natural person filing Form 304 as well as the name of the reporting trader represented by that person. The trader certifying this Form 304 on the signature/authorization page should note that filing a report that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 304: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Public Trader ID No. [provided by CFTC]	OMB No. 3038-0013

COMMODITY FUTURES TRADING COMMISSION
FORM 304
STATEMENT OF CASH POSITIONS FOR UNFIXED-PRICE COTTON "ON-CALL"

Identifying Information			
Identification Codes:			
NFA ID	Legal Entity Identifier (LEI)		
Name of Reporting Trader or Firm:			
Name of Person to Contact Regarding This Form:			
First Name	Middle Name	Last Name	Suffix
Contact Information:			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).

Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)

CFTC Form 304 (XX-XX)
Previous Editions Obsolete

Please sign/authenticate the Form 304 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 304, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 304 (XX-XX)
Previous Editions Obsolete

Form 304, Example – July 2017 Call purchases of 200 bales and sales of 1,800 bales; October Call purchases of 6,600 bales and sales of 8,000 bales.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).			
Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)
July	2017	2	18
October	2017	66	80

CFTC FORM 504

Statement of Cash Positions for Conditional Spot Month Exemptions

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR § 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (see, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR § 19.00(a)(1)(i) specifies who must file Form 504.
- 17 CFR § 19.00(b) specifies the manner of reporting on series '04 reports, including Form 504.
- 17 CFR § 19.01(a)(1) specifies the information required on Form 504.
- 17 CFR § 19.01(b)(2) specifies the frequency (**daily during the spot month**), the as of report date (close of business for each day a person exceeds the limit, up to and including the day the person's position first falls below the position limit), and the time (9 a.m. Eastern Time on the next business day following the date of the report) for filing Form 504.

As appropriate, please follow the instructions below to generate and submit the required report or filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 504 as follows:

The trader identification fields should be completed by all filers. This new Form 504 requires traders to identify themselves using their Public Trader Identification Number. This number is provided to traders who have previously filed Forms 40 and 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), he should also identify himself using those numbers. Form 504 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 504.

Form 504 must be completed for stocks and fixed-price cash positions by all filers claiming a conditional spot month limit exemption. Form 504 contains the following fields:

Date……………………………………..	As of date for reported position (§ 19.01(a)(1)(i))
CRFC…………………………………….	Core Referenced Futures Contract (§ 150.2(d))
Cash commodity……………………….	Cash commodity identification
Units……………………………………..	Units of measure for cash commodity
Stocks…………………………………..	Deliverable stored commodity (§ 19.01(a)(1)(ii))
Fixed-price Purchase………………….	Fixed-price purchase commitments (§ 19.01(a)(1)(iii))
Fixed-price Sale………………………..	Fixed-price sale commitments (§ 19.01(a)(1)(iv))
Unfixed-price Purchase……………….	Unfixed-price purchase commitments (§ 19.01(a)(1)(v))
Unfixed-price Sale……………………..	Unfixed-price sale commitments (§ 19.01(a)(1)(vi))

The signature/authorization page must be completed by all filers. This page must include the name and position of the natural person filing Form 504 as well as the name of the reporting trader represented by that person. The trader certifying this Form 504 on the signature/authorization page should note that filing a report that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 504: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Public Trader ID No. [provided by CFTC]	OMB No. 3038-0013

COMMODITY FUTURES TRADING COMMISSION
FORM 504
STATEMENT OF CASH POSITIONS FOR CONDITIONAL SPOT MONTH LIMIT EXEMPTIONS

Identifying Information			
Identification Codes:			
NFA ID	Legal Entity Identifier (LEI)		
Name of Reporting Trader or Firm:			
Name of Person to Contact Regarding This Form:			
First Name	Middle Name	Last Name	Suffix
Contact Information:			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Cash positions pursuant to § 19.01(a)(1).

Date	Core Reference Futures Contract (CRFC)	Cash Commodity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Deliverable Cash Commodity held in Stock or Storage	Fixed-price Cash Purchase Commitment	Fixed-price Cash Sale Commitment	Unfixed-price Cash Purchase Commitment	Unfixed-price Cash Sale Commitment

CFTC Form 504 (XX-XX)

Please sign/authenticate the Form 504 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 504, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 504 (XX-XX)

Form 504 Example. The spot month for the physical-delivery May 2017 NYMEX Henry Hub Natural Gas (NG) futures contract (the CRFC for natural gas) is from the close of business on April 23 through 5:15 p.m. on the last day of trading, April 26, 2017. A trader holds positions in cash-settled natural gas referenced contracts settling on April 25, 2017, that are in excess of the spot month limit of 2,000 contracts, but that do not exceed 10,000 contracts, on each of April 23, 24, and 25, 2017. That trader does not hold any cash-settled referenced contracts settling on April 26, 2017; however, pursuant to § 19.01(b)(2)(i), a person must also report cash positions through the day the person's position first falls below the position limit. Consistent with claiming the conditional spot month limit exemption, the person holds no position in the May 2017 NYMEX NG contract during the spot month. Each line of the report represents each day of this conditional spot month limit exemption.

The person's purchase and sales commitments have the same delivery period as that of the May 2017 NYMEX NG contract. As of the close of business on April 23, 2017, the person holds: natural gas inventory of 10,000,000 MMBtus; fixed-price purchase contracts of 5,000,000 MMBtus; fixed price sales contracts of 10,000,000 MMBtu; unfixed-price cash purchase contracts of 5,000,000 MMBtu; and unfixed-price cash sales contracts of 5,000,000 MMBtu. The contract prices for each of the unfixed-price sales contracts and the unfixed-price purchase contracts are to become fixed 20 percent per business day on April 24, 25, 26, 27, and 28, 2017. The trader does not execute any cash transactions during the spot month.

Cash positions pursuant to § 19.01(a)(1).								
Date	Core Reference Futures Contract (CRFC)	Cash Commodity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Deliverable Cash Commodity held in Stock or Storage	Fixed-price Cash Purchase Commitment	Fixed-price Cash Sale Commitment	Unfixed-price Cash Purchase Commitment	Unfixed-price Cash Sale Commitment
4/23/2017	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	5,000,000	10,000,000	5,000,000	5,000,000
4/24/2017	NG -NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	6,000,000	11,000,000	4,000,000	4,000,000
4/25/2017	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	7,000,000	12,000,000	3,000,000	3,000,000
4/26/2017	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	8,000,000	13,000,000	2,000,000	2,000,000

CFTC FORM 604
Statement of Pass-Through Swap Exemptions

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 USC 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (*see*, e.g., 17 CFR § 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (see, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.
[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR § 19.00(a)(1)(ii) specifies who must file Form 604.
- 17 CFR § 19.00(b) specifies the manner of reporting on series '04 reports, including Form 604.
- 17 CFR § 19.01(a)(2)(i) and (ii) specify the information required on Form 604.
- For pass-through swaps with non-referenced-contract swap offset: 17 CFR § 19.01(b)(1) specifies the frequency (**monthly**), the as of report date (close of business on the last Friday of the month), and the time (9 a.m. Eastern Time on the third business day following the date of the report) for filing Form 604.
- For pass-through swaps with spot-month swap offset: 17 CFR § 19.01(b)(2) specifies the frequency (**daily during the spot month**), the as of report date (close of business for each day a person exceeds the limit, up to and including the day the person's position first falls below the position limit), and the time (9 a.m. Eastern Time on the next business day following the date of the report) for filing Form 604.

As appropriate, please follow the instructions below to generate and submit the required report or filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 604 as follows:

The trader identification fields should be completed by all filers. This new Form 604 requires traders to identify themselves using their Public Trader Identification Number. This number is provided to traders who have previously filed Forms 40 and 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), he should also identify himself using those numbers. Form 604 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 604.

Section A of Form 604 must be completed by all filers who hold a non-referenced contract swap offset position. Section A contains the following fields:

Date…………………………………………..	As of date for reported position
Underlying Commodity………………….....	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (§ 19.01(a)(2)(i)(A))
CRFC………………………………………	Corresponding Core Referenced Futures Contract (§ 150.2(d))
Applicable Clearing Identifier…………….	Clearing Identifier (if swap is cleared) (§ 19.01(a)(2)(i)(B))
Commodity Quantity Unit (CQU)…………	Unit of Measurement for Commodity
Notional Quantity………………………….	Notional Quantity in CQU (§ 19.01(a)(2)(i)(C))
Position in FE in CRFC…………………...	Gross long and short positions in futures equivalents of the CRFC (§ 19.01(a)(2)(i)(D))
Position in RC for offsetting risk………….	Gross long and short positions in referenced contract offset position (§ 19.01(a)(2)(i)(E))

Section B of Form 604 must be completed by all filers who hold a spot-month swap offset position. Section B contains the following fields:

Date…………………………………………..	As of date for reported position
RC or non-RC for swap offset…………....	Underlying Commodity or Commodity Reference Price or Referenced Contract for swap offsetting counterparty's bona fide hedging exemption (§ 19.01(a)(2)(ii))
CRFC………………………………………	Corresponding Core Referenced Futures Contract (§ 150.2(d))
Applicable Clearing Identifier……………	Clearing Identifier (if swap is cleared) (§ 19.01(a)(2)(i)(B))
Commodity Quantity Unit (CQU)……….	Unit of Measurement for Commodity
Notional Quantity…………………………	Notional Quantity in CQU (§ 19.01(a)(2)(i)(C))

Position in FE in CRFC…………………. Gross long and short positions in futures equivalents of the CRFC (§ 19.01(a)(2)(ii)(A))
Position in physical delivery RC
for offsetting risk……………………….... Gross long and short positions in referenced contract offset position (§ 19.01(a)(2)(ii)(B))

The signature/authorization page must be completed by all filers. This page must include the name and position of the natural person filing Form 604 as well as the name of the reporting trader represented by that person. The trader certifying this Form 604 on the signature/authorization page should note that filing a report that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 604: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Public Trader ID No. [provided by CFTC]	OMB No. 3038-0013

COMMODITY FUTURES TRADING COMMISSION
FORM 604
STATEMENT OF PASS-THROUGH SWAP EXEMPTIONS

Identifying Information			
Identification Codes:			
NFA ID	Legal Entity Identifier (LEI)		
Name of Reporting Trader or Firm:			
Name of Person to Contact Regarding This Form:			
First Name	Middle Name	Last Name	Suffix
Contact Information:			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

A. Non-referenced contract swap offset pursuant to § 19.01(a)(2)(i), reported and submitted **monthly** pursuant to § 19.01(b)(1)

Date	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC)	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.)	Notional Quantity in CQU	Gross Long Position in Futures Equivalent in the CRFC	Gross Short Position in Futures Equivalent in the CFRC	Gross Long Position in the RC for the Offsetting Risk Position in CQU	Gross Short Position in the RC for the Offsetting Risk Position in CQU

CFTC Form 604 (XX-XX)

B. Spot-month swap offset pursuant to § 19.01(a)(2)(ii), reported and submitted **daily** pursuant to § 19.01(b)(2) for non-referenced and referenced cash-settled swaps									
Date	Underlying Commodity or Referenced Contract for cash-settled swap offsetting BFH exemption of counterparty	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.) - CQU	Notional Quantity in CQU	Gross Long Position for Cash-settled Swap in Futures Equivalent in the CRFC	Gross Short Position for Cash-settled Swap in Futures Equivalent in the CFRC	Gross Long Position in the Physical-delivery RC for the Offsetting Risk Position in CQU	Gross Short Position in the Physical-delivery RC for the Offsetting Risk Position in CQU

CFTC Form 604 (XX-XX)

Please sign/authenticate the Form 604 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking “submit,” “send,” or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 604, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 604 (XX-XX)

Form 604, Example A. A person offsets a long position in a cash-settled milo swap with a notional size of 5,000,000 bushels, using the CBOT Corn futures contract, as a cross-commodity hedge. The milo swap was a bona fide hedging position for the swap counterparty, and was not cleared. For illustrative purposes, the hedge ratio is assumed to be one-to-one between milo and corn.

A. Non-referenced contract swap offset pursuant to § 19.01(a)(2)(i), reported and submitted **monthly** pursuant to § 19.01(b)(1)									
Date	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC)	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.)	Notional Quantity in CQU	Gross Long Position in Futures Equivalent in the CRFC	Gross Short Position in Futures Equivalent in the CFRC	Gross Long Position in the RC for the Offsetting Risk Position in CQU	Gross Short Position in the RC for the Offsetting Risk Position in CQU
6/28/2017	Milo	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000

Form 604, Example B. A person offsets a cash-settled corn swap with a notional size of 5,000,000 bushels, using the CBOT Corn futures contract during the spot month. An exemption for swap offsets is not permitted in the physical-delivery CBOT Corn futures contract in the last five days of trading. For the May 2017 CBOT Corn futures contract, the last day of trading is May 12 (CBOT rules specify the last trading day as the business day preceding the fifteenth calendar day of the contract month). Hence, the spot month swap offset exemption is not available in the May 2017 CBOT Corn futures contract as of the close of business on May 5, 2017. At that time, the trader must comply with the 600 contract spot month limit, equivalent to 3,000,000 bushels of corn, absent another exemption. Each line represents each day's report for this swap offset position. The spot month for the CBOT Corn futures contract begins at the close of trading two business days prior to the first trading day of the delivery month; hence, April 27, 2017, is the start of the spot month for the May 2017 CBOT Corn futures contract. The corn swap was a bona fide hedging position for the swap counterparty, and was not cleared.

B. Spot-month swap offset pursuant to § 19.01(a)(2)(ii), reported and submitted **daily** pursuant to § 19.01(b)(2) for non-referenced and referenced cash-settled swaps

Date	Underlying Commodity or Referenced Contract for cash-settled swap offsetting BFH exemption of counterparty	Core Referenced Futures contract (CRFC)	Applicabl e Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.) - CQU	Notional Quantity in CQU	Gross Long Position for Cash-settled Swap in Futures Equivalent in the CRFC	Gross Short Position for Cash-settled Swap in Futures Equivalent in the CFRC	Gross Long Position in the Physical-delivery RC for the Offsetting Risk Position in CQU	Gross Short Position in the Physical-delivery RC for the Offsetting Risk Position in CQU
4/27/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
4/28/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/01/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/02/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/03/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/04/2017	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/05/2017	Corn swap	C-CBOT	NA	Bushels-Bu	5,000,000	1,000	0	0	3,000,000

CFTC FORM 704

INITIAL STATEMENT AND ANNUAL UPDATE FOR ANTICIPATORY BONA FIDE HEDGING POSITIONS

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 USC 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR § 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see*, e.g., 7 U.S.C. §§ 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR § 150.7(a) specifies who must file Form 704.
- 17 CFR § 19.00(b) specifies the manner of reporting on series '04 reports, including Form 704.
- 17 CFR § 150.7(d) specifies the information required on Form 704.
- 17 CFR § 150.7(a) specifies that initial statements on Form 704 must be filed at least 10 days in advance of the date the person expects to exceed position limits. Annual updates must be filed on Form 704 each year thereafter.

As appropriate, please follow the instructions below to generate and submit the required report or filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 704 as follows:

The trader identification fields should be completed by all filers. This new Form 704 requires traders to identify themselves using their Public Trader Identification Number. This number is provided to traders who have previously filed Forms 40 and 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), he should also identify himself using those numbers. Form 704 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 704.

Form 704 must be completed by all filers who seek an exemption for anticipated bona fide hedging positions. Form 704 contains the following fields:

Initial Statement or Annual Update	Select Initial Statement if filing for the first time OR Annual Update if filing an annual update to a previously filed Form 704 (§ 150.7(d))
Anticipated Activity............................	Type of anticipated activity; choose Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts. Traders filing for multiple types of anticipated activity must show each type on a new line of Form 704. (§ 150.1 BFH definition paragraphs 3(iii), 4(i),4(ii), 4(iv) or (5)
Cash Commodity..............................	Commodity being hedged (§ 150.7 (d)(1)(i))
Units..	Units of measure for cash commodity being hedged
CRFC..	Corresponding Core Referenced Futures Contract (§ 150.2(d))
Same or Cross-Hedged........................	Identify whether the cash commodity being hedged is the same as the commodity underlying the CRFC (type "S") or whether it is a cross-hedging commodity (type "C-H") (§ 150.7 (d)(1)(iii))
Annual Activity................................	Quantity of annual actual activity for each of the preceding three years if filing an initial statement OR the prior year if filing an annual update. If a filer does not have three years of activity to submit, she may submit a reasonable, supported estimate of anticipated production for review by Commission staff. (§ 150.7 (d)(1)(iv)(A)-(B))
Specific Time Period Claimed.................	Date range for which an anticipatory exemption is being claimed, e.g. 01/01/2017 – 12/31/2017. If filing an annual update, select the amount of time remaining since the initial statement (§ 150.7 (d)(1)(v))
Anticipated for Specified Time...............	Quantity of total anticipated activity over entire specified time period in futures equivalents (§ 150.7 (d)(1)(vi))

Fixed Price Forward Activity………………	Quantity of fixed price forward activity in cash commodity being hedged for the specified time period in futures equivalents (§ 150.7 (d)(1)(vii))
Unsold, Unfilled, Anticipated Activity …….	Unsold or unfilled anticipated production, requirements, royalty receipts, or service contract payments or receipts the risks of which have not been offset with cash positions, of such commodity for the specified time period (§ 150.7 (d)(1)(viii))
Maximum Expected Position………………	The maximum number of long or short positions in referenced contracts expected to be used to offset the risks of anticipated activity (§ 150.7 (d)(1)(ix))

The signature/authorization page must be completed by all filers. This page must include the name and position of the natural person filing Form 704 as well as the name of the reporting trader represented by that person. The trader certifying this Form 704 on the signature/authorization page should note that filing a report that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 704: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Public Trader ID No. [provided by CFTC]	OMB No. 3038-0013

COMMODITY FUTURES TRADING COMMISSION
FORM 704
INITIAL STATEMENT AND ANNUAL UPDATE FOR ANTICIPATORY BONA FIDE HEDGING POSITIONS

Identifying Information			
Identification Codes:			
NFA ID	Legal Entity Identifier (LEI)		
Name of Reporting Trader or Firm:			
Name of Person to Contact Regarding This Form:			
First Name	Middle Name	Last Name	Suffix
Contact Information:			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Initial Statement and Annual Update for Anticipatory Activity pursuant to § 150.7 (d)

Check here if filing Initial Statement: ☐ Check here if filing Annual Update: ☐

Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Core Referenced Futures contract (CRFC)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Annual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for Preceding Three Years (One Year if Annual Update)	Specified Time Period (Date Range) for which Anticipatory Hedge Exemption is Claimed	Anticipated Activity for Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases	Unsold, Unfilled and Anticipated Activity	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity

CFTC Form 704 (XX-XX)

Please sign/authenticate the Form 704 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 704, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission: ____________________

CFTC Form 704 (XX-XX)

Form 704, Example A – A producer files an initial anticipatory exemption for anticipated production of crude oil for the next three years. The producer had production over the prior three calendar years (15 million, 18 million, and 20 million barrels) and is highly certain of anticipated production for the next 3 calendar years of 20 million barrels per year. The producer has no forward sales; hence, the full 60 million barrels of anticipated production (20 million barrels of anticipated production per year for three years) is unsold anticipated production. The unit of trading for the NYMEX Light Sweet Crude Oil futures contract (CL) is 1,000 barrels. The maximum hedge would be a short position of 60,000 contracts in the NYMEX CL contract.

A. Initial Statement and Annual Update for Anticipatory Activity pursuant to § 150.7 (d)

Check here if filing Initial Statement: ☑

Check here if filing Annual Update: ☐

Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Core Referenced Futures contract (CRFC)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Annual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for Preceding Three Years (One Year if Annual Update)	Specified Time Period (Date Range) for which Anticipatory Hedge Exemption is Claimed	Anticipated Activity for Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases	Unsold, Unfilled and Anticipated Activity	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity
Production	Crude Oil	(m='000,000) bbls	CL-NYMEX	S	2014-15m 2015-18m 2016-20m	1/1/2017 – 12/31/2019	60,000	0	60,000	-60,000

Form 704, Example B. In 2018, one year after filing the initial statement, the producer in Example A files an annual update. Actual production for the prior year was 20 million barrels, as forecasted. The producer remains highly certain of 40 million barrels of production (20 million barrels of crude oil for each of the next two years). The producer has sold forward 10 million barrels. Hence, remaining unsold anticipated production is 30 million barrels. The maximum hedge would be a short position of 30,000 contracts in the NYMEX CL contract.

A. Initial Statement and Annual Update for Anticipatory Activity pursuant to § 150.7 (d)										
Check here if filing Initial Statement: ☐						Check here if filing Annual Update: ☑				
Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Type and Name of Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Core Referenced Futures contract (CRFC)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Annual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for Preceding Three Years (One Year if Annual Update)	Specified Time Period for which Anticipatory Hedge Exemption is Claimed	Anticipated Activity for Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases	Unsold, Unfilled and Anticipated Activity	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity
Production	Crude Oil	(m='000,000) bbls	CL-NYMEX	S	2017-20m	2 years	40,000	-10,000	30,000	-30,000

BILLING CODE 6351–01–C

PART 37—SWAP EXECUTION FACILITIES

■ 13. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

■ 14. Revise § 37.601 to read as follows:

§ 37.601 Additional sources for compliance.

A swap execution facility that is a trading facility must meet the requirements of part 150 of this chapter, as applicable.

■ 15. In Appendix B to part 37, under the heading Core Principle 6 of Section 5h of the Act—Position Limits or Accountability, revise paragraphs (A) and (B) to read as follows:

Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance with Core Principles

* * * * *

Core Principle 6 of Section 5h of the Act—Position Limits or Accountability

(A) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the swap execution facility shall:

(1) Set its position limitation at a level not higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(a) *Guidance.*

(1) Until a swap execution facility has access to sufficient swap position information, a swap execution facility that is a trading facility need not demonstrate compliance with Core Principle 6(B). A swap execution facility has access to sufficient swap position information if, for example:

(i) It has access to daily information about its market participants' open swap positions; or

(ii) It knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the swap execution facility, that its market participants regularly engage in large volumes of speculative trading activity that would cause reasonable surveillance personnel at a swap execution facility to inquire further about a market participant's intentions or open swap positions.

(2) When a swap execution facility has access to sufficient swap position information, this guidance is no longer applicable. At such time, a swap execution facility is required to demonstrate compliance with Core Principle 6(B).

(b) *Acceptable practices.* [Reserved]

* * * * *

PART 38—DESIGNATED CONTRACT MARKETS

■ 16. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

■ 17. Revise § 38.301 to read as follows:

§ 38.301 Position limitations and accountability.

A designated contract market must meet the requirements of part 150 of this chapter, as applicable.

■ 18. In Appendix B to part 38, under the heading Core Principle 5 of section 5(d) of the Act: Position Limitations or Accountability, revise paragraphs (A) and (B) to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance with Core Principles

* * * * *

Core Principle 5 of Section 5(d) of the Act: Position Limitations or Accountability

(A) *In general.*—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *Maximum allowable position limitation.*—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) *Guidance.*

(1) Until a board of trade has access to sufficient swap position information, a board of trade need not demonstrate compliance with Core Principle 5(B) with respect to swaps. A board of trade has access to sufficient swap position information if, for example:

(i) It has access to daily information about its market participants' open swap positions; or

(ii) It knows, including through knowledge gained in surveillance of heavy trading activity occurring on or pursuant to the rules of the designated contract market, that its market participants regularly engage in large volumes of speculative trading activity that would cause reasonable surveillance personnel at a board of trade to inquire further about a market participant's intentions or open swap positions.

(2) When a board of trade has access to sufficient swap position information, this guidance is no longer applicable. At such time, a board of trade is required to demonstrate compliance with Core Principle 5(B) with respect to swaps.

(b) *Acceptable Practices.* [Reserved]

* * * * *

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 19. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

§ 140.97 [Removed and reserved]

■ 20. Remove and reserve § 140.97.

PART 150—LIMITS ON POSITIONS

■ 21. The authority citation for part 150 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 22. Revise § 150.1 to read as follows:

§ 150.1 Definitions.

As used in this part—

Bona fide hedging position means—

(1) *Hedges of an excluded commodity.* For a position in commodity derivative contracts in an excluded commodity, as that term is defined in section 1a(19) of the Act:

(i) Such position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise and is enumerated in paragraph (3), (4) or (5) of this definition; or

(ii) Is otherwise recognized as a bona fide hedging position by the designated contract market or swap execution facility that is a trading facility, pursuant to such market's rules submitted to the Commission, which rules may include risk management exemptions consistent with Appendix A of this part; and

(2) *Hedges of a physical commodity—general definition.* For a position in commodity derivative contracts in a physical commodity:

(i) Such position:

(A) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(B) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise;

(C) Arises from the potential change in the value of—

(*1*) Assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(*2*) Liabilities which a person owes or anticipates incurring; or

(*3*) Services that a person provides, purchases, or anticipates providing or purchasing; or

(ii)(A) *Pass-through swap offsets.* Such position reduces risks attendant to a position resulting from a swap in the same physical commodity that was executed opposite a counterparty for which the swap would qualify as a bona fide hedging position pursuant to paragraph (2)(i) of this definition (a pass-through swap counterparty), *provided that* the bona fides of the pass-through swap counterparty may be determined at the time of the transaction;

(B) *Pass-through swaps.* Such swap position was executed opposite a pass-through swap counterparty and to the extent such swap position has been offset pursuant to paragraph (2)(ii)(A) of this definition; or

(C) *Offsets of bona fide hedging swap positions.* Such position reduces risks attendant to a position resulting from a swap that meets the requirements of paragraph (2)(i) of this definition.

(iii) *Additional requirements for enumeration or other recognition.* Notwithstanding the foregoing general definition, a position in commodity derivative contracts in a physical commodity shall be classified as a bona fide hedging position only if:

(A) The position satisfies the requirements of paragraph (2)(i) of this definition and is enumerated in paragraph (3), (4), or (5) of this definition;

(B) The position satisfies the requirements of paragraph (2)(ii) of this definition, *provided that* no offsetting position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery commodity derivative contract; or

(C) The position has been otherwise recognized as a non-enumerated bona fide hedging position by either a designated contract market or swap execution facility, each in accordance with § 150.9(a); or by the Commission.

(3) *Enumerated hedging positions.* A bona fide hedging position includes any of the following specific positions:

(i) *Hedges of inventory and cash commodity purchase contracts.* Short positions in commodity derivative contracts that do not exceed in quantity ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(ii) *Hedges of cash commodity sales contracts.* Long positions in commodity derivative contracts that do not exceed in quantity the fixed-price sales contracts in the contract's underlying cash commodity by the same person and the quantity equivalent of fixed-price sales contracts of the cash products and by-products of such commodity by the same person.

(iii) *Hedges of unfilled anticipated requirements. Provided that* such positions in a physical-delivery commodity derivative contract, during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month:

(A) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity, for processing, manufacturing, or use by the same person; and

(B) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity for resale by a utility to its customers.

(iv) *Hedges by agents.* Long or short positions in commodity derivative contracts by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, *provided that* the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(4) *Other enumerated hedging positions.* A bona fide hedging position also includes the following specific positions, *provided that* no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract:

(i) *Hedges of unsold anticipated production.* Short positions in commodity derivative contracts that do not exceed in quantity unsold anticipated production of the same commodity by the same person.

(ii) *Hedges of offsetting unfixed-price cash commodity sales and purchases.* Short and long positions in commodity derivative contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices:

(A) Basis different delivery months in the same commodity derivative contract; or

(B) Basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(iii) *Hedges of anticipated royalties.* Short positions in commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by the same person, *provided that* the royalty rights arise out of the production of the commodity underlying the commodity derivative contract.

(iv) *Hedges of services.* Short or long positions in commodity derivative contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person, *provided that* the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract.

(5) *Cross-commodity hedges.* Positions in commodity derivative contracts described in paragraph (2)(ii), paragraphs (3)(i) through (iv) and paragraphs (4)(i) through (iv) of this definition may also be used to offset the risks arising from a commodity other than the same cash commodity underlying a commodity derivative contract, *provided that* the fluctuations in value of the position in the commodity derivative contract, or the commodity underlying the commodity derivative contract, are substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap and no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract.

(6) *Offsets of commodity trade options.* For purposes of this definition, a commodity trade option, meeting the requirements of § 32.3 of this chapter for a commodity option transaction, may be deemed a cash commodity purchase or sales contract, as appropriate, *provided that* such option is adjusted on a futures-equivalent basis. By way of example, a commodity trade option with a fixed strike price may be converted to a futures-equivalent basis, and, on that futures-equivalent basis,

deemed a cash commodity sale, in the case of a short call option or long put option, or a cash commodity purchase, in the case of a long call option or short put option.

Calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction.

Commodity derivative contract means, for this part, any futures, option, or swap contract in a commodity (other than a security futures product as defined in section 1a(45) of the Act).

Commodity index contract means an agreement, contract, or transaction that is not a location basis contract or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same.

Core referenced futures contract means a futures contract that is listed in § 150.2(d).

Eligible affiliate. An eligible affiliate means an entity with respect to which another person:

(1) Directly or indirectly holds either:

(i) A majority of the equity securities of such entity, or

(ii) The right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity;

(2) Reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and

(3) Is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.

Eligible entity[1] means a commodity pool operator, the operator of a trading vehicle which is excluded or who itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter; the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions for positions it holds directly or indirectly, or on its behalf, but without its day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

Entity means a ''person'' as defined in section 1a of the Act.

Excluded commodity means an ''excluded commodity'' as defined in section 1a of the Act.

Futures-equivalent means

(1) An option contract, whether an option on a future or an option that is a swap, which has been adjusted by an economically reasonable and analytically supported risk factor, or delta coefficient, for that option computed as of the previous day's close or the current day's close or contemporaneously during the trading day, and converted to an economically equivalent amount of an open position in a core referenced futures contract, *provided however,* if a participant's position exceeds position limits as a result of an option assignment, that participant is allowed one business day to liquidate the excess position without being considered in violation of the limits;

(2) A futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract; and

(3) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.

Independent account controller[2] means a person—

(1) Who specifically is authorized by an eligible entity, as defined in this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is registered as a futures commission merchant, an introducing broker, a commodity trading advisor, an associated person or any such registrant, or is a general partner of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter.

Intercommodity spread contract means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Intermarket spread position means a long (short) position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, at a particular designated contract market or swap execution facility and a short (long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or its by-products, away from that particular designated contract market or swap execution facility.

Intramarket spread position means a long position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, and a short position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or its by-products, on the same designated contract market or swap execution facility.

Location basis contract means a commodity derivative contract that is cash-settled based on the difference in:

(1) The price, directly or indirectly, of:

(i) A particular core referenced futures contract; or

[1] The definition of the term, eligible entity, was amended by the Commission in a final rule published on December 16, 2016 (81 FR 91454, 91489). The unamended version of the definition presented here is included solely to maintain the continuity of this regulatory section and for the convenience of the reader. The definition of the term, eligible entity, is not a subject of this reproposal and will be revised when the amended definition takes effect on February 14, 2017.

[2] The definition of the term, independent account controller, was amended by the Commission in a final rule published on December 16, 2016 (81 FR 91454, 91489). The unamended version of the definition presented here is included solely to maintain the continuity of this regulatory section and for the convenience of the reader. The definition of the term, independent account controller, is not a subject of this reproposal and will be revised when the amended definition takes effect on February 14, 2017.

(ii) A commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and

(2) The price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of:

(i) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or

(ii) A commodity that is listed in Appendix B to this part as substantially the same as a commodity underlying the same core referenced futures contract.

Long position means, on a futures-equivalent basis, a long call option, a short put option, a long underlying futures contract, or a swap position that is equivalent to a long futures contract.

Physical commodity means any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a(20) of the Act.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Pre-existing position means any position in a commodity derivative contract acquired in good faith prior to the effective date of any bylaw, rule, regulation or resolution that specifies an initial speculative position limit level or a subsequent change to that level.

Referenced contract means a core referenced futures contract listed in § 150.2(d) or, on a futures equivalent basis with respect to a particular core referenced futures contract, a futures contract, options contract, or swap that is:

(1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or

(2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract.

(3) The definition of referenced contract does not include any guarantee of a swap, a location basis contract, a commodity index contract, or a trade option that meets the requirements of § 32.3 of this chapter.

Short position means, on a futures-equivalent basis, a short call option, a long put option, a short underlying futures contract, or a swap position that is equivalent to a short futures contract.

Speculative position limit means the maximum position, either net long or net short, in a commodity derivatives contract that may be held or controlled by one person, absent an exemption, such as an exemption for a bona fide hedging position. This limit may apply to a person's combined position in all commodity derivative contracts in a particular commodity (all-months-combined), a person's position in a single month of commodity derivative contracts in a particular commodity, or a person's position in the spot month of commodity derivative contacts in a particular commodity. Such a limit may be established under federal regulations or rules of a designated contract market or swap execution facility. An exchange may also apply other limits, such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.

Spot month means—

(1) For physical-delivery core referenced futures contracts, the period of time beginning at the earlier of the close of business on the trading day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market, or the close of business on the trading day preceding the third-to-last trading day, until the contract expires, except as follows:

(i) For *ICE Futures U.S. Sugar No. 11* (SB) referenced contract, the spot month means the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract until the contract expires;

(ii) For *ICE Futures U.S. Sugar No. 16* (SF) referenced contract, the spot month means the period of time beginning on the third-to-last trading day of the contract month until the contract expires;

(iii) For *Chicago Mercantile Exchange Live Cattle* (LC) referenced contract, the spot month means the period of time beginning at the close trading on the fifth business day of the contract month until the contract expires;

(2) For cash-settled core referenced futures contracts:

(i) [Reserved]

(3) For referenced contracts other than core referenced futures contracts, the spot month means the same period as that of the relevant core referenced futures contract.

Spread contract means either a calendar spread contract or an intercommodity spread contract.

Swap means ''swap'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Swap dealer means ''swap dealer'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Transition period swap means a swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to this part implementing section 737 of the Dodd-Frank Act of 2010.

■ 23. Revise § 150.2 to read as follows:

§ 150.2 Speculative position limits.

(a) *Spot-month speculative position limits.* No person may hold or control positions in referenced contracts in the spot month, net long or net short, in excess of the level specified by the Commission for:

(1) Physical-delivery referenced contracts; and, separately,

(2) Cash-settled referenced contracts;

(b) *Single-month and all-months-combined speculative position limits.* No person may hold or control positions, net long or net short, in referenced contracts in a single month or in all months combined (including the spot month) in excess of the levels specified by the Commission.

(c) For purposes of this part:

(1) The spot month and any single month shall be those of the core referenced futures contract; and

(2) An eligible affiliate is not required to comply separately with speculative position limits.

(d) *Core referenced futures contracts.* Speculative position limits apply to referenced contracts based on the core referenced futures contracts listed in Table Core Referenced Futures Contracts:

CORE REFERENCED FUTURES CONTRACTS

Commodity type	Designated contract market	Core referenced futures contract [1]
Legacy Agricultural	Chicago Board of Trade	Corn (C).

CORE REFERENCED FUTURES CONTRACTS—Continued

Commodity type	Designated contract market	Core referenced futures contract [1]
		Oats (O).
		Soybeans (S).
		Soybean Meal (SM).
		Soybean Oil (SO).
		Wheat (W).
		Hard Winter Wheat (KW).
	ICE Futures U.S.	Cotton No. 2 (CT).
	Minneapolis Grain Exchange	Hard Red Spring Wheat (MWE).
Other Agricultural	Chicago Board of Trade	Rough Rice (RR).
	Chicago Mercantile Exchange	Live Cattle (LC).
	ICE Futures U.S.	Cocoa (CC).
		Coffee C (KC).
		FCOJ–A (OJ).
		U.S. Sugar No. 11 (SB).
		U.S. Sugar No. 16 (SF).
Energy	New York Mercantile Exchange	Light Sweet Crude Oil (CL).
		NY Harbor ULSD (HO).
		RBOB Gasoline (RB).
		Henry Hub Natural Gas (NG).
Metals	Commodity Exchange, Inc.	Gold (GC).
		Silver (SI).
		Copper (HG).
	New York Mercantile Exchange	Palladium (PA).
		Platinum (PL).

[1] The core referenced futures contract includes any successor contracts.

(e) *Levels of speculative position limits*—(1) *Initial levels.* The initial levels of speculative position limits are fixed by the Commission at the levels listed in Appendix D to this part; *provided however,* compliance with such initial speculative limits shall not be required until January 3, 2018, which date shall be the initial establishment date for purposes of paragraphs (e)(3) and (4) of this section.

(2) *Subsequent levels.* (i) The Commission shall fix subsequent levels of speculative position limits in accordance with the procedures in this section and publish such levels on the Commission's Web site at *http://www.cftc.gov*.

(ii) Such subsequent speculative position limit levels shall each apply beginning on the close of business of the last business day of the second complete calendar month after publication of such levels; *provided however,* if such close of business is in a spot month of a core referenced futures contract, the subsequent spot-month level shall apply beginning with the next spot month for that contract.

(iii) All subsequent levels of speculative position limits shall be rounded up to the nearest hundred contracts.

(3) *Procedure for computing levels of spot-month limits.* (i) No less frequently than every two calendar years, the Commission shall fix the level of the spot-month limit no greater than one-quarter of the estimated spot-month deliverable supply in the relevant core referenced futures contract. Unless the Commission determines to rely on its own estimate of deliverable supply, the Commission shall utilize the estimated spot-month deliverable supply provided by a designated contract market. If the Commission determines to rely on its own estimate of deliverable supply, then the Commission shall publish such estimate for public comment in the **Federal Register**; provided however, that the Commission may determine to fix the level of the spot-month limit at a level, recommended by the designated contract market listing the relevant core referenced futures contract for good cause shown, that is less than one-quarter of the estimated spot-month deliverable supply, or not to change the level of the spot-month limit.

(ii) *Estimates of deliverable supply.* (A) Each designated contract market in a core referenced futures contract shall supply to the Commission an estimated spot-month deliverable supply. A designated contract market may use the guidance regarding deliverable supply in Appendix C to part 38 of this chapter. Each estimate must be accompanied by a description of the methodology used to derive the estimate and any statistical data supporting the estimate, and must be submitted no later than the following:

(*1*) For energy commodities, January 31 of the second calendar year following the most recent Commission action establishing such limit levels;

(*2*) For metals commodities, March 31 of the second calendar year following the most recent Commission action establishing such limit levels;

(*3*) For legacy agricultural commodities, May 31 of the second calendar year following the most recent Commission action establishing such limit levels; and

(*4*) For other agricultural commodities, August 31 of the second calendar year following the most recent Commission action establishing such limit levels.

(B) Notwithstanding paragraph (e)(3)(ii)(A) of this section, each designated contract market may petition the Commission not less than two calendar months before the due date for submission of an estimate of deliverable supply under paragraph (e)(3)(ii)(A) of this section, recommending that the Commission not change the spot-month limit. Such recommendation should include a summary of the designated contract market's experience administering its spot-month limit. The Commission shall determine not less than one calendar month before such due date whether to accept the designated contract market's recommendation. If the Commission accepts such recommendation, then the designated contract market need not submit an estimated spot-month deliverable supply for such due date.

(4) *Procedure for computing levels of single-month and all-months-combined limits.* No less frequently than every two calendar years, the Commission shall fix the level, for each referenced contract, of the single-month limit and the all-

months-combined limit. Each such limit shall be based on 10 percent of the estimated average open interest in referenced contracts, up to 25,000 contracts, with a marginal increase of 2.5 percent thereafter; *provided however,* the Commission may determine not to change the level of the single-month limit or the all-months-combined limit.

(i) *Time periods for average open interest.* The Commission shall estimate average open interest in referenced contracts based on the largest annual average open interest computed for each of the past two calendar years. The Commission may estimate average open interest in referenced contracts using either month-end open contracts or open contracts for each business day in the time period, as practical.

(ii) *Data sources for average open interest.* The Commission shall estimate average open interest in referenced contracts using data reported to the Commission pursuant to part 16 of this chapter, and open swaps reported to the Commission pursuant to part 20 of this chapter or data obtained by the Commission from swap data repositories collecting data pursuant to part 45 of this chapter. Options listed on designated contract markets shall be adjusted using an option delta reported to the Commission pursuant to part 16 of this chapter. Swaps shall be counted on a futures equivalent basis, equal to the economically equivalent amount of core referenced futures contracts reported pursuant to part 20 of this chapter or as calculated by the Commission using swap data collected pursuant to part 45 of this chapter.

(iii) *Publication of average open interest.* The Commission shall publish estimates of average open interest in referenced contracts on a monthly basis, as practical, after such data is submitted to the Commission.

(iv) *Minimum levels. Provided however,* notwithstanding the above, the minimum levels shall be the greater of the level of the spot month limit determined under paragraph (e)(3) of this section or 5,000 contracts.

(f) *Pre-existing positions*—(1) *Pre-existing positions in a spot-month.* Other than pre-enactment and transition period swaps exempted under § 150.3(d), a person shall comply with spot month speculative position limits.

(2) *Pre-existing positions in a non-spot-month.* A single-month or all-months-combined speculative position limit established under this section shall not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided however,* that if such position is not a pre-enactment or transition period swap then that position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(g) *Positions on foreign boards of trade.* The aggregate speculative position limits established under this section shall apply to a person with positions in referenced contracts executed on, or pursuant to the rules of a foreign board of trade, *provided that:*

(1) Such referenced contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(2) The foreign board of trade makes available such referenced contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

(h) *Anti-evasion provision.* For the purposes of applying the speculative position limits in this section, a commodity index contract used to circumvent speculative position limits shall be considered to be a referenced contract.

(i) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (e) of this section to fix and publish subsequent levels of speculative position limits, including the authority not to change levels of such limits, and the authority in paragraph (e)(3)(iii) of this section to relieve a designated contract market from the requirement to submit an estimate of deliverable supply.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

(j) The Commission will periodically update these initial levels for speculative position limits and publish such subsequent levels on its Web site at: *http://www.cftc.gov.*

■ 24. Revise § 150.3 to read as follows:

§ 150.3 Exemptions.

(a) *Positions which may exceed limits.* The position limits set forth in § 150.2 may be exceeded to the extent that:

(1) Such positions are:

(i) Bona fide hedging positions that comply with the definition in § 150.1, *provided that:*

(A) For non-enumerated bona fide hedges, the person has not otherwise been notified by the Commission under § 150.9(d)(4) or, under rules adopted pursuant to § 150.9(a)(4)(iv)(B), by the designated contract market or swap execution facility; and

(B) For anticipatory bona fide hedging positions under paragraphs (3)(iii), (4)(i), (4)(iii), (4)(iv) and (5) of the bona fide hedging position definition in § 150.1, the person complies with the filing requirements found in § 150.7 or the filing requirements adopted, in accordance with § 150.11(a)(3), by a designated contract market or swap execution facility, as applicable;

(ii) Financial distress positions exempted under paragraph (b) of this section;

(iii) Conditional spot-month limit positions exempted under paragraph (c) of this section;

(iv) Spread positions recognized by a designated contract market or swap execution facility, each in accordance with § 150.10(a), or the Commission, *provided that* the person has not otherwise been notified by the Commission under § 150.10(d)(4) or by the designated contract market or swap execution facility under rules adopted pursuant to § 150.10(a)(4)(iv)(B); or

(v) Other positions exempted under paragraph (e) of this section; and that

(2) The recordkeeping requirements of paragraph (g) of this section are met; and further that

(3) The reporting requirements of part 19 of this chapter are met.

(b) *Financial distress exemptions.* Upon specific request made to the Commission, the Commission may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances include situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons.

(c) *Conditional spot-month limit exemption.* The position limit set forth in § 150.2 may be exceeded for natural gas cash-settled referenced contracts, *provided* that such positions do not exceed 10,000 contracts and the person holding or controlling such positions does not hold or control positions in spot-month physical-delivery referenced contracts.

(d) *Pre-enactment and transition period swaps exemption.* The speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1; *provided however,* that a person may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit.

(e) *Other exemptions.* Any person engaging in risk-reducing practices commonly used in the market, which they believe may not be specifically enumerated in the definition of bona fide hedging position in § 150.1, may request:

(1) An interpretative letter from Commission staff, under § 140.99 of this chapter, concerning the applicability of the bona fide hedging position exemption; or

(2) Exemptive relief from the Commission under section 4a(a)(7) of the Act.

(3) Appendix C to this part provides a non-exhaustive list of examples of bona fide hedging positions as defined under § 150.1.

(f) *Previously granted exemptions.* (1) Exemptions granted by the Commission under § 1.47 of this chapter for risk management of positions in financial instruments shall not apply to positions in financial instruments entered into after the effective date of initial position limits implementing section 737 of the Dodd-Frank Act of 2010.

(2) Exemptions for risk management of positions in financial instruments granted by a designated contract market or swap execution facility shall not apply to positions in financial instruments entered into after the effective date of initial position limits implementing section 737 of the Dodd-Frank Act of 2010, *provided that,* for positions in financial instruments entered into on or before the effective date of initial position limits implementing section 737 of the Dodd-Frank Act of 2010, the exemption shall apply for purposes of position limits under § 150.2 if the exemption:

(i) Applies to positions outside of the spot month only; and

(ii) Was granted prior to the compliance date provided under § 150.2(e)(1).

(g) *Recordkeeping.* (1) Persons who avail themselves of exemptions under this section, including exemptions granted under section 4a(a)(7) of the Act, shall keep and maintain complete books and records concerning all details of their related cash, forward, futures, futures options and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, and cross-commodity hedges, and shall make such books and records, including a list of pass-through swap counterparties, available to the Commission upon request under paragraph (h) of this section.

(2) Further, a party seeking to rely upon the pass-through swap offset in paragraph (2)(B) of the definition of ''bona fide hedging position'' in § 150.1, in order to exceed the position limits of § 150.2 with respect to such a swap, may only do so if its counterparty provides a written representation (*e.g.,* in the form of a field or other representation contained in a mutually executed trade confirmation) that, as to such counterparty, the swap qualifies in good faith as a ''bona fide hedging position,'' as defined in § 150.1, *provided that* the bona fides of the pass-through swap counterparty may be determined at the time of the transaction. That written representation shall be retained by the parties to the swap for a period of at least two years following the expiration of the swap and furnished to the Commission upon request.

(3) Any person that represents to another person that a swap qualifies as a pass-through swap under paragraph (2)(ii)(B) of the definition of ''bona fide hedging position'' in § 150.1 shall keep and make available to the Commission upon request all relevant books and records supporting such a representation for a period of at least two years following the expiration of the swap.

(h) *Call for information.* Upon call by the Commission, the Director of the Division of Market Oversight or the Director's delegee, any person claiming an exemption from speculative position limits under this section must provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash market positions which support the claim of exemption; and the relevant business relationships supporting a claim of exemption.

(i) *Aggregation of accounts.* Entities required to aggregate accounts or positions under § 150.4 of this part shall be considered the same person for the purpose of determining whether they are eligible for a bona fide hedging position exemption under paragraph (a)(1)(i) of this section with respect to such aggregated account or position.

(j) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (b) of this section to provide exemptions in circumstances of financial distress.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 25. Revise § 150.5 to read as follows:

§ 150.5 Exchange-set position limits.

(a) *Requirements and acceptable practices for commodity derivative contracts subject to federal position limits.* (1) For any commodity derivative contract that is subject to a speculative position limit under § 150.2, a designated contract market or swap execution facility that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.

(2) *Exemptions to exchange-set limits*—(i) *Grant of exemption.* Any designated contract market or swap execution facility that is a trading facility may grant exemptions from any speculative position limits it sets under paragraph (a)(1) of this section, *provided that* exemptions from federal limits conform to the requirements specified in § 150.3, *and provided further* that any exemptions to exchange-set limits not conforming to § 150.3 are capped at the level of the applicable federal limit in § 150.2.

(ii) *Application for exemption.* Any designated contract market or swap execution facility that grants exemptions under paragraph (a)(2)(i) of this section:

(A) Must require traders to file an application requesting such exemption in advance of the date that such position would be in excess of the limits then in effect, *provided however,* that it may adopt rules that allow a trader to file an application for an enumerated bona fide hedging exemption within five business days after the trader assumed the position that exceeded a position limit.

(B) Must require, for any exemption granted, that the trader reapply for the exemption at least on an annual basis.

(C) May deny any such application, or limit, condition, or revoke any such exemption, at any time, including if it determines such positions would not be in accord with sound commercial practices, or would exceed an amount that may be established and liquidated in an orderly fashion.

(3) *Pre-enactment and transition period swap positions.* Speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1. *Provided however,* that a designated contract market or swap execution facility that is a trading facility shall allow a person to net such position with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative position limit.

(4) *Pre-existing positions*—(i) *Pre-existing positions in a spot-month.* A designated contract market or swap execution facility that is a trading facility must require compliance with spot month speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment and transition period swaps.

(ii) *Pre-existing positions in a non-spot month.* A single-month or all months-combined speculative position limit established under § 150.2 shall not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided however,* that such position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(5) *Aggregation.* Designated contract markets and swap execution facilities that are trading facilities must have aggregation rules that conform to § 150.4.

(6) *Additional acceptable practices.* A designated contract market or swap execution facility that is a trading facility may:

(i) Impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, then re-establishes a long position;

(ii) Establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and

(iii) Impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

(b) *Requirements and acceptable practices for commodity derivative contracts in a physical commodity as defined in § 150.1 that are not subject to the limits set forth in § 150.2*—(1) *Levels at initial listing.* At the time of each commodity derivative contract's initial listing, a designated contract market or swap execution facility that is a trading facility should base speculative position limits on the following:

(i) *Spot month position limits*—(A) *Commodities with a measurable deliverable supply.* For all commodity derivative contracts not subject to the limits set forth in § 150.2 that are based on a commodity with a measurable deliverable supply, the spot month limit level should be established at a level that is no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed (Designated Contract Markets and Swap Execution Facilities may refer to the guidance in paragraph (b)(1)(i) of Appendix C of part 38 of this chapter for guidance on estimating spot-month deliverable supply);

(B) *Commodities without a measurable deliverable supply.* For commodity derivative contracts that are based on a commodity with no measurable deliverable supply, the spot month limit level should be set at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months combined position limits.* For agricultural or exempt commodity derivative contracts not subject to the limits set forth in § 150.2, the individual non-spot or all-months-combined levels should be equal to or less than the greater of: The level of the spot month limit; or 5,000 contracts, when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity. If the notional quantity per contract is larger than the typical cash market transaction, then the individual non-spot month limit or all-months combined limit level should be scaled down accordingly. If the commodity derivative contract is substantially the same as a pre-existing commodity derivative contract, then the designated contract market or swap execution facility may adopt the same limit as applies to that pre-existing commodity derivative contract.

(iii) *Commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract.* For commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract listed on a designated contract market or swap execution facility that is a trading facility, the cash-settled contract should adopt spot-month, individual non-spot-month, and all-months combined position limits comparable to those of the original price referenced contract.

(2) *Adjustments to levels.* Designated contract markets and swap execution facilities that are trading facilities should adjust their speculative limit levels as follows:

(i) *Spot month position limits.* The spot month position limit level should be reviewed no less than once every twenty-four months from the date of initial listing and should be maintained at a level that is:

(A) No greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed; or

(B) In the case of a commodity derivative contract based on a commodity without a measurable deliverable supply, necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months-combined position limits.* Individual non-spot or all-months-combined levels should be based on position sizes customarily held by speculative traders on the contract market or equal to or less than the greater of: The spot-month position limit level; 10% of the average combined futures and delta adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% thereafter; or 5,000 contracts. In any case, such levels should be reviewed no less than once every twenty-four months from the date of initial listing.

(3) *Position accountability in lieu of speculative position limits.* A designated contract market or swap execution facility that is a trading facility may adopt a bylaw, rule, regulation, or resolution, substituting for the exchange-set speculative position limits specified under this paragraph (b), an exchange rule requiring traders to consent to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's position or to reduce their positions in an orderly manner, in each case upon request by the exchange as follows:

(i) *Physical commodity derivative contracts.* On a physical commodity derivative contract that is not subject to the limits set forth in § 150.2, having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 or more contracts during the most recent calendar year and a liquid cash market, a designated contract market or swap execution facility that is a trading facility may adopt individual non-spot month or all-months-combined position accountability levels, *provided however,* that such designated contract market or swap execution facility that is a trading facility should adopt a spot month speculative position limit with a level no greater than one-quarter of the estimated spot month deliverable supply.

(ii) *New commodity derivative contracts that are substantially the same as an existing contract.* On a new commodity derivative contract that is substantially the same as an existing commodity derivative contract listed for trading on a designated contract market or swap execution facility that is a trading facility, which has adopted position accountability in lieu of position limits, the designated contract market or swap execution facility may adopt for the new contract when it is initially listed for trading the position accountability levels of the existing contract.

(4) *Calculation of trading volume and open interest.* For purposes of this paragraph, trading volume and open interest should be calculated by:

(i) *Open interest.* (A) Averaging the month-end open positions in a futures contract and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year; and

(B) Averaging the month-end futures equivalent amount of open positions in swaps in a particular commodity (such as, for swaps that are not referenced contracts, by combining the notional month-end open positions in swaps in a particular commodity, including options in that same commodity that are swaps on a delta-adjusted basis, and dividing by a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity), except that a designated contract market or swap execution facility that is a trading facility shall include swaps in their open interest calculation only if such entities administer position limits on swap contracts of their facilities.

(ii) *Trading volume.* (A) Counting the number of contracts in a futures contract and its related option contract, on a delta-adjusted basis, transacted during the most recent calendar year; and

(B) Counting the futures-equivalent number of swaps in a particular commodity transacted during the most recent calendar year, except that a designated contract market or swap execution facility that is a trading facility shall include swaps in their trading volume count only if such entities administer position limits on swap contracts of their facilities.

(5) *Exemptions*—(i) *Hedge exemption.* (A) Any hedge exemption rules adopted by a designated contract market or a swap execution facility that is a trading facility should conform to the definition of bona fide hedging position in § 150.1 and may provide for recognition as a non-enumerated bona fide hedge in a manner consistent with the process described in § 150.9(a).

(B) Any hedge exemption rules adopted under paragraph (b)(5)(i)(A) of this section may allow a person to file an application for enumerated hedging positions, which application should be filed not later than five business days after the person assumed the position that exceeded a position limit.

(ii) *Other exemptions.* A designated contract market or swap execution facility may grant other exemptions for:

(A) *Financial distress.* Upon specific request made to the designated contract market or swap execution facility that is a trading facility, the designated contract market or swap execution facility that is a trading facility may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances include situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons.

(B) *Conditional spot-month limit exemption.* Exchange-set spot-month speculative position limits may be exceeded for cash-settled contracts, *provided that* such positions should not exceed two times the level of the spot-month limit specified by the designated contract market or swap execution facility that is a trading facility, that lists a physical-delivery contract to which the cash-settled contracts are directly or indirectly linked, and the person holding or controlling such positions should not hold or control positions in such spot-month physical-delivery contract.

(C) *Intramarket spread positions and intermarket spread positions,* each as defined in § 150.1, *provided that* the designated contract market or swap execution facility, in considering whether to grant an application for such exemption, should take into account whether exempting the spread position from position limits would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unduly reduce the effectiveness of position limits to:

(*1*) Diminish, eliminate, or prevent excessive speculation;

(*2*) Deter and prevent market manipulation, squeezes, and corners; and

(*3*) Ensure that the price discovery function of the underlying market is not disrupted.

(iii) *Application for exemption.* Traders should be required to apply to the designated contract market or swap execution facility that is a trading facility for any exemption from its speculative position limit rules. In considering whether to grant such an application for exemption, a designated contract market or swap execution facility that is a trading facility should take into account whether the requested exemption is in accord with sound commercial practices and results in a position that does not exceed an amount that may be established and liquidated in an orderly fashion.

(6) *Pre-enactment and transition period swap positions.* Speculative position limits should not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1. *Provided however,* that a designated contract market or swap execution facility that is a trading facility may allow a person to net such position with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative position limit.

(7) *Pre-existing positions*—(i) *Preexisting positions in a spot-month.* A designated contract market or swap execution facility that is a trading facility should require compliance with spot month speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment and transition period swaps.

(ii) *Pre-existing positions in a non-spot month.* A single-month or all-months-combined speculative position limit should not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided however,* that such position should be attributed to the person if the person's position is increased after the effective date of such limit.

(8) *Aggregation.* Designated contract markets and swap execution facilities that are trading facilities must have aggregation rules that conform to § 150.4.

(9) *Additional acceptable practices.* Particularly in the spot month, a

designated contract market or swap execution facility that is a trading facility may:

(i) Impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, then re-establishes a long position;

(ii) Establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and

(iii) Impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

(c) *Requirements and acceptable practices for excluded commodity derivative contracts as defined in section 1a(19) of the Act*—(1) *Levels at initial listing.* At the time of each excluded commodity derivative contract's initial listing, a designated contract market or swap execution facility that is a trading facility should base speculative position limits on the following:

(i) *Spot month position limits.*—(A) *Excluded commodity derivative contracts with a measurable deliverable supply.* For all excluded commodity derivative contracts that are based on a commodity with a measurable deliverable supply, the spot month limit level should be established at a level that is no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed (Designated Contract Markets and Swap Execution Facilities may refer to the guidance in paragraph (b)(1)(i) of Appendix C of part 38 of this chapter for guidance on estimating spot-month deliverable supply);

(B) *Excluded commodity derivative contracts without a measurable deliverable supply.* For excluded commodity derivative contracts that are based on a commodity with no measurable deliverable supply, the spot month limit level should be set at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months combined position limits.* For excluded commodity derivative contracts, the individual non-spot or all-months-combined levels should be equal to or less than the greater of: The level of the spot month limit; or 5,000 contracts, when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity. If the notional quantity per contract is larger than the typical cash market transaction, then the individual non-spot month limit or all-months combined limit level should be scaled down accordingly. If the commodity derivative contract is substantially the same as a pre-existing commodity derivative contract, then the designated contract market or swap execution facility may adopt the same limit as applies to that pre-existing commodity derivative contract.

(iii) *Commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract.* For excluded commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract listed on a designated contract market or swap execution facility that is a trading facility, the cash-settled contract should adopt spot-month, individual non-spot-month, and all-months combined position limits that are comparable to those of the original price referenced contract.

(2) *Adjustments to levels.* Designated contract markets and swap execution facilities that are trading facilities should adjust their speculative limit levels as follows:

(i) *Spot month position limits.* The spot month position limit level for excluded commodity derivative contracts should be reviewed no less than once every twenty-four months from the date of initial listing and should be maintained at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months-combined position limits.* Individual non-spot or all-months-combined levels should be based on position sizes customarily held by speculative traders on the contract market or equal to or less than the greater of: the spot-month position limit level; 10% of the average combined futures and delta adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% thereafter; or 5,000 contracts. In any case, such levels should be reviewed no less than once every twenty-four months from the date of initial listing.

(3) *Position accountability in lieu of speculative position limits.* A designated contract market or swap execution facility that is a trading facility may adopt a bylaw, rule, regulation, or resolution, substituting for the exchange-set speculative position limits specified under this paragraph (c), an exchange rule requiring traders to consent to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's position or to reduce their positions in an orderly manner, in each case upon request by the exchange as follows:

(i) *Spot month.* On an excluded commodity derivative contract for which there is a highly liquid cash market and no legal impediment to delivery, a designated contract market or swap execution facility that is a trading facility may adopt position accountability in lieu of position limits in the spot month. For an excluded commodity derivative contract based on a commodity without a measurable deliverable supply, a designated contract market or swap execution facility that is a trading facility may adopt position accountability in lieu of position limits in the spot month. For all other excluded commodity derivative contracts, a designated contract market or swap execution facility that is a trading facility should adopt a spot-month position limit with a level no greater than one-quarter of the estimated deliverable supply;

(ii) *Individual non-spot or all-months combined position limits.* On an excluded commodity derivative contract, a designated contract market or swap execution facility that is a trading facility may adopt position accountability levels in lieu of position limits in the individual non-spot month or all-months-combined.

(iii) *New commodity derivative contracts that are substantially the same as an existing contract.* On a new commodity derivative contract on an excluded commodity derivative contract that is substantially the same as an existing commodity derivative contract listed for trading on a designated contract market or swap execution facility that is a trading facility, which has adopted position accountability in lieu of position limits, the designated contract market or swap execution facility may adopt for the new contract when it is initially listed for trading the position accountability levels of the existing contract.

(4) *Calculation of trading volume and open interest.* For purposes of this paragraph, trading volume and open interest should be calculated by:

(i) *Open interest.* (A) Averaging the month-end open positions in a futures contract and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year; and

(B) Averaging the month-end futures equivalent amount of open positions in swaps in a particular commodity (such as, for swaps that are not referenced contracts, by combining the notional month-end open positions in swaps in a particular commodity, including options in that same commodity that are swaps on a delta-adjusted basis, and dividing by a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity), except that a designated contract market or swap execution facility that is a trading facility should include swaps in their open interest calculation only if such entities administer position limits on swap contracts of their facilities.

(ii) *Trading volume.* (A) Counting the number of contracts in a futures contract and its related option contract, on a delta-adjusted basis, transacted during the most recent calendar year; and

(B) Counting the futures-equivalent number of swaps in a particular commodity transacted during the most recent calendar year, except that a designated contract market or swap execution facility that is a trading facility should include swaps in their trading volume count only if such entities administer position limits on swap contracts of their facilities.

(5) *Exemptions*—(i) *Hedge exemptions.* Any hedge exemption rules adopted by a designated contract market or a swap execution facility that is a trading facility should conform to the definition of bona fide hedging position in § 150.1.

(ii) *Other exemptions for excluded commodities.* A designated contract market or swap execution facility may grant, in addition to the exemptions under paragraphs (b)(5)(ii)(A), (b)(5)(ii)(B), and (b)(5)(ii)(C) of this section, a risk management exemption pursuant to rules submitted to the Commission, including for a position that is consistent with the guidance in Appendix A of this part.

(iii) *Application for exemption.* Traders should be required to apply to the designated contract market or swap execution facility that is a trading facility for any exemption from its speculative position limit rules. Such exchange may allow a person to file an application after the person assumed the position that exceeded a position limit. In considering whether to grant such an application for exemption, a designated contract market or swap execution facility that is a trading facility should take into account whether the requested exemption is in accord with sound commercial practices and results in a position that does not exceed an amount that may be established and liquidated in an orderly fashion.

(6) *Pre-enactment and transition period swap positions.* Speculative position limits should not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1. *Provided however,* that a designated contract market or swap execution facility that is a trading facility may allow a person to net such position with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative position limit.

(7) *Pre-existing positions*—(i) *Pre-existing positions in a spot-month.* A designated contract market or swap execution facility that is a trading facility should require compliance with spot month speculative position limits for pre-existing positions in commodity derivative contracts.

(ii) *Pre-existing positions in a non-spot month.* A single-month or all-months-combined speculative position limit should not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided however,* that such position should be attributed to the person if the person's position is increased after the effective date of such limit.

(8) *Aggregation.* Designated contract markets and swap execution facilities that are trading facilities should have aggregation rules for excluded commodity derivative contracts that conform to § 150.4.

(9) *Additional acceptable practices.* A designated contract market or swap execution facility that is a trading facility may impose such other restrictions on excluded commodity derivative contracts as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

(d) *Requirements for security futures products.* For security futures products, position limitations and position accountability requirements are specified in § 41.25(a)(3) of this chapter.

■ 26. Revise § 150.6 to read as follows:

§ 150.6 Ongoing application of the Act and Commission regulations.

This part shall only be construed as having an effect on position limits set by the Commission or a designated contract market or swap execution facility, including any associated recordkeeping and reporting regulations. Nothing in this part shall be construed to affect any other provisions of the Act or Commission regulations, including but not limited to those relating to manipulation, attempted manipulation, corners, squeezes, fraudulent or deceptive conduct or prohibited transactions, unless incorporated by reference.

■ 27. Add §§ 150.7 through 150.11 to read as follows:

§ 150.7 Requirements for anticipatory bona fide hedging position exemptions.

(a) *Statement.* Any person who wishes to avail himself of exemptions for unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), 4(iii), 4(iv), or (5), respectively, of the definition of bona fide hedging position in § 150.1 shall file an application on Form 704 with the Commission in advance of the date the person expects to exceed the position limits established under this part. Filings in conformity with the requirements of this section shall be effective ten days after submission, unless otherwise notified by the Commission.

(b) *Commission notification.* At any time, the Commission may, by notice to any person filing an application or annual update on Form 704, specify its determination as to what portion, if any, of the amounts described in such filing does not meet the requirements for bona fide hedging positions. In no case shall such person's anticipatory bona fide hedging positions exceed the levels specified in paragraph (f) of this section.

(c) *Call for additional information.* At any time, the Commission may request a person who has on file an application or annual update Form 704 under paragraph (a) of this section to file specific additional or updated information with the Commission to support a determination that the application or annual update on file accurately reflects unsold anticipated production, unfilled anticipated requirements, anticipated royalties, or anticipated services contract payments or receipts.

(d) *Initial statement and annual update.* Initial Form 704 concerning the classification of positions as bona fide hedging pursuant to paragraphs (3)(iii), or 4(i), 4(iii), 4(iv) or anticipatory cross-commodity hedges under paragraph (5) of the definition of bona fide hedging position in § 150.1 shall be filed with the Commission at least ten days in advance of the date that such positions would be in excess of limits then in effect pursuant to section 4a of the Act.

Each person that has filed an initial statement on Form 704 for an anticipatory bona fide hedge exemption shall provide annual updates on the utilization of the anticipatory exemption, including actual cash activity utilizing the anticipatory exemption for the preceding year, as well as the cumulative utilization since the filing of the initial or most recent annual statement. Such statements shall set forth in detail for a specified operating period the person's anticipated activity, *i.e.,* unfilled anticipated requirements, unsold anticipated production, anticipated royalties, or anticipated services contract payments or receipts, and explain the method of determination thereof, including, but not limited to, the following information:

(1) *For each anticipated activity:* (i) The type of cash commodity underlying the anticipated activity;

(ii) The name of the actual cash commodity underlying the anticipated activity and the units in which the cash commodity is measured;

(iii) An indication of whether the cash commodity is the same commodity (grade and quality) that underlies a core referenced futures contract or whether a cross-hedge will be used and, if so, additional information for cross hedges specified in paragraph (d)(2) of this section;

(iv)(A) Annual production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for the three complete fiscal years preceding the current fiscal year, if filing an initial statement; or

(B) For the prior fiscal year if filing an annual update;

(v) The specified time period for which the anticipatory hedge exemption is claimed;

(vi) Anticipated production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for such specified time period;

(vii) Fixed-price forward sales, inventory, and fixed-price forward purchases of such commodity, including any quantity in process of manufacture and finished goods and byproducts of manufacture or processing (in terms of such commodity);

(viii) Unsold anticipated production, unfilled anticipated requirements, unsold anticipated royalty receipts, and anticipated service contract payments or receipts the risks of which have not been offset with cash positions, of such commodity for the specified time period; and

(ix) The maximum number of long positions and short positions in referenced contracts expected to be used to offset the risks of such anticipated activity.

(2) *Additional information for cross hedges.* Cash positions that represent a commodity, or products or byproducts of a commodity, that is different from the commodity underlying a commodity derivative contract that is expected to be used for hedging, shall be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity as provided for on Form 704. In computing their cash position, every person shall use such standards and conversion factors that are usual in the particular trade or that otherwise reflect the value-fluctuation-equivalents of the cash position in terms of the commodity underlying the commodity derivative contract used for hedging. Such person shall furnish to the Commission upon request detailed information concerning the basis for and derivation of such conversion factors, including:

(i) The hedge ratio used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging; and

(ii) An explanation of the methodology used for determining the hedge ratio.

(e) *Monthly reporting.* Monthly reporting of remaining anticipated hedge exemption shall be reported on Form 204, along with reporting other exemptions pursuant to § 19.01(a)(3)(vii) of this chapter.

(f) *Maximum sales and purchases.* Sales or purchases of commodity derivative contracts considered to be bona fide hedging positions under paragraphs (3)(iii)(A) or (4)(i) of the bona fide hedging position definition in § 150.1 shall at no time exceed the lesser of:

(1) A person's anticipated activity (including production, requirements, royalties and services) as described by the information most recently filed pursuant to this section that has not been offset with cash positions; or

(2) Such lesser amount as determined by the Commission pursuant to paragraph (b) of this section.

(g) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (b) of this section to provide notice to a person that some or all of the amounts described in a Form 704 filing does not meet the requirements for bona fide hedging positions;

(ii) In paragraph (c) of this section to request a person who has filed an application or annual update on Form 704 under paragraph (a) of this section to file specific additional or updated information with the Commission to support a determination that the Form 704 filed accurately reflects unsold anticipated production, unfilled anticipated requirements, anticipated royalties, or anticipated services contract payments or receipts; and

(iii) In paragraph (d)(2) of this section to request detailed information concerning the basis for and derivation of conversion factors used in computing the cash position provided in any applications or annual updates filed on Form 704.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 150.8 Severability.

If any provision of this part, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

§ 150.9 Process for recognition of positions as non-enumerated bona fide hedges.

(a) *Requirements for a designated contract market or swap execution facility to recognize non-enumerated bona fide hedging positions.* (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications to demonstrate why a derivative position satisfies the requirements of section 4a(c) of the Act shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for recognition of non-enumerated bona fide hedging positions consistent with the requirements of this section and the general definition of bona fide hedging position in § 150.1. A designated contract market or swap execution facility may elect to process non-enumerated bona fide hedging position applications for positions in commodity derivative contracts only if, in each case:

(i) The commodity derivative contract is a referenced contract;

(ii) Such designated contract market or swap execution facility lists such commodity derivative contract for trading;

(iii) Such commodity derivative contract is actively traded on such designated contract market or swap execution facility;

(iv) Such designated contract market or swap execution facility has established position limits for such commodity derivative contract; and

(v) Such designated contract market or swap execution facility has at least one year of experience and expertise administering position limits for a referenced contract in a particular commodity. A designated contract market or swap execution facility shall not recognize a non-enumerated bona fide hedging position involving a commodity index contract and one or more referenced contracts.

(2) A designated contract market or swap execution facility may establish different application processes for persons to demonstrate why a derivative position constitutes a non-enumerated bona fide hedging position under novel facts and circumstances and under facts and circumstances substantially similar to a position for which a summary has been published on such designated contract market's or swap execution facility's Web site, pursuant to paragraph (a)(7) of this section.

(3) Any application process that is established by a designated contract market or swap execution facility shall elicit sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances in respect of a derivative position satisfy the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, and whether it is appropriate to recognize such position as a non-enumerated bona fide hedging position, including at a minimum:

(i) A description of the position in the commodity derivative contract for which the application is submitted and the offsetting cash positions;

(ii) Information to demonstrate why the position satisfies the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1;

(iii) A statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted;

(iv) Information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted during the past year; and

(v) Any other information necessary to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to recognize such position as a non-enumerated bona fide hedging position.

(4) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person intending to exceed position limits to submit an application, to reapply at least on an annual basis by updating that application, and to receive notice of recognition from the designated contract market or swap execution facility of a position as a non-enumerated bona fide hedging position in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If an applicant does not amend or resubmit such application within a reasonable amount of time after such notice, a designated contract market or swap execution facility may reject the application;

(iii) Determine in a timely manner whether a derivative position for which a complete application has been submitted satisfies the requirements of section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, and whether it is appropriate to recognize such position as a non-enumerated bona fide hedging position;

(iv) Have the authority to revoke, at any time, any recognition issued pursuant to this section if it determines the recognition is no longer in accord with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1; and

(v) Notify an applicant in a timely manner:

(A) That the derivative position for which a complete application has been submitted has been recognized by the designated contract market or swap execution facility as a non-enumerated bona fide hedging position under this section, and the details and all conditions of such recognition;

(B) That its application is rejected, including the reasons for such rejection; or

(C) That the designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (a)(8) of this section.

(5) An applicant's derivatives position shall be deemed to be recognized as a non-enumerated bona fide hedging position exempt from federal position limits at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will recognize such position as a non-enumerated bona fide hedging position.

(6) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file reports pertaining to the use of any such exemption that has been granted in the manner, form, and frequency, as determined by the designated contract market or swap execution facility.

(7) After recognition of each unique type of derivative position as a non-enumerated bona fide hedging position, based on novel facts and circumstances, a designated contract market or swap execution facility shall publish on its Web site, on at least a quarterly basis, a summary describing the type of derivative position and explaining why it was recognized as a non-enumerated bona fide hedging position.

(8) If a non-enumerated bona fide hedging position application presents novel or complex issues or is potentially inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, a designated contract market or swap execution facility may ask the Commission to consider the application under the process set forth in paragraph (d) of this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility.

(b) *Recordkeeping.* (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the recognition by the designated contract market or swap execution facility of any derivative position as a non-enumerated bona fide hedging position, the revocation or modification of any such recognition, the rejection by the designated contract market or swap execution facility of an application, or the withdrawal, supplementation or updating of an application by the applicant. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application;

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) *Reports to the Commission.* (1) A designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) For each commodity derivative position that had been recognized that week by the designated contract market or swap execution facility as a non-enumerated bona fide hedging position, and for any revocation or modification of a previously granted recognition:

(A) The date of disposition,

(B) The effective date of the disposition,

(C) The expiration date of any recognition,

(D) Any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) Any unique identifier assigned by the designated contract market or swap execution facility to a type of recognized non-enumerated bona fide hedging position,

(F) The identity of the applicant,

(G) The listed commodity derivative contract to which the application pertains,

(H) The underlying cash commodity,

(I) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a non-enumerated bona fide hedging position,

(J) Any size limitation established for such commodity derivative position on the designated contract market or swap execution facility, and

(K) A concise summary of the applicant's activity in the cash markets for the commodity underlying the commodity derivative position; and

(ii) The summary of any non-enumerated bona fide hedging position published pursuant to paragraph (a)(7) of this section, or revised, since the last summary submitted to the Commission.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications shall submit to the Commission, no less frequently than monthly, any report such designated contract market or swap execution facility requires to be submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required under paragraph (a)(6) of this section.

(3) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process non-enumerated bona fide hedging position applications shall submit to the Commission the information required by paragraphs (c)(1) and (2) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at *www.cftc.gov*;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) *Review of applications by the Commission.* (1) The Commission may in its discretion at any time review any non-enumerated bona fide hedging position application submitted to a designated contract market or swap execution facility, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any non-enumerated bona fide hedging position application or the disposition thereof by a designated contract market or swap execution facility presents novel or complex issues that require additional time to analyze, or that an application or the disposition thereof by such designated contract market or swap execution facility is potentially inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the issues identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) The Commission shall determine whether it is appropriate to recognize the derivative position for which such application has been submitted as a non-enumerated bona fide hedging position, or whether the disposition of such application by such designated contract market or swap execution facility is consistent with section 4a(c) the Act and the general definition of bona fide hedging position in § 150.1.

(4) If the Commission determines that the disposition of such application is inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the derivative position or otherwise come into compliance. This notification will briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the application is, or appears to be, inconsistent.

(e) *Review of summaries by the Commission.* The Commission may in its discretion at any time review any summary of a type of non-enumerated bona fide hedging position required to be published on a designated contract market's or swap execution facility's Web site pursuant to paragraph (a)(7) of this section for any purpose, including to evaluate whether the summary promotes transparency and fair and open access by all market participants to information regarding bona fide hedges. If the Commission determines that a summary is deficient in any way, the Commission shall notify such designated contract market or swap execution facility, and grant to the designated contract market or swap execution facility a reasonable amount of time to revise the summary.

(f) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(8) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a non-enumerated bona fide hedging position application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at *www.cftc.gov*, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any non-enumerated bona fide hedging position application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant;

(iv) In paragraph (d)(2) of this section to preliminarily determine that a non-enumerated bona fide hedging position application or the disposition thereof by a designated contract market or swap execution facility presents novel or complex issues that require additional time to analyze, or that such application or the disposition thereof is potentially inconsistent with section 4a(c) of the Act and the general definition of bona fide hedging position in § 150.1, to notify the designated contract market or swap execution facility and the applicable applicant of the issues identified, and to provide them with 10 business days in which to file supplemental information; and

(v) In paragraph (e) of this section to review any summary of a type of non-enumerated bona fide hedging position required to be published on a designated contract market's or swap execution facility's Web site, to determine that any such summary is deficient, to notify a designated contract market or swap execution facility of a deficient summary, and to grant such designated contract market or swap execution facility a reasonable amount of time to revise such summary.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 150.10 Process for designated contract market or swap execution facility exemption from position limits for certain spread positions.

(a) *Requirements for a designated contract market or swap execution facility to exempt from position limits certain positions normally known to the trade as spreads.* (1) A designated contract market or swap execution facility that elects to process applications for exemptions from position limits for certain positions normally known to the trade as spreads shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for exempting positions normally known to the trade as spreads consistent with the requirements of this section. A designated contract market or swap execution facility may elect to process applications for such spread exemptions only if, in each case:

(i) Such designated contract market or swap execution facility lists for trading at least one contract that is either a component of the spread or a referenced contract that is a component of the spread;

(ii) The contract, in paragraph (a)(1)(i) of this section, in a particular commodity is actively traded on such designated contract market or swap execution facility;

(iii) Such designated contract market or swap execution facility has established position limits for at least one contract that is either a component of the spread or a referenced contract that is a component of the spread; and

(iv) Such designated contract market or swap execution facility has at least one year of experience and expertise administering position limits for at least one contract that is either a component of the spread or a referenced contract that is a component of the spread. A designated contract market or swap execution facility shall not approve a spread exemption involving a commodity index contract and one or more referenced contracts.

(2) Spreads that a designated contract market or swap execution facility may approve under this section include:

(i) Calendar spreads;

(ii) Quality differential spreads;

(iii) Processing spreads; and

(iv) Product or by-product differential spreads.

(3) Any application process that is established by a designated contract market or swap execution facility under this section shall elicit sufficient information to allow the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances demonstrate that it is appropriate to exempt a spread position from position limits, including at a minimum:

(i) A description of the spread position for which the application is submitted;

(ii) Information to demonstrate why the spread position should be exempted from position limits, including how the exemption would further the purposes of section 4a(a)(3)(B) of the Act;

(iii) A statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted; and

(iv) Any other information necessary to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether it is appropriate to exempt such spread position from position limits.

(4) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person requesting an exemption from position limits for its spread position to submit an application, to reapply at least on an annual basis by updating that application, and to receive approval in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If an applicant does not amend or resubmit such application within a reasonable amount of time after such notice, a designated contract market or swap execution facility may reject the application;

(iii) Determine in a timely manner whether a spread position for which a complete application has been submitted satisfies the requirements of paragraph (a)(4)(vi) of this section, and whether it is appropriate to exempt such spread position from position limits;

(iv) Have the authority to revoke, at any time, any spread exemption issued pursuant to this section if it determines the spread exemption no longer satisfies the requirements of paragraph (a)(4)(vi) of this section and it is no longer appropriate to exempt the spread from position limits;

(v) Notify an applicant in a timely manner:

(A) That a spread position for which a complete application has been submitted has been exempted by the designated contract market or swap execution facility from position limits, and the details and all conditions of such exemption;

(B) That its application is rejected, including the reasons for such rejection; or

(C) That the designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (a)(8) of this section; and

(vi) Determine whether exempting the spread position from position limits would, to the maximum extent practicable, ensure sufficient market liquidity for bona fide hedgers, and not unreasonably reduce the effectiveness of position limits to:

(A) Diminish, eliminate or prevent excessive speculation;

(B) Deter and prevent market manipulation, squeezes, and corners; and

(C) Ensure that the price discovery function of the underlying market is not disrupted.

(5) An applicant's derivatives position shall be deemed to be recognized as a spread position exempt from federal position limits at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will exempt such spread position.

(6) A designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file reports pertaining to the use of any such exemption that has been granted in the manner, form, and frequency, as determined by the designated contract market or swap execution facility.

(7) After exemption of each unique type of spread position, a designated contract market or swap execution facility shall publish on its Web site, on at least a quarterly basis, a summary describing the type of spread position and explaining why it was exempted.

(8) If a spread exemption application presents complex issues or is potentially inconsistent with the purposes of section 4a(a)(3)(B) of the Act, a designated contract market or swap execution facility may ask the Commission to consider the application under the process set forth in paragraph (d) of this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility.

(b) *Recordkeeping.* (1) A designated contract market or swap execution facility that elects to process spread exemption applications shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the exemption of any spread position, the revocation or modification of any exemption, the rejection by the designated contract market or swap execution facility of an application, or the withdrawal, supplementation or updating of an application by the applicant. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application;

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) *Reports to the Commission.* (1) A designated contract market or swap execution facility that elects to process spread exemption applications shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) The disposition of any spread exemption application, including the exemption of any spread position, the revocation or modification of any exemption, or the rejection of any application, as well as the following details:

(A) The date of disposition,

(B) The effective date of the disposition,

(C) The expiration date of any exemption,

(D) Any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) Any unique identifier assigned by the designated contract market or swap execution facility to a type of exempt spread position,

(F) The identity of the applicant,

(G) The listed commodity derivative contract to which the application pertains,

(H) The underlying cash commodity,

(I) The size limitations on any exempt spread position, specified by contract month if applicable, and

(J) Any conditions on the exemption; and

(ii) The summary of any exempt spread position newly published pursuant to paragraph (a)(7) of this section, or revised, since the last summary submitted to the Commission.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall submit to the Commission, no less frequently than monthly, any report such designated contract market or swap execution facility requires to be submitted by an applicant to such designated contract market or swap execution facility pursuant to rules required by paragraph (a)(6) of this section.

(3) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process applications to exempt spread positions from position limits shall submit to the Commission the information required by paragraphs (c)(1) and (2) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at *www.cftc.gov*;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) *Review of applications by the Commission.* (1) The Commission may in its discretion at any time review any spread exemption application submitted to a designated contract market or swap execution facility, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with the purposes of section 4a(a)(3)(B) of the Act.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any application to exempt a spread position from position limits, or the disposition thereof by a designated contract market or swap execution facility, presents novel or complex issues that require additional time to analyze, or that an application or the disposition thereof by such designated contract market or swap execution facility is potentially inconsistent with the Act, the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the issues identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) The Commission shall determine whether it is appropriate to exempt the spread position for which such application has been submitted from position limits, or whether the disposition of such application by such designated contract market or swap execution facility is consistent with the purposes of section 4a(a)(3)(B) of the Act.

(4) If the Commission determines that it is not appropriate to exempt the spread position for which such application has been submitted from position limits, or that the disposition of such application is inconsistent with the Act, the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the spread position or otherwise come into compliance. This notification will briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the application is, or appears to be, inconsistent.

(e) *Review of summaries by the Commission.* The Commission may in its discretion at any time review any summary of a type of spread position required to be published on a designated contract market's or swap execution facility's Web site pursuant to paragraph (a)(7) of this section for any purpose, including to evaluate whether the summary promotes transparency and fair and open access by all market participants to information regarding spread exemptions. If the Commission determines that a summary is deficient in any way, the Commission shall notify such designated contract market or swap execution facility, and grant to the designated contract market or swap execution facility a reasonable amount of time to revise the summary.

(f) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(8) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a spread exemption application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at *www.cftc.gov*, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any spread exemption application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility, or from the applicant;

(iv) In paragraph (d)(2) of this section to preliminarily determine that a spread exemption application or the disposition thereof by a designated contract market or swap execution facility presents complex issues that require additional time to analyze, or that such application or the disposition thereof is potentially inconsistent with the Act, to notify the designated contract market or swap execution facility and the applicable applicant of the issues identified, and to provide them with 10 business days in which to file supplemental information; and

(v) In paragraph (e) of this section to review any summary of a type of spread exemption required to be published on a designated contract market's or swap execution facility's Web site, to determine that any such summary is deficient, to notify a designated contract market or swap execution facility of a deficient summary, and to grant such designated contract market or swap execution facility a reasonable amount of time to revise such summary.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 150.11 Process for recognition of positions as bona fide hedges for unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedge positions.

(a) *Requirements for a designated contract market or swap execution facility to recognize certain enumerated anticipatory bona fide hedging positions.* (1) A designated contract market or swap execution facility that elects to process applications for recognition of positions as hedges of unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), (iii), (iv), or (5), respectively, of the definition of bona fide hedging position in § 150.1 shall maintain rules, submitted to the Commission pursuant to part 40 of this chapter, establishing an application process for such anticipatory bona fide hedges consistent with the requirements of this section. A designated contract market or swap execution facility may elect to process such anticipatory hedge applications for positions in commodity derivative contracts only if, in each case:

(i) The commodity derivative contract is a referenced contract;

(ii) Such designated contract market or swap execution facility lists such commodity derivative contract for trading;

(iii) Such commodity derivative contract is actively traded on such derivative contract market;

(iv) Such designated contract market or swap execution facility has established position limits for such commodity derivative contract; and

(v) Such designated contract market or swap execution facility has at least one year of experience and expertise administering position limits for a referenced contract in a particular commodity.

(2) Any application process that is established by a designated contract

market or swap execution facility shall require, at a minimum, the information required under § 150.7(d).

(3) Under any application process established under this section, a designated contract market or swap execution facility shall:

(i) Require each person intending to exceed position limits to submit an application, and to reapply at least on an annual basis by updating that application, as required under § 150.7(d), and to receive notice of recognition from the designated contract market or swap execution facility of a position as a bona fide hedging position in advance of the date that such position would be in excess of the limits then in effect pursuant to section 4a of the Act;

(ii) Notify an applicant in a timely manner if a submitted application is not complete. If the applicant does not amend or resubmit such application within a reasonable amount of time after notification from the designated contract market or swap execution facility, the designated contract market or swap execution facility may reject the application;

(iii) Inform an applicant within ten days of receipt of such application by the designated contract market or swap execution facility that:

(A) The derivative position for which a complete application has been submitted has been recognized by the designated contract market or swap execution facility as a bona fide hedging position, and the details and all conditions of such recognition;

(B) The application is rejected, including the reasons for such rejection; or

(C) The designated contract market or swap execution facility has asked the Commission to consider the application under paragraph (a)(6) of this section; and

(iv) Have the authority to revoke, at any time, any recognition issued pursuant to this section if it determines the position no longer complies with the filing requirements under paragraph (a)(2) of this section.

(4) An applicant's derivatives position shall be deemed to be recognized as a bona fide hedging position at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will recognize such position as a bona fide hedging position.

(5) A designated contract market or swap execution facility that elects to process bona fide hedging position applications shall file new rules or rule amendments pursuant to part 40 of this chapter, establishing or amending requirements for an applicant to file the supplemental reports, as required under § 150.7(e), pertaining to the use of any such exemption that has been granted.

(6) A designated contract market or swap execution facility may ask the Commission to consider any application made under this section. The Commission may, in its discretion, agree to or reject any such request by a designated contract market or swap execution facility, *provided that,* if the Commission agrees to the request, it will have 10 business days from the time of the request to carry out its review.

(b) *Recordkeeping.* (1) A designated contract market or swap execution facility that elects to process bona fide hedging position applications under this section shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof, including the recognition of any derivative position as a bona fide hedging position, the revocation or modification of any recognition, the rejection by the designated contract market or swap execution facility of an application, or withdrawal, supplementation or updating of an application. Included among such records shall be:

(i) All information and documents submitted by an applicant in connection with its application;

(ii) Records of oral and written communications between such designated contract market or swap execution facility and such applicant in connection with such application; and

(iii) All information and documents in connection with such designated contract market's or swap execution facility's analysis of and action on such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(c) *Reports to the Commission.* (1) A designated contract market or swap execution facility that elects to process bona fide hedging position applications under this section shall submit to the Commission a report for each week as of the close of business on Friday showing the following information:

(i) The disposition of any application, including the recognition of any position as a bona fide hedging position, the revocation or modification of any recognition, as well as the following details:

(A) The date of disposition,

(B) The effective date of the disposition,

(C) The expiration date of any recognition,

(D) Any unique identifier assigned by the designated contract market or swap execution facility to track the application,

(E) Any unique identifier assigned by the designated contract market or swap execution facility to a bona fide hedge recognized under this section;

(F) The identity of the applicant,

(G) The listed commodity derivative contract to which the application pertains,

(H) The underlying cash commodity,

(I) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedging position,

(J) Any size limitation established for such commodity derivative position on the designated contract market or swap execution facility, and

(K) A concise summary of the applicant's activity in the cash market for the commodity underlying the position for which the application was submitted.

(2) Unless otherwise instructed by the Commission, a designated contract market or swap execution facility that elects to process bona fide hedging position applications shall submit to the Commission the information required by paragraph (c)(1) of this section, as follows:

(i) As specified by the Commission on the Forms and Submissions page at *www.cftc.gov*;

(ii) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission; and

(iii) Not later than 9:00 a.m. Eastern time on the third business day following the date of the report.

(d) *Review of applications by the Commission.* (1) The Commission may in its discretion at any time review any bona fide hedging position application submitted to a designated contract market or swap execution facility under this section, and all records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application, for any purpose, including to evaluate whether the disposition of the application is consistent with the Act.

(i) The Commission may request from such designated contract market or swap execution facility records required to be kept by such designated contract market or swap execution facility pursuant to paragraph (b) of this section in connection with such application.

(ii) The Commission may request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant.

(2) If the Commission preliminarily determines that any anticipatory hedge application is inconsistent with the filing requirements of § 150.11(a)(2), the Commission shall:

(i) Notify such designated contract market or swap execution facility and the applicable applicant of the deficiencies identified by the Commission; and

(ii) Provide them with 10 business days in which to provide the Commission with any supplemental information.

(3) If the Commission determines that the anticipatory hedge application is inconsistent with the filing requirements of § 150.11(a)(2), the Commission shall notify the applicant and grant the applicant a commercially reasonable amount of time to liquidate the derivative position or otherwise come into compliance. This notification will briefly specify the specific provisions of the filing requirements of § 150.11(a)(2), with which the application is, or appears to be, inconsistent.

(e) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (a)(6) of this section to agree to or reject a request by a designated contract market or swap execution facility to consider a bona fide hedge application;

(ii) In paragraph (c) of this section to provide instructions regarding the submission to the Commission of information required to be reported by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at *www.cftc.gov*, and to determine the format, coding structure, and electronic data transmission procedures for submitting such information;

(iii) In paragraph (d)(1) of this section to review any bona fide hedging position application and all records required to be kept by a designated contract market or swap execution facility in connection with such application, to request such records from such designated contract market or swap execution facility, and to request additional information in connection with such application from such designated contract market or swap execution facility or from the applicant; and

(iv) In paragraph (d)(2) of this section to determine that it is not appropriate to recognize a derivative position for which an application for recognition has been submitted as a bona fide hedging position, or that the disposition of such application by a designated contract market or swap execution facility is inconsistent with the Act, and, in connection with such a determination, to grant the applicant a reasonable amount of time to liquidate the derivative position or otherwise come into compliance.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 28. In Part 150, add Appendices A through E to read as follows:

Appendix A to Part 150—Guidance on Risk Management Exemptions for Commodity Derivative Contracts in Excluded Commodities

(1) This appendix provides non-exclusive interpretative guidance on risk management exemptions for commodity derivative contracts in excluded commodities permitted under the definition of bona fide hedging position in § 150.1. The rules of a designated contract market or swap execution facility that is a trading facility may recognize positions consistent with this guidance as bona fide hedging positions. The Commission recognizes that risk management positions in commodity derivative contracts in excluded commodities may not conform to the general definition of bona fide hedging positions applicable to commodity derivative contracts in physical commodities, as provided under section 4a(c)(2) of the Act, and may not conform to enumerated bona fide hedging positions applicable to commodity derivative contracts in physical commodities under the definition of bona fide hedging position in § 150.1.

This interpretative guidance for core principle 5 for designated contract markets, section 5(d)(5) of the Act, and core principle 6 for swap execution facilities that are trading facilities, section 5h(f)(6) of the Act, is illustrative only of the types of positions for which a trading facility may elect to provide a risk management exemption and is not intended to be used as a mandatory checklist. Other positions might also be included appropriately within a risk management exemption.

(2)(a) *No temporary substitute criterion.* Risk management positions in commodity derivative contracts in excluded commodities need not be expected to represent a substitute for a subsequent transaction or position in a physical marketing channel. There need not be any requirement to replace a commodity derivative contract with a cash market position in order to qualify for a risk management exemption.

(b) *Cross-commodity hedging is permitted.* Risks that are offset in commodity derivative contracts in excluded commodities need not arise from the same commodities underlying the commodity derivative contracts. For example, a trading facility may recognize a risk management exemption based on the net interest rate risk arising from a bank's balance sheet of loans and deposits that is offset using Treasury security futures contracts or short-term interest rate futures contracts.

(3) *Examples of risk management positions.* This section contains examples of risk management positions that may be appropriate for management of risk in the operation of a commercial enterprise.

(a) *Balance sheet hedging.* A commercial enterprise may have risks arising from its net position in assets and liabilities.

(i) *Foreign currency translation.* One form of balance sheet hedging involves offsetting net exposure to changes in currency exchange rates for the purpose of stabilizing the domestic dollar accounting value of net assets and/or liabilities which are denominated in a foreign currency. For example, a bank may make loans in a foreign currency and take deposits in that same foreign currency. Such a bank is exposed to net foreign currency translation risk when the amount of loans is not equal to the amount of deposits. A bank with a net long exposure to a foreign currency may hedge by establishing an offsetting short position in a foreign currency commodity derivative contract.

(ii) *Interest rate risk.* Another form of balance sheet hedging involves offsetting net exposure to changes in values of assets and liabilities of differing durations. Examples include:

(A) A pension fund may invest in short term securities and have longer term liabilities. Such a pension fund has a duration mismatch. Such a pension fund may hedge by establishing a long position in Treasury security futures contracts to lengthen the duration of its assets to match the duration of its liabilities. This is economically equivalent to using a long position in Treasury security futures contracts to shorten the duration of its liabilities to match the duration of its assets.

(B) A bank may make a certain amount of fixed-rate loans of one maturity and fund such assets through taking fixed-rate deposits of a shorter maturity. Such a bank is exposed to interest rate risk, in that an increase in interest rates may result in a greater decline in value of the assets than the decline in value of the deposit liabilities. A bank may hedge by establishing a short position in short-term interest rate futures contracts to lengthen the duration of its liabilities to match the duration of its assets. This is economically equivalent to using a short position in short-term interest rate futures contracts, for example, to shorten the duration of its assets to match the duration of its liabilities.

(b) *Unleveraged synthetic positions.* An investment fund may have risks arising from a delayed investment in an asset allocation promised to investors. Such a fund may synthetically gain exposure to an asset class using a risk management strategy of establishing a long position in commodity derivative contracts that does not exceed cash set aside in an identifiable manner, including short-term investments, any funds deposited as margin and accrued profits on such commodity derivative contract positions. For example:

(i) A collective investment fund that invests funds in stocks pursuant to an asset allocation strategy may obtain immediate stock market exposure upon receipt of new monies by establishing a long position in stock index futures contracts (''equitizing cash''). Such a long position may qualify as a risk management exemption under trading facility rules provided such long position does not exceed the cash set aside. The long position in stock index futures contracts need not be converted to a position in stock.

(ii) Upon receipt of new funds from investors, an insurance company that invests in bond holdings for a separate account wishes to lengthen synthetically the duration of the portfolio by establishing a long position in Treasury futures contracts. Such a long position may qualify as a risk management exemption under trading facility rules provided such long position does not exceed the cash set aside. The long position in Treasury futures contracts need not be converted to a position in bonds.

(c) *Temporary asset allocations.* A commercial enterprise may have risks arising from potential transactional costs in temporary asset allocations (altering portfolio exposure to certain asset classes such as equity securities and debt securities). Such an enterprise may hedge existing assets owned by establishing a short position in an appropriate commodity derivative contract and synthetically gain exposure to an alternative asset class using a risk management strategy of establishing a long position in another commodity derivative contract that does not exceed: the value of the existing asset at the time the temporary asset allocation is established or, in the alternative, the hedged value of the existing asset plus any accrued profits on such risk management positions. For example:

(i) A collective investment fund that invests funds in bonds and stocks pursuant to an asset allocation strategy may believe that market considerations favor a temporary increase in the fund's equity exposure relative to its bond holdings. The fund manager may choose to accomplish the reallocation using commodity derivative contracts, such as a short position in Treasury security futures contracts and a long position in stock index futures contracts. The short position in Treasury security futures contracts may qualify as a hedge of interest rate risk arising from the bond holdings. A trading facility may adopt rules to recognize as a risk management exemption such a long position in stock index futures.

(ii) Reserved.

(4) *Clarification of bona fides of short positions.*

(a) *Calls sold.* A seller of a call option establishes a short call option. A short call option is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such a written call option that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(b) *Puts purchased and portfolio insurance.* A buyer of a put option establishes a long put option. However, a long put option is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such an owned put that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

The Commission also recognizes as bona fide hedging positions strategies that provide protection against a price decline equivalent to an owned position in a put option for an existing portfolio of securities owned. A dynamically managed short position in a futures contract may replicate the characteristics of a long position in a put option.

(c) *Synthetic short futures contracts.* A person may establish a synthetic short futures position by purchasing a put option and selling a call option, when each option has the same notional amount, strike price, expiration date and underlying commodity. Such a synthetic short futures position is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such a synthetic short futures position that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

Appendix B to Part 150—Commodities Listed as Substantially the Same for Purposes of the Definition of Location Basis Contract

The following table lists core referenced futures contracts and commodities that are treated as substantially the same as a commodity underlying a core referenced futures contract for purposes of the definition of location basis contract in § 150.1.

LOCATION BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
NYMEX Light Sweet Crude Oil futures contract (CL)	1. Light Louisiana Sweet (LLS) Crude Oil	NYMEX Argus LLS vs. WTI (Argus) Trade Month futures contract (E5). NYMEX LLS (Argus) vs. WTI Financial futures contract (WJ). ICE Futures Europe Crude Diff—Argus LLS vs WTI 1st Line Swap futures contract (ARK). ICE Futures Europe Crude Diff—Argus LLS vs WTI Trade Month Swap futures contract (ARL).
NYMEX New York Harbor ULSD Heating Oil futures contract (HO)	1. Chicago ULSD	NYMEX Chicago ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (5C).
	2. Gulf Coast ULSD	NYMEX Group Three ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (A6). NYMEX Gulf Coast ULSD (Argus) Up-Down futures contract (US). NYMEX Gulf Coast ULSD (Argus) Up-Down BALMO futures contract (GUD). NYMEX Gulf Coast ULSD (Platts) Up-Down BALMO futures contract (1L). NYMEX Gulf Coast ULSD (Platts) Up-Down Spread futures contract (LT).

LOCATION BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES—Continued

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
		ICE Futures Europe Diesel Diff—Gulf Coast vs Heating Oil 1st Line Swap futures contract (GOH). CME Clearing Europe Gulf Coast ULSD(Platts) vs. New York Heating Oil (NYMEX) Spread Calendar swap (ELT). CME Clearing Europe New York Heating Oil (NYMEX) vs. European Gasoil (IC) Spread Calendar swap (EHA).
	3. California Air Resources Board Spec ULSD (CARB no. 2 oil).	NYMEX Los Angeles CARB Diesel (OPIS) vs. NY Harbor ULSD Heating Oil futures contract (KL).
	4. Gas Oil Deliverable in Antwerp, Rotterdam, or Amsterdam Area.	ICE Futures Europe Gasoil futures contract (G). ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Gasoil 1st Line Swap futures contract (HOT). ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Low Sulphur Gasoil 1st Line Swap futures contract (ULL). NYMEX NY Harbor ULSD Heating Oil vs. Gasoil futures contract (HA).
NYMEX RBOB Gasoline futures contract (RB)	1. Chicago Unleaded 87 gasoline	NYMEX Chicago Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (3C). NYMEX Group Three Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (A8).
	2. Gulf Coast Conventional Blendstock for Oxygenated Blending (CBOB) 87.	NYMEX Gulf Coast CBOB Gasoline A1 (Platts) vs. RBOB Gasoline futures contract (CBA). NYMEX Gulf Coast Unl 87 (Argus) Up-Down futures contract (UZ).
	3. Gulf Coast CBOB 87 (Summer Assessment).	NYMEX Gulf Coast CBOB Gasoline A2 (Platts) vs. RBOB Gasoline futures contract (CRB).
	4. Gulf Coast Unleaded 87 (Summer Assessment).	NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline futures contract (RVG). NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline BALMO futures contract (GBB). NYMEX Gulf Coast 87 Gasoline M2 (Argus) vs. RBOB Gasoline BALMO futures contract (RBG).
	5. Gulf Coast Unleaded 87	NYMEX Gulf Coast Unl 87 (Platts) Up-Down BALMO futures contract (1K). NYMEX Gulf Coast Unl 87 Gasoline M1 (Platts) vs. RBOB Gasoline futures contract (RV). CME Clearing Europe Gulf Coast Unleaded 87 Gasoline M1 (Platts) vs. New York RBOB Gasoline (NYMEX) Spread Calendar swap (ERV).
	6. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Regular.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	7. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Premium.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	8. Euro-BOB OXY NWE Barges	NYMEX RBOB Gasoline vs. Euro-bob Oxy NWE Barges (Argus) (1000mt) futures contract (EXR). CME Clearing Europe New York RBOB Gasoline (NYMEX) vs. European Gasoline Euro-bob Oxy Barges NWE (Argus) (1000mt) Spread Calendar swap (EEXR).
	9. Euro-BOB OXY FOB Rotterdam	ICE Futures Europe Gasoline Diff—RBOB Gasoline 1st Line vs. Argus Euro-BOB OXY FOB Rotterdam Barge Swap futures contract (ROE).

Appendix C to Part 150—Examples of Bona Fide Hedging Positions for Physical Commodities

A non-exhaustive list of examples meeting the definition of bona fide hedging position under § 150.1 is presented below. With respect to a position that does not fall within an example in this appendix, a person seeking to rely on a bona fide hedging position exemption under § 150.3 may seek guidance from the Division of Market Oversight. References to paragraphs in the examples below are to the definition of bona fide hedging position in § 150.1.

1. Portfolio Hedge Under Paragraph (3)(i) of the Bona Fide Hedging Definition

Fact Pattern: It is currently January and Participant A owns seven million bushels of corn located in its warehouses. Participant A has entered into fixed-price forward sale contracts with several processors for a total of five million bushels of corn that will be delivered by May of this year. Participant A has no fixed-price corn purchase contracts. Participant A's gross long cash position is equal to seven million bushels of corn. Because Participant A has sold forward five million bushels of corn, its net cash position is equal to long two million bushels of corn. To reduce price risk associated with potentially lower corn prices, Participant A chooses to establish a short position of 400 contracts in the CBOT Corn futures contract, equivalent to two million bushels of corn, in the same crop year as the inventory.

Analysis: The short position in a contract month in the current crop year for the CBOT Corn futures contract, equivalent to the amount of inventory held, satisfies the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions associated with owning a commodity under paragraph (3)(i).[1] Because the firm's net cash position is two million bushels of unsold corn, the firm is exposed to price risk. Participant A's hedge of the two million bushels represents a substitute for a fixed-price forward sale at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the short position in a referenced contract does not exceed the quantity equivalent risk exposure (on a net basis) in the cash commodity in the current crop year. Last, the hedge arises from a potential change in the value of corn owned by Participant A.

2. Lending a Commodity and Hedge of Price Risk Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Bank B owns 1,000 ounces of gold that it lends to Jewelry Fabricator J at LIBOR plus a differential. Under the terms of the loan, Jewelry Fabricator J may later purchase the gold from Bank B at a differential to the prevailing price of the Commodity Exchange, Inc. (COMEX) Gold futures contract (*i.e.,* an open-price purchase agreement is embedded in the terms of the loan). Jewelry Fabricator J intends to use the gold to make jewelry and reimburse Bank B for the loan using the proceeds from jewelry sales and either purchase gold from Bank B by paying the market price for gold or return the equivalent amount of gold to Bank B by purchasing gold at the market price. Because Bank B has retained the price risk on gold, the bank is concerned about its potential loss if the price of gold drops. The bank reduces the risk of a potential loss in the value of the gold by establishing a ten contract short position in the COMEX Gold futures contract, which has a unit of trading of 100 ounces of gold. The ten contract short position is equivalent to 1,000 ounces of gold.

Analysis: This position meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the requirements associated with owning a cash commodity under paragraph (3)(i). The physical commodity that is being hedged is the underlying cash commodity for the COMEX Gold futures contract. Bank B's short hedge of the gold represents a substitute for a transaction to be made in the physical marketing channel (*e.g.,* completion of the open-price sale to Jewelry Fabricator J). Because the notional quantity of the short position in the gold futures contract is equal to the amount of gold that Bank B owns, the hedge is economically appropriate to the reduction of risk. Finally, the short position in the commodity derivative contract offsets the potential change in the value of the gold owned by Bank B.

3. Repurchase Agreements and Hedge of Inventory Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Elevator A purchased 500,000 bushels of wheat in April and reduced its price risk by establishing a short position of 100 contracts in the CBOT Wheat futures contract, equivalent to 500,000 bushels of wheat. Because the price of wheat rose steadily since April, Elevator A had to make substantial maintenance margin payments. To alleviate its cash flow concern about meeting further margin calls, Elevator A decides to enter into a repurchase agreement with Bank B and offset its short position in the wheat futures contract. The repurchase agreement involves two separate contracts: a fixed-price sale from Elevator A to Bank B at today's spot price; and an open-price purchase agreement that will allow Elevator A to repurchase the wheat from Bank B at the prevailing spot price three months from now. Because Bank B obtains title to the wheat under the fixed-price purchase agreement, it is exposed to price risk should the price of wheat drop. Bank B establishes a short position of 100 contracts in the CBOT Wheat futures contract, equivalent to 500,000 bushels of wheat.

Analysis: Bank B's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning the cash commodity under paragraph (3)(i). The short position in referenced contracts by Bank B is a substitute for a fixed-price sales transaction to be taken at a later time in the physical marketing channel either to Elevator A or to another commercial party. The position is economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise (Bank B) because the notional quantity of the short position in referenced contracts held by Bank B is not larger than the quantity of cash wheat purchased by Bank B. Finally, the short position in the CBOT Wheat futures contract reduces the price risk associated with owning cash wheat.

4. Utility Hedge of Anticipated Customer Requirements Under Paragraph (3)(iii)(B) of the Bona Fide Hedging Position Definition

Fact Pattern: A Natural Gas Utility A, regulated by State Public Utility Commission, decides to hedge its purchases of natural gas in order to reduce natural gas price risk on behalf of its residential customers. State Public Utility Commission considers the hedging practice to be prudent and allows gains and losses from hedging to be passed on to Natural Gas Utility A's residential natural gas customers. Natural Gas Utility A has about one million residential customers who have average historical usage of about 71.5 mmBTUs of natural gas per year per residence. The utility decides to hedge about 70 percent of its residential customers' anticipated requirements for the following year, equivalent to a 5,000 contract long position in the NYMEX Henry Hub Natural Gas futures contract. To reduce the risk of higher prices to residential customers, Natural Gas Utility A establishes a 5,000 contract long position in the NYMEX Henry Hub Natural Gas futures contract. Since the utility is only hedging 70 percent of historical usage, Natural Gas Utility A is highly certain that realized demand will exceed its hedged anticipated residential customer requirements.

Analysis: Natural Gas Utility A's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for hedges of unfilled anticipated requirements by a utility under paragraph (3)(iii)(B). The physical commodity that is being hedged involves a commodity underlying the NYMEX Henry Hub Natural Gas futures contract. The long position in the commodity derivative contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the price of natural gas may increase. The commodity derivative contract position offsets the price risk of natural gas that the utility anticipates purchasing on behalf of its residential customers. As provided under paragraph (3)(iii), the risk-reducing position qualifies as a bona fide hedging position in the natural gas physical-delivery referenced contract during the spot month, provided that the position does not exceed the unfilled anticipated requirements for that month and for the next succeeding month.

[1] Participant A could also choose to hedge on a gross basis. In that event, Participant A could establish a short position in the March Chicago Board of Trade Corn futures contract equivalent to seven million bushels of corn to offset the price risk of its inventory and establish a long position in the May Chicago Board of Trade Corn futures contract equivalent to five million bushels of corn to offset the price risk of its fixed-price forward sale contracts.

5. Processor Margins Hedge Using Unfilled Anticipated Requirements Under Paragraph (3)(iii)(A) of the Bona Fide Hedging Position Definition and Anticipated Production Under Paragraph (4)(i) of the Definition

Fact Pattern: Soybean Processor A has a total throughput capacity of 200 million bushels of soybeans per year (equivalent to 40,000 CBOT soybean futures contracts). Soybean Processor A crushes soybeans into products (soybean oil and soybean meal). It currently has 40 million bushels of soybeans in storage and has offset that risk through fixed-price forward sales of the amount of products expected to be produced from crushing 40 million bushels of soybeans, thus locking in its processor margin on one million metric tons of soybeans. Because it has consistently operated its plants at full capacity over the last three years, it anticipates purchasing another 160 million bushels of soybeans to be delivered to its storage facility over the next year. It has not sold the 160 million bushels of anticipated production of crushed products forward. Processor A faces the risk that the difference in price relationships between soybeans and the crushed products (*i.e.,* the crush spread) could change adversely, resulting in reduced anticipated processing margins. To hedge its processing margins and lock in the crush spread, Processor A establishes a long position of 32,000 contracts in the CBOT Soybean futures contract (equivalent to 160 million bushels of soybeans) and corresponding short positions in CBOT Soybean Meal and Soybean Oil futures contracts, such that the total notional quantity of soybean meal and soybean meal futures contracts are equivalent to the expected production from crushing 160 million bushels of soybeans into soybean meal and soybean oil.

Analysis: These positions meet the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for hedges of unfilled anticipated requirements under paragraph (3)(iii)(A) and unsold anticipated production under paragraph (4)(i). The physical commodities being hedged are commodities underlying the CBOT Soybean, Soybean Meal, and Soybean Oil futures contracts. Such positions are a substitute for purchases and sales to be made at a later time in the physical marketing channel and are economically appropriate to the reduction of risk. The positions in referenced contracts offset the potential change in the value of soybeans that the processor anticipates purchasing and the potential change in the value of products and by-products the processor anticipates producing and selling. The size of the permissible long hedge position in the soybean futures contract must be reduced by any inventories and fixed-price purchases because they would reduce the processor's *unfilled* requirements. Similarly, the size of the permissible short hedge positions in soybean meal and soybean oil futures contracts must be reduced by any fixed-price sales because they would reduce the processor's *unsold* anticipated production. As provided under paragraph (3)(iii)(A), the risk reducing long position in the soybean futures contract that is not in excess of the anticipated requirements for soybeans for that month and the next succeeding month qualifies as a bona fide hedging position during the last five days of trading in the physical-delivery referenced contract. As provided under paragraph (4)(i), the risk reducing short position in the soybean meal and oil futures contract do not qualify as a bona fide hedging position in a physical-delivery referenced contract during the last five days of trading in the event the Soybean Processor A does not have unsold products in inventory.

The combination of the long and short positions in soybean, soybean meal, and soybean oil futures contracts are economically appropriate to the reduction of risk. However, unlike in this example, an unpaired position (*e.g.,* only a long position in a commodity derivative contract) that is *not* offset by either a cash market position (*e.g.,* a fixed-price sales contract) or derivative position (*e.g.,* a short position in a commodity derivative contract) would not represent an economically appropriate reduction of risk. This is because the commercial enterprise's crush spread risk is relatively low in comparison to the price risk from taking an outright long position in the futures contract in the underlying commodity or an outright short position in the futures contracts in the products and by-products of processing. The price fluctuations of the crush spread, that is, the risk faced by the commercial enterprise, would not be expected to be substantially related to the price fluctuations of either an outright long or outright short futures position.

6. Agent Hedge Under Paragraph (3)(iv) of the Bona Fide Hedging Position Definition

Fact Pattern: Cotton Merchant A is in the business of merchandising (selling) cash cotton. Cotton Merchant A does not own any cash commodity, but has purchased the right to redeem a producer's cotton held as collateral by USDA (that is, ''cotton equities'') and, thereby, Cotton Merchant A has incurred price risk. A producer of cotton may borrow from the USDA's Commodity Credit Corporation, posting their cotton as collateral on the loan. USDA permits the producer to assign the right to redeem cotton held as collateral. Once Cotton Merchant A purchases from a producer the right to redeem cotton from USDA, Cotton Merchant A, in effect, is responsible for merchandising of the cash cotton held as collateral by USDA. For the volumes of cotton it is authorized to redeem from USDA, Cotton Merchant A enters into economically appropriate short positions in cotton commodity derivative contracts that offset the price risks of the cash commodities.

Analysis: The positions meet the requirements of paragraphs (2)(1)(A)–(C) for hedges of a physical commodity and paragraph (3)(iv) for hedges by an agent. The positions represent a substitute for transactions to be made in the physical marketing channel, are economically appropriate to the reduction of risks arising from cotton owned by the agent's contractual counterparties, and arise from the potential change in the value of such cotton. The agent does not own and has not contracted to purchase such cotton at a fixed price, but is responsible for merchandising the cash positions that are being offset in commodity derivative contracts. The agent has a contractual arrangement with the persons who own the cotton being offset.

7. Sovereign Hedge of a Pass-Through Swap Under Paragraph (2)(ii) of the Bona Fide Hedging Position Definition Opposite a Deemed Bona Fide Hedge of Unsold Anticipated Production Under Paragraph 4(i)

Fact Pattern: A Sovereign induces a farmer to sell his anticipated production of 100,000 bushels of corn forward to User A at a fixed price for delivery during the expected harvest, by, in effect, granting that farmer a cash-settled call option at no cost. In return for the farmer entering into the fixed-price forward sale at the prevailing market price, the Sovereign agrees to pay the farmer the difference between the market price at the time of harvest and the price of the fixed-price forward, in the event that the market price at the time of harvest is above the price of the forward. The fixed-price forward sale of 100,000 bushels of corn offsets the farmer's price risk associated with his anticipated agricultural production. The call option provides the farmer with upside price participation. The Sovereign faces commodity price risk from the option it granted at no cost to the farmer. To reduce that risk, the Sovereign establishes a long position of 20 call options on the Chicago Board of Trade (CBOT) Corn futures contract, equivalent to 100,000 bushels of corn.

Analysis: The farmer was induced by a long call option granted at no cost, in return for the farmer entering into a fixed-price forward sale at the prevailing market price.The risk profile of the combination of the forward sale and the long call is approximately equivalent to the risk profile of a synthetic long put.[2] A synthetic long put offsets the downside price risk of anticipated production. Under these circumstances of a Sovereign granting a call option to a farmer at no cost, the Commission deems the synthetic position of the farmer as satisfying the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and meeting the requirements for anticipated agricultural production under paragraph (4)(i), for purposes of the Sovereign's pass-through swap offset under paragraph (2)(ii). The agreement between the Sovereign and the farmer involves the production of a commodity underlying the CBOT Corn futures contract. Also under these circumstances, the Commission deems the synthetic long put as a substitute for transactions that the farmer has made in the physical marketing channel, because a long put would reduce the price risk associated with the farmer's anticipated agricultural production.

The Sovereign is the counterparty to the farmer, who under these circumstances the Commission deems to be a bona fide hedger for purposes of the Sovereign's pass-through swap offset. That is, the Commission considers the Sovereign's long call position to be a pass-through swap meeting the

[2] Put-call parity describes the mathematical relationship between price of a put and call with identical strike prices and expiry.

requirements of paragraph (2)(ii)(B). As provided under paragraph (2)(ii)(A), the Sovereign's risk-reducing position in the CBOT Corn option would qualify as a pass-through swap offset as a bona fide hedging position, or, alternatively, if the pass-through swap is not a referenced contract, then the pass-through swap offset may qualify as a cross-commodity hedge under paragraph (5), provided the fluctuations in value of the pass-through swap offset are substantially related to the fluctuations in value of the pass-through swap. Such a pass-through swap offset will not qualify as a bona fide hedging position in a physical-delivery futures contract during the last five days of trading under paragraphs (2)(iii)(B) or (5); however, since the CBOT Corn option will exercise into a physical-delivery CBOT Corn futures contract prior to the last five days of trading in that physical-delivery futures contract, the Sovereign may continue to hold its option position as a bona fide hedging position through option expiry.

8. Hedge of Offsetting Unfixed Price Sales and Purchases Under Paragraph (4)(ii) of the Bona Fide Hedging Position Definition

Fact Pattern: Currently it is October and Oil Merchandiser A has entered into cash forward contracts to purchase 600,000 of crude oil at a floating price that references the January contract month (in the next calendar year) for the ICE Futures Brent Crude futures contract and to sell 600,000 barrels of crude oil at a price that references the February contract month (in the next calendar year) for the NYMEX Light Sweet Crude Oil futures contract. Oil Merchandiser A is concerned about an adverse change in the price spread between the January ICE Futures Brent Crude futures contract and the February NYMEX Light Sweet Crude Oil futures contract. To reduce that risk, Oil Merchandiser A establishes a long position of 600 contracts in the January ICE Futures Brent Crude futures contract, price risk equivalent to buying 600,000 barrels of oil, and a short position of 600 contracts in the February NYMEX Light Sweet Crude Oil futures contract, price risk equivalent to selling 600,000 barrels of oil.

Analysis: Oil Merchandiser A's positions meet the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for offsetting sales and purchases in referenced contracts under paragraph (4)(ii). The physical commodity that is being hedged involves a commodity underlying the NYMEX Light Sweet Crude Oil futures contract. The long and short positions in commodity derivative contracts represent substitutes for transactions to be taken at a later time in the physical marketing channel. The positions are economically appropriate to the reduction of risk because the price spread between the ICE Futures Brent Crude futures contract and the NYMEX Light Sweet Crude Oil futures contract could move adversely to Oil Merchandiser A's interests in the two cash forward contracts, that is, the price of the ICE Futures Brent Crude futures contract could increase relative to the price of the NYMEX Light Sweet Crude Oil futures contract. The positions in commodity derivative contracts offset the price risk in the cash forward contracts. As provided under paragraph (4), the risk-reducing position does not qualify as a bona fide hedging position in the crude oil physical-delivery referenced contract during the spot month.

9. Anticipated Royalties Hedge Under Paragraph (4)(iii) of the Bona Fide Hedging Position Definition and Pass-Through Swaps Hedge Under Paragraph (2)(ii) of the Definition

a. *Fact Pattern:* In order to develop an oil field, Company A approaches Bank B for financing. To facilitate the loan, Bank B first establishes an independent legal entity commonly known as a special purpose vehicle (SPV). Bank B then provides a loan to the SPV. The SPV is obligated to repay principal and interest to the Bank based on a fixed price for crude oil. The SPV in turn makes a production loan to Company A. The terms of the production loan require Company A to provide the SPV with volumetric production payments (VPPs) based on a specified share of the production to be sold at the prevailing price of crude oil (*i.e.,* the index price) as oil is produced. Because the price of crude oil may fall, the SPV reduces that risk by entering into a crude oil swap with Swap Dealer C. The swap requires the SPV to pay Swap Dealer C the floating price of crude oil (*i.e.,* the index price) and for Swap Dealer C to pay a fixed price to the SPV. The notional quantity for the swap is equal to the expected production underlying the VPPs to the SPV. The SPV will receive a floating price at index on the VPP and will pay a floating price at index on the swap, which will offset. The SPV will receive a fixed price payment on the swap and repay the loan's principal and interest to Bank B. The SPV is highly certain that the VPP production volume will occur, since the SPV's engineer has reviewed the forecasted production from Company A and required the VPP volume to be set with a cushion (*i.e.,* a hair-cut) below the forecasted production.

Analysis: For the SPV, the swap between Swap Dealer C and the SPV meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the requirements for anticipated royalties under paragraph (4)(iii). The SPV will receive payments under the VPP royalty contract based on the unfixed price sale of anticipated production of the physical commodity underlying the royalty contract, *i.e.,* crude oil. The swap represents a substitute for the price of sales transactions to be made in the physical marketing channel. The SPV's swap position qualifies as a hedge because it is economically appropriate to the reduction of price risk. The swap reduces the price risk associated with a change in value of a royalty asset. The fluctuations in value of the SPV's anticipated royalties are substantially related to the fluctuations in value of the crude oil swap with Swap Dealer C.

b. *Continuation of Fact Pattern:* Swap Dealer C offsets the price risk associated with the swap to the SPV by establishing a short position in cash-settled crude oil futures contracts. The notional quantity of the short position in futures contracts held by Swap Dealer C exactly matches the notional quantity of the swap with the SPV.

Analysis: For the swap dealer, because the SPV enters the cash-settled swap as a bona fide hedger under paragraph (4)(iii) (*i.e.,* a pass-through swap counterparty), the offset of the risk of the swap in a futures contract by Swap Dealer C qualifies as a bona fide hedging position (*i.e.,* a pass-through swap offset) under paragraph (2)(ii)(A). Since the swap was executed opposite a pass-through swap counterparty and was offset, the swap itself also qualifies as a bona fide hedging position (*i.e.,* a pass-through swap) under paragraph (2)(ii)(B). If the cash-settled swap is not a referenced contract, then the pass-through swap offset may qualify as a cross-commodity hedge under paragraph (5), provided the fluctuations in value of the pass-through swap offset are substantially related to the fluctuations in value of the pass-through swap.

10. Anticipated Royalties Hedge Under Paragraph (4)(iii) of the Bona Fide Hedging Position Definition and Cross-Commodity Hedge Under Paragraph (5) of the Definition

Fact Pattern: An eligible contract participant (ECP) owns royalty interests in a portfolio of oil wells. Royalties are paid at the prevailing (floating) market price for the commodities produced and sold at major trading hubs, less transportation and gathering charges. The large portfolio and well-established production history for most of the oil wells provide a highly certain production stream for the next 24 months. The ECP also determined that changes in the cash market prices of 50 percent of the oil production underlying the portfolio of royalty interests historically have been closely correlated with changes in the calendar month average of daily settlement prices of the nearby NYMEX Light Sweet Crude Oil futures contract. The ECP decided to hedge some of the royalty price risk by entering into a cash-settled swap with a term of 24 months. Under terms of the swap, the ECP will receive a fixed payment and make monthly payments based on the calendar month average of daily settlement prices of the nearby NYMEX Light Sweet Crude Oil futures contract and notional amounts equal to 50 percent of the expected production volume of oil underlying the royalties.

Analysis: This position meets the requirements of paragraphs (2)(i)(A)–(C) for hedges of a physical commodity, paragraph (4)(iii) for hedges of anticipated royalties, and paragraph (5) for cross-commodity hedges. The long position in the commodity derivative contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the price of oil may decrease. The commodity derivative contract position offsets the price risk of royalty payments, based on oil production, that the ECP anticipates receiving. The ECP is exposed to price risk arising from the anticipated production volume of oil attributable to her royalty interests. The physical commodity underlying the royalty portfolio that is being hedged involves a commodity with fluctuations in value that are substantially related to the fluctuations in value of the swap.

11. Hedges of Services Under Paragraph (4)(iv) of the Bona Fide Hedging Position Definition

a. *Fact Pattern:* Company A enters into a risk service agreement to drill an oil well with Company B. The risk service agreement provides that a portion of the revenue receipts to Company A depends on the value of the light sweet crude oil produced. Company A is exposed to the risk that the price of oil may fall, resulting in lower anticipated revenues from the risk service agreement. To reduce that risk, Company A establishes a short position in the New York Mercantile Exchange (NYMEX) Light Sweet Crude Oil futures contract, in a notional amount equivalent to the firm's anticipated share of the expected quantity of oil to be produced. Company A is highly certain of its anticipated share of the expected quantity of oil to be produced.

Analysis: Company A's hedge of a portion of its revenue stream from the risk service agreement meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for services under paragraph (4)(iv). The contract for services involves the production of a commodity underlying the NYMEX Light Sweet Crude Oil futures contract. A short position in the NYMEX Light Sweet Crude Oil futures contract is a substitute for transactions to be taken at a later time in the physical marketing channel, with the value of the revenue receipts to Company A dependent on the price of the oil sales in the physical marketing channel. The short position in the futures contract held by Company A is economically appropriate to the reduction of risk, because the total notional quantity underlying the short position in the futures contract held by Company A is equivalent to its share of the expected quantity of future production under the risk service agreement. Because the price of oil may fall, the short position in the futures contract reduces price risk from a potential reduction in the payments to Company A under the service contract with Company B. Under paragraph (4)(iv), the risk-reducing position will not qualify as a bona fide hedging position during the spot month of the physical-delivery oil futures contract.

b. *Fact Pattern:* A City contracts with Firm A to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the City will pay for the cost of the natural gas used to transport the solid waste by Firm A. In the event that natural gas prices rise, the City's waste transport expenses will increase. To mitigate this risk, the City establishes a long position in the NYMEX Henry Hub Natural Gas futures contract in an amount equivalent to the expected volume of natural gas to be used over the life of the service contract.

Analysis: This position meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for services under paragraph (4)(iv). The contract for services involves the use of a commodity underlying the NYMEX Henry Hub Natural Gas futures contract. Because the City is responsible for paying the cash price for the natural gas used under the services contract, the long hedge is a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the total notional quantity of the long position in a commodity derivative contract equals the expected volume of natural gas to be used over the life of the contract. The position in the commodity derivative contract reduces the price risk associated with an increase in anticipated costs that the City may incur under the services contract in the event that the price of natural gas increases. As provided under paragraph (4), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery futures contract.

12. Cross-Commodity Hedge Under Paragraph (5) of the Bona Fide Hedging Position Definition and Inventory Hedge Under Paragraph (3)(i) of the Definition

Fact Pattern: Copper Wire Fabricator A is concerned about possible reductions in the price of copper. Currently it is November and it owns inventory of 100 million pounds of copper and 50 million pounds of finished copper wire. Copper Wire Fabricator A expects to sell 150 million pounds of finished copper wire in February of the following year. To reduce its price risk, Copper Wire Fabricator A establishes a short position of 6,000 contracts in the February COMEX Copper futures contract, equivalent to selling 150 million pounds of copper. The fluctuations in value of copper wire are expected to be substantially related to fluctuations in value of copper.

Analysis: The Copper Wire Fabricator A's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning a commodity under paragraph (3)(i) and for a cross-hedge of the finished copper wire under paragraph (5). The short position in a referenced contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The short position is economically appropriate to the reduction of price risk in the conduct and management of the commercial enterprise because the price of copper could drop. The short position in the referenced contract offsets the risk of a possible reduction in the value of the inventory that it owns. Since the finished copper wire is a product of copper that is not deliverable on the commodity derivative contract, 2,000 contracts of the short position are a cross-commodity hedge of the finished copper wire and 4,000 contracts of the short position are a hedge of the copper inventory.

13. Cross-Commodity Hedge Under Paragraph (5) of the Bona Fide Hedging Position Definition and Anticipated Requirements Hedge Under Paragraph (3)(iii)(A) of the Definition

Fact Pattern: Airline A anticipates using a predictable volume of jet fuel every month based on scheduled flights and decides to hedge 80 percent of that volume for each of the next 12 months. After a review of various commodity derivative contract hedging strategies, Airline A decides to cross hedge its anticipated jet fuel requirements in ultra-low sulfur diesel (ULSD) commodity derivative contracts. Airline A determined that price fluctuations in its average cost for jet fuel were substantially related to the price fluctuations of the calendar month average of the first nearby physical-delivery NYMEX New York Harbor ULSD Heating Oil (HO) futures contract and determined an appropriate hedge ratio, based on a regression analysis, of the HO futures contract to the quantity equivalent amount of its anticipated requirements. Airline A decided that it would use the HO futures contract to cross hedge part of its jet fuel price risk. In addition, Airline A decided to protect against jet fuel price increases by cross hedging another part of its anticipated jet fuel requirements with a long position in cash-settled calls in the NYMEX Heating Oil Average Price Option (AT) contract. The AT call option is settled based on the price of the HO futures contract. The sum of the notional amounts of the long position in AT call options and the long position in the HO futures contract will not exceed the quantity equivalent of 80 percent of Airline A's anticipated requirements for jet fuel.

Analysis: The positions meet the requirements of paragraphs (2)(i)(A)–(C) for hedges of a physical commodity, paragraph (3)(iii)(A) for unfilled anticipated requirements and paragraph (5) for cross-commodity hedges. The positions represent a substitute for transactions to be made in the physical marketing channel, are economically appropriate to the reduction of risks arising from anticipated requirements for jet fuel, and arise from the potential change in the value of such jet fuel. The aggregation notional amount of the airline's positions in the call option and the futures contract does not exceed the quantity equivalent of anticipated requirements for jet fuel. The value fluctuations in jet fuel are substantially related to the value fluctuations in the HO futures contract.

Airline A may hold its long position in the cash-settled AT call option contract as a cross hedge against jet fuel price risk without having to exit the contract during the spot month.

14. Position Aggregation Under § 150.4 and Inventory Hedge Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Company A owns 100 percent of Company B. Company B buys and sells a variety of agricultural products, including wheat. Company B currently owns five million bushels of wheat. To reduce some of its price risk, Company B establishes a short position of 600 contracts in the CBOT Wheat futures contract, equivalent to three million bushels of wheat. After communicating with Company B, Company A establishes an additional short position of 400 CBOT Wheat futures contracts, equivalent to two million bushels of wheat.

Analysis: The aggregate short position in the wheat referenced contract held by Company A and Company B meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning a cash commodity under paragraph (3)(i). Because Company A owns more than 10 percent of Company B, Company A and B are aggregated together as one person under § 150.4. Entities required to aggregate accounts or positions under § 150.4 are the same person for the purpose of determining whether a person is eligible for a bona fide hedging position exemption under § 150.3. The aggregate short position in the futures contract held by Company A and Company B represents a substitute for transactions to be taken at a later time in the physical marketing channel. The aggregate short position in the futures contract held by Company A and Company B is economically appropriate to the reduction of price risk because the aggregate short position in the CBOT Wheat futures contract held by Company A and Company B, equivalent to five million bushels of wheat, does not exceed the five million bushels of wheat that is owned by Company B. The price risk exposure for Company A and Company B results from a potential change in the value of that wheat.

Appendix D to Part 150—Initial Position Limit Levels

Contract	Spot-month	Single month and all months
Legacy Agricultural:		
Chicago Board of Trade Corn (C)	600	62,400
Chicago Board of Trade Oats (O)	600	5,000
Chicago Board of Trade Soybeans (S)	600	31,900
Chicago Board of Trade Soybean Meal (SM)	720	16,900
Chicago Board of Trade Soybean Oil (SO)	540	16,700
Chicago Board of Trade Wheat (W)	600	32,800
ICE Futures U.S. Cotton No. 2 (CT)	1,600	9,400
Chicago Board of Trade KC HRW Wheat (KW)	600	12,000
Minneapolis Grain Exchange Hard Red Spring Wheat (MWE)	1,000	12,000
Other Agricultural:		
Chicago Board of Trade Rough Rice (RR)	600	5,000
Chicago Mercantile Exchange Live Cattle (LC)	450	12,200
ICE Futures U.S. Cocoa (CC)	5,500	10,200
ICE Futures U.S. Coffee C (KC)	2,400	8,800
ICE Futures U.S. FCOJ–A (OJ)	2,800	5,000
ICE Futures U.S. Sugar No. 11 (SB)	23,300	38,400
ICE Futures U.S. Sugar No. 16 (SF)	7,000	7,000
Energy:		
New York Mercantile Exchange Henry Hub Natural Gas (NG)	2,000	200,900
New York Mercantile Exchange Light Sweet Crude Oil (CL)	10,400	148,800
New York Mercantile Exchange NY Harbor ULSD (HO)	2,900	21,300
New York Mercantile Exchange RBOB Gasoline (RB)	6,800	15,300
Metal:		
Commodity Exchange, Inc. Copper (HG)	1,000	7,800
Commodity Exchange, Inc. Gold (GC)	6,000	19,500
Commodity Exchange, Inc. Silver (SI)	3,000	7,600
New York Mercantile Exchange Palladium (PA)	100	5,000
New York Mercantile Exchange Platinum (PL)	500	5,000

Appendix E To Part 150—Guidance Regarding Exchange-Set Speculative Position Limits

Guidance for Designated Contract Markets

(1) Until such time that a boards of trade has access to sufficient swap position information, a board of trade need not demonstrate compliance with Core Principle 5 with respect to swaps. A board of trade should have access to sufficient swap position information if, for example: (1) It had access to daily information about its market participants' open swap positions; or (2) it knows that its market participants regularly engage in large volumes of speculative trading activity, including through knowledge gained in surveillance of heavy trading activity, that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions or total open swap positions.

(2) When a board of trade has access to sufficient swap position information, this guidance would no longer be applicable. At such time, a board of trade is required to file rules with the Commission to implement the relevant position limits and demonstrate compliance with Core Principle 5(A) and (B).

Guidance for Swap Execution Facilities

(1) Until such time that a swap execution facility that is a trading facility has access to sufficient swap position information, the swap execution facility need not demonstrate compliance with Core Principle 6(A) or (B). A swap execution facility should have access to sufficient swap position information if, for example: (1) It had access to daily information about its market participants' open swap positions; or (2) if it knows that its market participants regularly engage in large volumes of speculative trading activity, including through knowledge gained in surveillance of heavy trading activity, that would cause reasonable surveillance personnel at an exchange to inquire further about a market participant's intentions or total open swap positions.

(2) When a swap execution facility has access to sufficient swap position information, this guidance would no longer be applicable. At such time, a swap execution facility is required to file rules with the Commission to implement the relevant position limits and demonstrate compliance with Core Principle 6(A) and (B).

PART 151—[REMOVED AND RESERVED]

■ 29. Under the authority of section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5), remove and reserve part 151.

Issued in Washington, DC, on December 5, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Position Limits for Derivatives—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Timothy G. Massad

Today, the Commission is issuing a revised position limits proposal. We are also finalizing a separate but related rule on the aggregation of positions. I am pleased that today's actions are unanimous.

Congress directed us to implement a position limits rule to limit excessive speculation. While speculators play a necessary and important role in our markets, position limits can prevent the type of excessive speculation by a few large participants that leads to corners, squeezes and other activity that can distort markets and be unfair to other participants. Position limits can also promote convergence without compromising market liquidity. There are many issues to consider in this rule, but position limits are not a new or untested concept. They have been in place in our markets for decades, either through federal limits or exchange-set limits, and they have worked well.

There are two reasons why I am supporting issuing a reproposal. First, we have made many changes to the 2013 proposal we inherited that are reflected in today's reproposal. Certain aspects have been previously proposed in separate pieces, and I believe the public would benefit from seeing the proposal in its entirety, to better understand how the various changes work together.

Second, the Commission is now in a time of transition. I do not want to adopt a final rule today that the Commission would choose not to implement or defend next year. Our markets and the many end-users and consumers who rely on them are served best by having reasonable and predictable regulation. Uncertainty and inconsistency from one year to the next are not helpful.

Our staff has done a tremendous amount of work to devise a position limits rule that meets the requirements of the law and balances the various concerns at stake. This work has spanned several years, involved review of literally thousands of pages of comments from participants, and included many meetings and public roundtables.

Commissioners Bowen, Giancarlo, and I have also spent substantial time on this issue. We took office together in June 2014 and inherited a proposal that the Commission had issued six months before. As I promised then, we have been working hard to get the rule right. In addition to discussing the issues extensively with staff, we have each had many meetings with market participants and other members of the public. We have each traveled around the country and heard from users of these markets. In particular, I have heard from many smaller, traditional users about the importance of position limits. I have also had the benefit of sponsoring the Agricultural Advisory Committee, whose members have provided important input on these issues.

We have revised the proposed limits themselves in light of substantial work our staff has done to make sure they are based on the latest and best information as to estimated deliverable supply. We have considered a wide range of information, including the recommendations of the exchanges and other data to which the exchanges do not have access. For some contracts, the proposed limits for the spot month are higher than the exchange-set limits today. There have been, for example, substantial increases in estimates of deliverable supply in the energy sector. In other cases, we have accepted recommendations of the exchanges to set federal limits that are actually lower than 25 percent of deliverable supply, because we determined that the requested lower limit was consistent with the overall policy goals and would not compromise market liquidity.

We have proposed further adjustments to the bona fide hedging position definition, to eliminate certain requirements that we have decided are unnecessary, and to address other concerns raised by market participants.

Another substantial difference from the 2013 text is our proposal first made this summer to allow the exchanges to grant non-enumerated hedge exemptions. This process must be subject to our oversight as a matter of law and as a matter of policy, given the inherent tension in the roles of the exchanges as market overseers and beneficiaries of higher trading volumes.

The proposal we are issuing today provides extensive analysis of the impact of the proposed spot and all months limits, which I believe supports the view that the limits should not compromise liquidity while addressing excessive speculation. The analysis shows few existing positions would exceed the limits, and that is without considering possible exemptions.

I recognize there will still be those that are critical of the proposal. Some will complain simply because of the length of the proposal—even though most of that is not rule text, but rather the summaries of the extensive comments and analysis required by law. Others may suggest broadening the bona fide hedge exemption so that it encompasses practically any activity with a business purpose, which is not what Congress said in the law. Still others will argue position limits are not necessary. But while the Commission should consider all comments, it is important to remember that the Commission has a responsibility to implement a balanced rule that achieves the objectives Congress has established.

Finally, while the Commission works to finalize this rule, we still have federal limits for nine agricultural commodities and exchange-set spot month limits for all the physical delivery contracts covered by this rule, which the Commission will continue to enforce.

I want to thank the staff again for their extensive work on this rule, particularly our staff in the Division of Market Oversight, the Office of the Chief Economist and the Office of the General Counsel. Their expertise and dedication on this matter is truly exemplary. I also want to thank Commissioners Bowen and Giancarlo for their very constructive engagement on this issue.

Appendix 3—Statement of Commissioner Sharon Y. Bowen

With today's repreposal, the Commission moves one step closer to the implementation of position limits as directed by Congress in 2010. CFTC staff has worked laboriously with market users and the exchanges we regulate to craft a rule that will protect investors from disruptive practices and manipulation, while simultaneously allowing our markets to serve their critical price-discovery function. I commend staff on their hard work and thank the hundreds of commenters for their insightful feedback. I would also like to thank Chairman Massad and Commissioner Giancarlo on their commitment to this important rule and look forward to its finalization in the near future.

Appendix 4—Statement of Commissioner J. Christopher Giancarlo

Since taking my seat on the Commission, I have traveled to well over a dozen states where I met with many family farmers and toured numerous energy utilities and manufacturing facilities. I have heard the concerns of agriculture and energy producers and consumers about market speculation and the role of position limits.

I have always been open to supporting a well-conceived and practical position limits rule that restricts excessive speculation. That is so long as it protects the ability of America's farmers, ranchers and processors to hedge risks of agricultural commodities and the ability of America's energy producers and distributors to control risks of energy production, storage and distribution.

That is why I believe it is so important to carefully consider the impact of this very complex rule on America's almost nine thousand grain elevators,[1] two million family farms[2] and 147 million electric utility customers.[3] That is why I support putting out this rule as a proposal.

My concern regarding previous earlier proposals has been that they would restrict bona fide hedging activity or harm America's agriculture and energy industries that have been sorely impacted by plummeting commodity prices and service provider consolidation. I am simply not willing to support a poorly designed and unworkable rule that ever after needs to be adjusted through a series of no-action letters and ad hoc staff interpretations and advisories that had become too common at the CFTC in prior years.

While some may view position limits as the ''eternal rule,'' I disagree. The current proposal is very detailed and highly complex. It is over 700 pages in length and has over one thousand footnotes. In some areas, concerns expressed by market participants regarding the 2011 rule that was struck down by the court and the 2013 proposal have been well addressed. In other

[1] U.S. Grain Storage Data, National Grain and Feed Association Web site (last visited Dec. 5, 2016), *https://www.ngfa.org/news-policy-center/resources/grain-industry-data/*.

[2] News Release, Family Farms are the Focus of New Agriculture Census Data, U.S. Department of Agriculture, Mar. 17, 2015, *http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2015/03/0066.xml&printable=true*.

[3] 2015–2016 Annual Directory & Statistical Report, American Public Power Association, at 26 (2016), *http://www.publicpower.org/files/PDFs/USElectricUtilityIndustryStatistics.pdf*.

areas, they do not appear to have been as well addressed.

Notably, the proposal introduces a series of new estimates of deliverable supply that have not been previously presented to the public. It also incorporates concepts introduced in the 2016 supplemental proposal. Given these new additions and the complexity of the proposal, one more round of public comment is appropriate.

I feel comfortable that the proposal before us provides the basis for the implementation of a final position limits rule that I could support. I commend the staff responsible for this proposal for all their hard work in making the significant improvements that are before us. I also extend my gratitude to Chairman Massad and Commissioner Bowen for agreeing to put this proposal before the public for comment.

I welcome commenters' views on the proposal. I expect that with their added insight we can finalize a position limits rule in 2017 that is workable and does not undo years of standard practice in these markets.

[FR Doc. 2016–29483 Filed 12–29–16; 8:45 am]

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Part IV

Department of Justice

Drug Enforcement Administration

21 CFR Parts 1300, 1301, 1302, et al.

Revision of Import and Export Requirements for Controlled Substances, Listed Chemicals, and Tableting and Encapsulating Machines, Including Changes To Implement the International Trade Data System (ITDS); Revision of Reporting Requirements for Domestic Transactions in Listed Chemicals and Tableting and Encapsulating Machines; and Technical Amendments; Final Rule

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1301, 1302, 1303, 1304, 1308, 1309, 1310, 1312, 1313, 1314, 1315, 1316, and 1321

[Docket No. DEA–403]

RIN 1117–AB41

Revision of Import and Export Requirements for Controlled Substances, Listed Chemicals, and Tableting and Encapsulating Machines, Including Changes To Implement the International Trade Data System (ITDS); Revision of Reporting Requirements for Domestic Transactions in Listed Chemicals and Tableting and Encapsulating Machines; and Technical Amendments

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: The Drug Enforcement Administration is updating its regulations for the import and export of tableting and encapsulating machines, controlled substances, and listed chemicals, and its regulations relating to reports required for domestic transactions in listed chemicals, gamma-hydroxybutyric acid, and tableting and encapsulating machines. In accordance with Executive Order 13563, the Drug Enforcement Administration has reviewed its import and export regulations and reporting requirements for domestic transactions in listed chemicals (and gamma-hydroxybutyric acid) and tableting and encapsulating machines, and evaluated them for clarity, consistency, continued accuracy, and effectiveness. The amendments clarify certain policies and reflect current procedures and technological advancements. The amendments also allow for the implementation, as applicable to tableting and encapsulating machines, controlled substances, and listed chemicals, of the President's Executive Order 13659 on streamlining the export/import process and requiring the government-wide utilization of the International Trade Data System (ITDS). This rule additionally contains amendments that implement recent changes to the Controlled Substances Import and Export Act (CSIEA) for reexportation of controlled substances among members of the European Economic Area made by the Improving Regulatory Transparency for New Medical Therapies Act. The rule also includes additional substantive and technical and stylistic amendments.

DATES: This rule is effective January 30, 2017. However, compliance with the revisions to DEA regulations made by this rule is not required until June 28, 2017.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Outline

I. Background and Purpose

A. Legal Authority

The DEA implements and enforces titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. 21 U.S.C. 801–971. Titles II and III are known as the ''Controlled Substances Act'' and the ''Controlled Substances Import and Export Act,'' respectively, and are collectively referred to as the ''Controlled Substances Act'' or ''CSA'' for the purpose of this action. The DEA publishes implementing regulations for these statutes in title 21 of the Code of Federal Regulations (21 CFR), chapter II. The CSA and its implementing regulations are designed to prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while ensuring an adequate supply is available for the legitimate medical, scientific, research, and industrial needs of the United States. Controlled substances have the potential for abuse and dependence and are controlled to protect the public health and safety.

Under the CSA, each controlled substance is classified into one of five schedules based upon its potential for abuse, its currently accepted medical use in treatment in the United States, and the degree of dependence the substance may cause. 21 U.S.C. 812. The initial schedules of controlled substances established by Congress are found at 21 U.S.C. 812(c), and pursuant to 21 U.S.C. 812(a) and (b), the current list of all scheduled substances is published at 21 CFR part 1308. Controlled substances generally include narcotics, stimulants, depressants, and hallucinogens that have a potential for abuse and physical and psychological dependence, as well as anabolic steroids. Listed chemicals are separately classified based on their use and importance to the illicit manufacture of controlled substances (list I or list II chemicals). 21 U.S.C. 802(33)–(35).

Through the enactment of the CSA and its amendments, Congress has established a closed system of distribution making it unlawful to handle any controlled substance (manufacture, distribute, reverse distribute, dispense, conduct research, engage in narcotic treatment or maintenance, import, export, collect, conduct chemical analysis, dispose, or possess) or manufacture, distribute, import, or export any listed chemical except in a manner authorized by the CSA. See *e.g.,* Gonzales v. Raich, 545

U.S. 1, 12–13 (2005) (stating ''The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels. To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. 841(a)(1), 844(a); H.R. REP. NO. 91–1444, pt. 1 at 3 (1970) (stating: ''Title II: Control and Enforcement.—The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal.'').

In order to maintain this closed system of distribution, the CSA requires handlers of controlled substances, unless exempt from registration, to be registered with the DEA at each principal place of business or professional practice where controlled substances are manufactured, distributed, or dispensed. 21 U.S.C. 822. The CSA also requires persons who manufacture or distribute, or who propose to manufacture or distribute, list I chemicals to be registered at each principal place of business or professional practice, unless exempt. 21 U.S.C. 822; 21 CFR 1309.22. A separate registration is also required for each principal place of business where controlled substances or list I chemicals are imported or exported, unless exempt from registration. 21 U.S.C. 958. A ''registrant'' is any person who is registered pursuant to either section 303 or section 1008 of the CSA (codified at 21 U.S.C. 823 or 958).[1] 21 CFR 1300.01(b). Registrants are permitted to possess controlled substances and list I chemicals as authorized by their registration and must comply with the applicable requirements associated with their registration. 21 U.S.C. 822 and 958.

In contrast, a ''regulated person'' means ''a person who manufactures, distributes, imports, or exports a listed chemical, a tableting machine, or an encapsulating machine or who acts as a broker or trader[2] for an international transaction[3] involving a listed chemical, a tableting machine, or an encapsulating machine.'' 21 U.S.C. 802(38). (Tableting machines and encapsulating machines are also commonly known as ''pill presses'' and ''capsule fillers'' respectively.) Regulated persons who engage in ''regulated transactions,'' defined at 21 U.S.C. 802(39),[4] are subject to specific recordkeeping and reporting requirements pursuant to 21 U.S.C. 830, 971; 21 CFR part 1310. In addition, a person located in the United States who is a broker or trader for an international transaction in a listed chemical that is a regulated transaction shall, with respect to that transaction, be subject to all of the notification, reporting, recordkeeping, and other requirements placed upon exporters of listed chemicals. 21 U.S.C. 971(e).

The CSA grants the Attorney General authority to promulgate rules and regulations relating to: The registration of controlled substance and list I chemical handlers; control of the manufacture, distribution, and dispensing of controlled substances; control of the manufacture and distribution of listed chemicals; maintenance and submission of records and reports; and for the efficient execution of her statutory functions. 21 U.S.C. 821–822, 825, 827–831, 871, 952, 954, 956, 958, 971. The Attorney General is further authorized by the CSA to promulgate rules and regulations relating to the registration and control of importers and exporters of controlled substances or listed chemicals. 21 U.S.C. 958(f). The Attorney General has delegated these authorities to the Administrator of the DEA, who in turn redelegated many of these authorities to the Deputy Administrator of the DEA and the Deputy Assistant Administrator of the DEA Office of Diversion Control.[5] 28 CFR 0.100 *et seq*.

Within the DEA, the Diversion Control Division is the strategic focus area that carries out the mandates of the CSA to ensure that adequate supplies of controlled substances and listed chemicals are available to meet legitimate domestic medical, scientific, industrial, and export needs. The Diversion Control Division carries out the mission of the DEA to prevent, detect, and eliminate the diversion of these substances into the illicit drug market. Activities in support of the Diversion Control Division and its mission include: Determination of program priorities; field management oversight; coordination of major investigations; drafting and promulgating regulations; the design and proposal of national legislation; advice and leadership on State legislation/regulatory initiatives; oversight of the importation and exportation of tableting and encapsulating machines, controlled substances, and listed chemicals; establishment of national drug production quotas; activities related to drug scheduling and compliance with international treaty obligations; the design and execution of diplomatic missions; computerized monitoring and tracking of the distribution of certain controlled substances; planning and allocation of program resources; and liaison efforts with industry and their representative associations as well as to the DEA's regulatory and law enforcement counterparts at the federal, State, tribal, and local levels.

B. Purpose of Regulatory Action

1. Executive Order 13659

Section 3 of the President's Executive Order 13659 of February 19, 2014, ''Streamlining the Export/Import Process for America's Businesses,'' directs participating agencies to have capabilities, agreements, and other requirements in place to allow electronic filing through the International Trade Data System (ITDS) and supporting systems of data and other relevant documents (exclusive of applications for permits, licenses, or certifications) required for imported and exported goods. Participating agencies are ''[a]ll federal agencies that require

[1] Unless otherwise noted, all references to registrant(s) in this preamble include persons exempt from DEA registration and persons not registered with the DEA as an importer or exporter who are authorized to perform importing or exporting activities as a coincident activity of their research or chemical analysis registration in accordance with 21 CFR 1301.13(e).

[2] A ''broker'' and ''trader'' are persons that assist in arranging an international transaction in a listed chemical by: negotiating contracts; serving as an agent or intermediary; or bringing together a buyer and seller, a buyer and transporter, or a seller and transporter. 21 U.S.C. 802(43).

[3] An ''international transaction'' is a transaction that involves ''the shipment of a listed chemical across an international border (other than a United States border) in which a broker or trader located in the United States participates.'' 21 U.S.C. 802(42).

[4] The CSA defines a ''regulated transaction'' as being: (1) With certain enumerated exceptions, ''a distribution, receipt, sale, importation, or exportation of, or an international transaction involving shipment of, a listed chemical, or if the Attorney General establishes a threshold amount for a specific listed chemical, a threshold amount, including a cumulative threshold amount for multiple transactions (as determined by the Attorney General, in consultation with the chemical industry and taking into consideration the quantities normally used for lawful purposes), of a listed chemical;'' and (2) ''a distribution, importation, or exportation of a tableting machine or encapsulating machine.'' 21 U.S.C. 802(39).

[5] Due to an internal reorganization, on September 19, 2016, the DEA Office of Diversion Control became the Diversion Control Division. Throughout the document any references referring to the Office of Diversion Control have been updated to reflect this change.

documentation for clearing or licensing the importation and exportation of cargo.'' Section 3 of Executive Order 13659 describes the ITDS as ''an electronic information exchange capability, or ''single window,'' through which businesses will transmit data required by participating agencies for the importation or exportation of cargo.'' Within the ITDS, businesses are able to transmit their import and export data using through an Electronic Data Interchange (EDI), an electronic communication framework providing standards for exchanging data via any electronic means. CBP has identified the Automated Commercial Environment (ACE), and any successor system to ACE, to serve as an authorized EDI for purposes of import and export data required by CBP and participating agencies.

In light of Executive Order 13659, the DEA is updating its regulations regarding the import and export of tableting and encapsulating machines, controlled substances, and listed chemicals. The amendments codify existing practices, incorporate existing procedures and technological advancements, and implement the President's Executive Order on streamlining the export/import process.

Previous DEA regulations specifically required applications for permits, declarations, and other required notices and reports to be filed in paper form, or by electronic means in some circumstances. To comply with Executive Order 13659, the DEA is amending its regulations to integrate DEA procedures related to the importation and exportation of tableting and encapsulating machines, controlled substances, and listed chemicals with the ITDS.

The ITDS excludes applications for permits, licenses, or certifications. In light of this, DEA registrants and regulated persons will continue to use the DEA application and filing process for permit applications that must be completed in advance of importation or exportation; however, the processes will be electronic rather than paper. As a result, DEA registrants or regulated persons applying for permits (DEA Forms 161, 161R, 161R–EEA, and 357) or filing notifications or reports with the DEA will apply or file directly with DEA electronically through the Diversion Control Division secure network application.

The DEA import/export declarations (DEA Forms 236, 486 and 486A), will also be replaced with an electronic process. Upon receipt of a complete declaration through the Diversion Control Division secure network application, DEA will provide the importer or exporter with the notice of receipt that must then be filed with CBP as part of the CBP import or export filing through ACE, or any successor system. DEA will also transmit the declaration information electronically to CBP so that customs officers can validate importations and exportations subject to DEA regulations.

Because of the requirement that regulated persons submit reports of regulated transactions in tableting machines and encapsulating machines to the DEA, the DEA is requiring such domestic regulated transaction reports to be submitted through the DEA Diversion Control Division secure network application, in addition to import and export regulated transactions. Mandatory reporting requirements for domestic regulated transactions are included as part of this rule because it allows for the DEA to create, at one time, an efficient, streamlined reporting structure of regulated activities applicable to tableting and encapsulating machines.

Additionally, this final rule contains amendments that implement section 4, Re-exportation Among Members of the European Economic Area, of the Improving Regulatory Transparency for New Medical Therapies Act, Public Law 114–89, which was signed into law on November 25, 2015. Section 4 amended section 1003 of the Controlled Substances Import and Export Act (21 U.S.C. 953) by making changes to paragraph (f) and adding paragraph (g) that allows for reexportation of controlled substances among members of the European Economic Area.

This rule also includes technical and stylistic changes to several regulations to clarify and simplify the language and to further the goals of the President's memorandum on Transparency and Open Government. 74 FR 4685, Jan. 26, 2009.

2. Pilot Program

The DEA published a general notice in the **Federal Register** announcing, in coordination with U.S. Customs and Border Protection (CBP), a pilot test of the ITDS involving the electronic submission of data related to the importation and exportation of controlled substances and listed chemicals.[6] The pilot program is testing the electronic transmission through CBP's ACE system, of data, forms and documents required by the DEA using the Partner Government Agency (PGA) Message Set and the Document Image System (DIS). The data, forms, and documents will be transmitted for review by the DEA. The PGA Message Set and DIS would enable importers, exporters, and brokers to electronically transmit data required by the DEA directly through ACE; this electronic process will replace certain paper-based processes that are used outside of the pilot program.

The test commenced on August 1, 2016, and will continue until publication of a notice in the **Federal Register**. Any party seeking to participate in the test was instructed to contact their CBP client representative.

The DEA anticipated that this pilot program would help prepare for a successful transition from the paper-based process to the electronic entry and transmission of data to ACE. As of October 25, 2016 there were 35 companies, representing 95 registration numbers, participating in the pilot program.

DEA and CBP have determined that the pilot program has successfully tested the functionality for electronic submission of data related to the importation and exportation of controlled substances and listed chemicals. As a result, the pilot program will be concluded as of the effective date of this final rule. At that time, all importers, exporters, and brokers will be able to use ACE to electronically file required data and documentation associated with the importation and exportation of controlled substances and listed chemicals.

3. Notice of Proposed Rulemaking

The DEA published a notice of proposed rulemaking (NPRM) in the **Federal Register** incorporating all the above changes on September 15, 2016.[7] The NPRM provided an opportunity for

[6] *Electronic Filing of Certain Import/Export Data Relating to Controlled Substances and Listed Chemicals: Announcement of the Partner Government Agency Message Set/Document Image System Test and Request for Participants,* July 15, 2016. 81 FR 46058–89. To be eligible to apply for and participate in the pilot, an applicant had to be a self-filing importer or broker, with the ability to file ACE Entry and Entry Summaries certified for cargo release using a software program that has completed ACE certification testing for the PGA Message Set and DIS, and, if an exporter, must have the ability to file electronically in the Automated Export System (AES) or in ACE AES Direct.

[7] *Revision of Import and Export Requirements for Controlled Substances, Listed Chemicals, and Tableting and Encapsulating Machines, Including Changes to Implement the International Trade Data System; Revision of Reporting Requirements for Domestic Transactions in Listed Chemicals and Tableting and Encapsulating Machines; and Technical Amendments,* September 15, 2016. 81 FR 63575. The DEA's Economic Impact Analysis (EIA), was made available in its entirety under ''Supporting Documents'' in the public docket of this action at *http://www.regulations.gov,* under FDMS Docket ID: DEA–2016–0017 (Docket No. DEA–403).

persons to submit written comments on the proposal on or before October 17, 2016. The DEA specifically solicited comments on the economic impact of the rule, and requested that commenters describe the specific nature of any impact on small entities and provide empirical data to illustrate the extent of such impact.

C. Summary of the Major Provisions of the Regulatory Action

The DEA is finalizing the rule as proposed except where otherwise stated in the paragraphs below.

Below are summaries of provisions contained in the final rule.

1. Mandatory Electronic Applications and Filings

The DEA is amending its regulations to authorize electronic submission of data, and make the procedure mandatory over paper in most circumstances. 21 U.S.C. 958(f). The use of electronic applications and filings is consistent not only with the requirements of Executive Order 13659, but also with the general principles outlined in the Government's Open Data Policy which requires agencies to collect or create information in a way that supports downstream information processing and dissemination. The Open Data Policy states that information should be collected electronically by default.

Executive Order 13659 directs participating agencies to have capabilities, agreements, and other requirements in place to allow electronic filing through ITDS and supporting systems of data and other relevant documents (exclusive of applications for permits, licenses, or certifications) required for imported and exported goods. Businesses are able to transmit their import and export data through using an EDI, an electronic communication framework providing standards for exchanging data via any electronic means. Data is transmitted through the EDI links to ACE, which serves as the single window for CBP.

Mandatory electronic applications and filings allow for the DEA to create an efficient, streamlined reporting structure of regulated activities.

2. Import and Export Permits for Controlled Substances

The DEA is amending its regulations regarding expiration dates associated with imports and exports of controlled substances. The DEA is changing the current expiration period of import and export permits found in §§ 1312.16 and 1312.25 from not more than six months to not more than 180 calendar days after the date of issuance. This change standardizes expiration procedures as not all months have the same number of days.

The DEA is revising §§ 1312.16 and 1312.25 to clearly specify how and under what conditions controlled substance import and export permits may be amended or cancelled after issuance and when a new permit is required instead of an amendment. Registrants will submit a request to amend or cancel an application for an import or export permit, amend an issued import or export permit, or request cancelation of an issued import or export permit to the Administration through the DEA Diversion Control Division secure network application.

Consistent with current practice, importers and exporters will continue to be able to request an amendment to a permit for the following data fields: The National Drug Control number, description of the packaging, or trade name of the product, so long as the description is for the same basic class of controlled substance(s) as in the original permit; the proposed port of entry or export; the proposed date of import or export; the method of transport; any registrant notes; and the justification entered by the importer or exporter for why an import or export is needed to meet the medical, scientific, or other legitimate needs of the United States or foreign jurisdiction. The DEA allows amendments to these fields as these are areas that may be easily mis-keyed or subject to change as part of the normal import and export business practice.

Consistent with current practice, importers and exporters will continue to generally be allowed to amend the base weight of controlled substance(s) listed on their permit prior to the start of an import or export transaction (*i.e.,* prior to shipment). However, also consistent with current practice, exporters will not be allowed to exceed the total base weight of controlled substance(s) listed on the corresponding foreign permit. Neither will exporters be allowed to exceed the strength of a controlled substance product if product strength information has been included on the import permit issued by the foreign competent national authority. Under § 1312.15(a), importers will continue to be allowed to request an amendment to the quantity of controlled substances specified on an import permit once a shipment has arrived at the U.S. customs port of entry if the increase in the amount of controlled substance to be imported is less than 1% of that listed on the issued import permit. Importers and exporters need not request an amendment for the sole purpose of decreasing the amount authorized.

Consistent with current practice, importers and exporters would continue to be able to request that an import or export permit be amended to remove a controlled substance.

However, importers and exporters may not amend permits to add or replace a controlled substance/Administration controlled substance code number to the item(s) to be imported or exported. Importers and exporters who desire to import or export a different controlled substance than that contained on their issued permit or permit application must submit a request for the permit or permit application to be canceled and request a new permit.

The DEA understands that sometimes the incorrect controlled substance is identified on the permit application due to clerical error, for example because a similar item was selected from the drop-down selection in the DEA Diversion Control Division secure network application that was located near the correct item. However, the DEA has closely considered this issue and ultimately determined that because the listed controlled substance proposed to be imported or exported is such a critical element of determining whether or not a permit should be issued and, if issued, the amount allowed to be imported or exported, this element should not be amendable. As stated elsewhere in this preamble, the DEA reminds importers and exporters that the duty to file reports and other documents with the DEA includes the duty that these filings be complete and accurate.

Similarly, in a change from current practice, the DEA is not allowing exporters to amend foreign permit information on permit applications and issued permits.

The DEA understands that sometimes, especially in the case of less experienced exporters, the incorrect foreign permit number is entered onto the permit application. This is often the result of numbers being transposed or a different number on the foreign permit being entered instead of the actual permit identification number. However, similar to the controlled substance identified on the permit, the DEA has closely considered this matter and ultimately determined that, because the authorization from the foreign competent national authority is such a critical element in determining whether a permit can be issued and the amount of the controlled substance to be exported, this element should not be amendable. As stated above and elsewhere in this document, the DEA reminds importers and exporters that the duty to file reports and other documents with the DEA includes the duty that these filings be complete and accurate.

Consistent with current practice, importers and exporters will not be able to request an amendment to a permit for changes to the importer or exporter's name (as it appears on their DEA certificate of registration) or the name of the foreign importer or exporter. The DEA considers the name of the foreign importer or exporter to be a key factor in determining associated risks of the diversion of controlled substances and subsequently whether or not to issue an import or export permit. Therefore, these fields are not amendable.

However, also consistent with current practice, as stated above, the DEA will continue to allow importers and exporters to amend any additional associated company names they are DBA (doing business as) that they wish to have included in the notes section of the permit. The only change from current practice is that such amendments would be required to be made through the DEA Diversion Control Division secure network application.

Importers and exporters will be required to make an official request through the DEA Diversion Control Division secure network application for an amendment. Supplementary information submitted by an importer or exporter through the DEA Diversion Control Division secure network application will not automatically trigger the amendment process. An amendment will have no effect on the date of expiration of the permit; an amended import or export permit will have the same expiration date as the originally issued permit. Importers and exporters will be able to request that an issued import or export permit be canceled provided that no shipment has yet been made.

Under revised § 1312.16(a)(5), registrants and regulated persons will be required to submit all requests for an amendment that would affect the total base weight of each controlled substance, other than those submitted in accordance with § 1312.15(a), at least three business days in advance of the date of release by a customs officer. Three business days are the minimum amount of time that the DEA needs to review this type of requested amendment, approve or deny the request, and transmit the applicable data to the ITDS. All other requests for amendment will be required to be submitted to the DEA at least one business day before the date of release by a customs officer at the port of entry. One business day is the minimum amount of time that the DEA needs to review the requested amendment, approve or deny the request, and transmit the applicable data to the ITDS.

DEA registrants have been able to submit DEA forms electronically for several years, and are familiar with the DEA Diversion Control Division secure network application system. If a DEA registrant needs to change information on an application for a permit that is not amendable, they must submit a new application for a permit. The registrant will follow the same process used with the original submission and submit the forms electronically. The DEA will review the submission, process the document and issue a Transaction Identification Number (TIN). The estimated time to complete the online document is minimal. Requiring the new submission will ensure the integrity of the information in the DEA system as well as what is transmitted to CBP.

To make an allowable amendment, a DEA registrant will access the DEA secure network application and provide the Transaction Identification Number which was assigned with the original submission. The system will provide access to the registrant's application for a permit, and the registrant can then make the appropriate changes. The DEA will review the changes and process the document. To ensure that there is no delay in CBP releasing a product from being imported or exported, the DEA provides the amended documents or new submissions to CBP in its daily feed.

As a result of the ITDS/ACE system relying on the Harmonized Tariff System (HTS) used by CBP to properly release products for import or export, the DEA had to identify the proper HTS codes for the substances under its control. The HTS codes are utilized in ACE and directly correlate to Administration Controlled Substance Code Number. As a result, the DEA will not allow a registrant to amend an application by adding a controlled substance that has a different Administration Controlled Substance Code Number. This will ensure a more streamlined process and will allow CBP to efficiently release product in a timely manner.

Countries that are parties to international drug control treaties have an established competent national authority (CNA) (identified in the United Nations Office on Drugs and Crime publication ''Competent National Authorities Under the International Drug Control Treaties'') that oversees the handling of controlled substances and listed chemicals to include the approval of imports and exports. All CNAs make certain reports to the International Narcotics Control Board (INCB) on the distribution of the substances being imported and exported. The DEA communicates directly with CNAs or through the INCB if issues arise regarding official authorization documents submitted to the DEA by DEA registrants.

For the reasons discussed above, the DEA is also requiring electronic reporting of return information for controlled substances imported or exported under permit procedures.

3. Import and Export Declarations for Controlled Substances

The DEA is also amending §§ 1312.18 and 1312.27 to specify an expiration date for import and export declarations for controlled substances.

Such declarations did not have an expiration date assigned to them; however, permits to import and export controlled substances expire not more than six months after approved under the previous regulation. 21 CFR 1312.16 and 1312.25. Similar to permits, declarations filed with the DEA are sometimes never actually utilized. The DEA is concerned that absence of an expiration date for these declarations may lead to incomplete or inaccurate records in the ITDS. Therefore, declarations expire 180 calendar days after the date the declaration is deemed filed with the Administration.

The DEA is incorporating the mandatory electronic filing of DEA import declarations and DEA export declarations for controlled substances with the DEA into §§ 1312.18 and 1312.27. This requirement is also incorportated into a new § 1312.03 which references a list of applicable forms for part 1312, and will state the declaration forms are electronic. This information is listed multiple in the applicable regulations.

Consistent with current requirements, controlled substance declarations will be required to be filed at least 15 calendar days in advance of the anticipated date of release by a customs officer at the port of entry or port of export. 21 CFR 1312.18(b), 1312.27(a). The DEA is retaining this 15-day-advance filing time period to ensure enough time for the DEA to review the submission for completeness and conduct any necessary follow-up prior to the import/export transaction. Under revised §§ 1312.18(b) and 1312.27(a), controlled substance declarations are not deemed filed until the

Administration issues a transaction identification number. However, the DEA is allowing registrants and regulated persons to proceed with the import or export transaction as soon as the transaction identification number has been issued, regardless of whether 15 calendar days have elapsed since its issuance. Finally, DEA regulations requiring declarations to be completed in triplicate would be eliminated.

The DEA is amending its import/export regulations to describe the procedures relating to amendments following the filing of a controlled substance import or export declaration with implementation of the ITDS. The DEA is changing §§ 1312.18(f) and 1312.27(e) to clearly specify how and under what conditions controlled substance import and export declarations may be amended or cancelled after having been filed and when a new declaration is required instead of an amendment. Registrants and regulated persons will submit a request to amend or cancel a filed declaration to the Administration through the DEA Diversion Control Division secure network application.

Consistent with current practice, importers and exporters will continue to be able to amend a declaration for the following data fields: The National Drug Control number, description of the packaging, or trade name of the product, so long as the description is for the same basic class of controlled substance(s) as in the original declaration; the proposed port of entry or export; the anticipated date of release by a customs officer at the port of entry or port of export; the method of transport; any registrant notes; and the justification entered by the importer or exporter for why an import or export is needed to meet the legitimate scientific or medical needs of the United States or foreign jurisdiction. The DEA allows amendments to these fields as these are areas that may be easily mis-keyed or subject to change as part of the normal import and export business practice.

Importers and exporters will continue to generally be allowed to amend the base weight of controlled substance(s) listed on their filed declaration prior to the start of an import or export transaction (*i.e.,* prior to shipment). However, exporters would not be allowed to exceed the total base weight of controlled substance(s) listed on the corresponding authorization for import issued by the foreign competent national authority. Neither would exporters be allowed to exceed the strength of a controlled substance product if product strength information has been included on the authorization for import issued by the foreign competent national authority. Consistent with § 1312.15(a) for imports of controlled substances under permit procedure, importers under declaration procedures will be allowed to request an amendment to an import declaration regarding the quantity of controlled substances once a shipment has arrived at the U.S. customs port of entry if the increase in the amount of controlled substance to be imported is less than 1% of that listed on the filed declaration. Importers and exporters need not request an amendment for the sole purpose of decreasing the amount authorized.

Importers and exporters will continue to be able to amend a filed import or export declaration to remove a controlled substance. However, importers and exporters will no longer be able to amend declarations to add a new controlled substance or replace a controlled substance with another controlled substance. Instead, importers and exporters who need to make changes to any of these fields will need to cancel the existing declaration and file a new declaration.

The DEA understands that sometimes the incorrect controlled substance is identified on the declaration due to clerical error, for example because a similar item was selected from the drop-down selection in the DEA Office of Diversion Control secure network application that was located near the correct item. However, the DEA has closely considered this issue and ultimately determined that because the identification of the controlled substance proposed to be imported or exported is such a critical element of the closed system of distribution, that this element should not be amendable. As stated elsewhere in this preamble, the DEA reminds importers and exporters that the duty to file reports and other documents with the DEA includes the duty that these filings be complete and accurate.

The DEA is not allowing importers and exporters to amend information related to the authorization to import or export from the foreign competent national authority. The DEA understands that sometimes, especially in the case of less experienced importers and exporters, the incorrect foreign authorization identifier is entered onto the declaration. This is often the result of numbers being transposed or a different number on the foreign permit being entered instead of the actual authorization identifier. However, similar to the identification of the controlled substance to be imported or exported, the DEA has closely considered this matter and ultimately determined that because the authorization from the foreign competent national authority to import or export a controlled substance is such a critical element to the Administration's ability to monitor and ensure the closed system of distribution, this element should not be amendable. As stated above and elsewhere in this document, the DEA reminds importers and exporters that the duty to file reports and other documents with the DEA includes the duty that these filings be complete and accurate.

Importers and exporters will not be able to request an amendment to a filed import or export declaration for changes to the importer or exporter's name (as it appears on their DEA certificate of registration) or the name of the foreign importer or exporter. The DEA considers the name of the foreign importer or exporter to be a key factor in determining associated risks of the diversion of controlled substances. Therefore, these fields would not be amendable.

The DEA will continue to allow importers and exporters to amend any additional associated company names they are DBA (doing business as) that they wish to have included in the notes section of the declaration; such amendments would be required to be made through the DEA Diversion Control Division secure network application.

Importers and exporters will be required to make an official request through the DEA Diversion Control Division secure network application for an amendment. Supplementary information submitted by an importer or exporter through the DEA Diversion Control Division secure network application will not automatically trigger the amendment process. An amendment will have no effect on the date of expiration of the declaration; an amended import or export declaration will have the same expiration date as the originally filed declaration.

Importers and exporters will be able to request that filed import or export declarations be canceled provided that no shipment has yet been made.

Registrants will be required to submit all requests for an amendment that will affect the total base weight of each controlled substance, other than those allowed to be released into the United States pursuant to §§ 1312.18(f) and 1312.16(a)(5), at least three business days in advance of the date of release by CBP. Three business days are the minimum amount of time that the DEA needs to review this type of requested amendment and transmit the applicable data to the ITDS. All other requests for amendment will be required to be submitted to the DEA at least one business day before the anticipated date of release by a customs CBP officer at the port of entry or port of export. One business day is the minimum amount of time that the DEA needs to review and accept the requested amendment and transmit the applicable data to the ITDS.

DEA registrants have been able to submit DEA forms electronically for several years, and are familiar with the DEA Diversion Control Division secure network application system. If a DEA registrant needs to change information on a declaration that is not amendable, they must submit a new declaration. 21 CFR 1312.12, 1312.18, 1312.22, and 1312.27. The registrant will follow the same process used with the original submission and submit the forms electronically. The DEA will review the submission, process the document and issue a Transaction Identification Number (TIN). The estimated time to complete the online document is minimal. Requiring the new submission will ensure the integrity of the information in the DEA system as well as what is transmitted to CBP.

To make an allowable amendment, a DEA registrant will access the DEA Secure Network Application and provide the Transaction Identification Number which was assigned with the original submission. The system will provide access to the registrant's declaration, and the registrant can then make the appropriate changes. The DEA will review the changes and process the document. To ensure that there is no delay in CBP releasing a product from being imported or exported, the DEA provides the amended documents or new submissions to CBP in its daily feed.

As a result of the ITDS/ACE system relying on the Harmonized Tariff System (HTS) used by CBP to properly release products for import or export, the DEA had to identify the proper HTS codes for the substances under its control. The HTS codes are utilized in ACE and directly correlate to Administration Controlled Substance Code Number. As a result, the DEA will not allow a registrant to amend a declaration by adding a controlled substance that has a different Administration Controlled Substance Code Number. This will ensure a more streamlined process and will allow CBP to efficiently release product in a timely manner.

As stated previously all countries that are parties to international drug control treaties have an established CNA that oversees the handling of controlled substances and listed chemicals to include the approval of imports and exports. All CNAs make certain reports to the INCB on the distribution of the substances being imported and exported. The DEA communicates directly with CNAs or through the INCB if issues arise regarding official authorization documents submitted to the DEA by DEA registrants.

For the reasons stated above, the DEA is also requiring mandatory electronic filing of return information for controlled substances imported or exported under declaration procedures.

4. Imports, Exports, and International Transactions for Listed Chemicals

The DEA is amending part 1313 to provide that each regulated person who seeks to import or export a listed chemical that meets or exceeds a threshold quantity, must notify/provide a declaration to the DEA (by filing a DEA Form 486/486A through the DEA Diversion Control Division secure network application) of the intended import or export not later than 15 calendar days before the date of release by a customs officer at the port of entry. Regarding imports and exports for those entities with regular customer and regular importer status, the notification must be filed at least three business days before the date of release by a customs officer at the port of entry. All declarations must be signed and dated by the importer or exporter and must contain the address of the final destination for the shipment.

The DEA is specifying that all listed chemical declarations expire in 180 calendar days, consistent with the controlled substance import/export permits. If release by a customs officer will occur more than 180 calendar days after the declaration is deemed filed, the declarant must submit a new declaration for the transaction.

In § 1313.32 the DEA is incorporating the mandatory electronic filing of notifications of international transactions involving listed chemicals which meet or exceed the threshold amount identified in § 1310.04. The broker or trader must notify the DEA (by filing a DEA Form 486 through the DEA Diversion Control Division secure network application) of the intended international transaction not later than 15 calendar days before the transaction is to take place. The DEA is amending § 1313.32 to require that notifications of international transactions would not be deemed filed until a transaction identification number has been issued by the DEA. This change is designed to ensure that electronically submitted notifications are received by the DEA, are completed, and can be appropriately tracked and monitored; to streamline the notification filing process; and eliminate duplicate filings.

5. Reexportation of Controlled Substances Among Members of the European Economic Area

This final rule implements section 4, Re-exportation Among Members of the European Economic Area, of the Improving Regulatory Transparency for New Medical Therapies Act, Public Law 114–89 (hereinafter ''the 2015 Act''), which was signed into law on November 25, 2015. Section 4 of the 2015 Act amended section 1003 of the Controlled Substances Import and Export Act (CSIEA) (21 U.S.C. 953) by making changes to paragraph (f) and adding paragraph (g), changes that allow for expanded reexportation of certain controlled substances among members of the European Economic Area (EEA). Prior to passage of the 2015 Act, the CSIEA (21 U.S.C. 953(f)) provided, with respect to controlled substances in schedule I or II and narcotic drugs in schedule III or IV, that such substances could be exported from the United States for subsequent reexport from the recipient country (the ''first country'') to another country (the ''second country'')—but with no further reexports from the second country. The 2015 Act removed this latter limitation, provided that every country involved is an EEA country, and provided that the conditions specified in the 2015 Act are met.

In order to effectuate the changes contained in the 2015 Act, the final rule implements the following changes:

- Allowing unlimited reexports among EEA countries.
- Eliminating the 180 day time period to complete reexport (reexport from first country to the second country (ies)).
- No longer requiring bulk substances to undergo further manufacturing processes within the first EEA country if the substance is to be reexported within the EEA.
- No longer requiring that the exporter must provide product and consignee information beyond the first country in advance of (prior to) export from the United States.
- Establishing a new Form 161R–EEA for the reporting of reexports among members of the EEA. (The form is accessed, completed, and submitted through the DEA Diversion Control Division secure network application.)

All other requirements that existed prior to the enactment of the 2015 Act (and which were not modified by Congress in 2015 Act) remain. Additionally, persons who export controlled substances for reexport among members of the EEA are required by the law to provide return information to the Attorney General within 30 days after each reexportation, including certification that the reexportation has occurred and ''information concerning the consignee, country, and product.'' 21 U.S.C. 953(f)(6)(B). Finally, while the new law did not have a direct impact on reexports for nonnarcotic controlled substances in schedules III and IV or controlled substances in schedule V, for the purpose of consistency, the DEA is making corresponding changes to its reexport of controlled substances under declaration procedures found in § 1312.27.

6. Domestic Transaction and Import and Export Reports for Tableting and Encapsulating Machines

The DEA is mandating electronic reporting requirements in § 1310.05 for all regulated transactions involving tableting machines and encapsulating machines, including domestic, import, and export transactions. To standardize and streamline the electronic filing of these reports, the DEA is implementing usage of a new form, DEA Form 452, Reports for Regulated Machines, which covers imports, exports, and domestic regulated transactions of tableting and encapsulating machines. The new form will be accessed, completed, and submitted by regulated persons entirely though the DEA Diversion Control Division secure network application. Upon receipt and review, the Administration will assign each completed report a transaction identification number. The DEA Form 452 will not be deemed filed until the Administration issues a transaction identification number. This change is designed to ensure that electronically submitted reports are indeed received by the DEA, are completed, and can be appropriately tracked and monitored; to streamline the report filing process; and to eliminate duplicate filings.

The DEA Form 452 is used for both domestic transactions and import/export transactions of tableting and encapsulating machines, and the reporting requirements implemented by this final rule differ.

Domestic Transactions: Previously in 21 CFR 1310.05(a)(4) and (b), regulated persons who engaged in a domestic regulated transaction in a tableting or encapsulating machine are required, whenever possible, to make an oral report to the DEA Divisional Office in advance of the transaction, followed by a written report. The new § 1310.05(b)(2) in the final rule, makes the oral reporting mandatory and mandates the electronic filing of the written report. Additionally, the new § 1310.05(b)(2) requires regulated persons to orally report domestic regulated transactions in a tableting machine or an encapsulating machine when an order is placed rather than at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. The written report (DEA Form 452) is required to be filed within 15 calendar days after the order has been shipped by the seller.

Import/Export Transactions: The DEA is requiring that the DEA Form 452 be submitted to the DEA through the DEA Diversion Control Division secure network application 15 calendar days before the anticipated date of arrival at the port of entry or port of export. Under this final rule, an importer or exporter may not initiate an import or export transaction involving a tableting machine or encapsulating machine until the regulated person has been issued a transaction identification number from the Administration. The importer or exporter may proceed with the import or export of the machine(s) as soon as the transaction identification number has been issued. These changes are in § 1310.05(c). Additionally, the DEA revised § 1310.06(e)(1)(v) so that reports of importation of tableting or encapsulating machines include the reason for the importation, *i.e.,* medical, commercial, scientific, or other legitimate use of the machine.

The DEA also added paragraph (c)(2) to § 1310.05 to require import shipments of tableting machines or encapsulating machines that have been denied release by customs to be reported to the Administration, through the DEA Diversion Control Division secure network application, within 5 business days of denial. If an importer subsequently receives notice from a customs officer that their shipment will be released into the United States, the importer is required to file an amended DEA Form 452 with the DEA before the shipment may be released. In such circumstances, the regulated person may seek to have the tableting machines or encapsulating machines released by customs upon receipt of a transaction identification number for the refiled and amended DEA Form 452 without regard to the 15-day advance filing requirement.

The DEA is requiring electronic filing of return information, specifying the particulars of the transaction, for tableting and encapsulating machines imported or exported within 30 calendar days after actual receipt of a tableting or encapsulating machine, or within 10 calendar days after receipt of a written request by the Administration to the importer, whichever is sooner. Return information requirements are incorporated into a new paragraph (h) in § 1310.06 and requires the filing of the report with the Administration (on DEA Form 452) utilizing the DEA Diversion Control Division secure network application.

7. Mail Order Reporting for Ephedrine, Pseudoephedrine, Phenylpropanolamine, and Gamma-Hydroxybutyric Acid

The DEA is incorporating mandatory electronic reporting requirements into part 1310 for monthly reports of mail-order transactions involving ephedrine, pseudoephedrine, phenylpropanolamine, and gamma-hydroxybutyric acid (including drug products containing these chemicals or controlled substance) required to be filed in accordance with § 1310.03(c) pursuant to 21 U.S.C. 830(b)(3). To standardize and streamline the electronic filing requirements of these monthly mail-order reports, the DEA is implementing usage of a new form, DEA Form 453. The new form will be accessed, completed, and submitted by regulated persons entirely through the DEA Diversion Control Division secure network application. 21 CFR 1310.03(c) is further revised to reflect that reports would not be deemed filed until the Administration issues a transaction identification number unless they are complete upon submission. This change is designed to ensure that electronically submitted reports are indeed received by the DEA, are complete, and can be appropriately tracked and monitored; to streamline the report filing process; and to eliminate potential duplicate filings. The previous § 1310.06(i), redesignated in this final rule as § 1310.06(k), is revised to reflect that the monthly mail-order information is required to be submitted to the DEA on Form 453. 21 CFR 1310.03(c) is further revised by separately listing the requirement for monthly reports to be submitted by regulated persons who engage in the specified domestic mail-order transactions and export transactions. This revision also more plainly lays out the requirement that the regulated person must be engaged in a transaction with one of the specified chemicals or controlled substance and use or attempt to use the U.S. Postal Service or any private or commercial carrier for both activities in order to be required to file the monthly report. This revision is not intended to impose any different requirements than the current regulation, but only to ease understanding of the reporting requirements. 21 CFR 1310.05(e) would correspondingly be amended to reflect the implementation of the mandatory electronic filing requirement.

The DEA is also technically amending § 1310.05(d) to revise the mailing information in the second sentence and to replace the term ''shall'' in three locations without changing the requirements.

8. Transshipments of Controlled Substances

Applications for transshipment permits are still allowed to be submitted to the DEA via paper in accordance with the existing procedures under § 1312.31 for schedule I controlled substances. Information will be posted to the DEA Diversion Control Division Web site informing persons seeking to transship schedule I controlled substances on how to submit an application for a transshipment permit. Advance notification of transshipments for schedule II, III, and IV controlled substances would also still be allowed to be submitted to the DEA via paper in accordance with the current § 1312.32. The electronic application and filing process is not feasible in such circumstances because foreign IP addresses are blocked by the Department of Justice's firewall and are prevented from accessing the DEA Diversion Control Division secure network application. Although the transshippers themselves would not have direct access to the instructions on the DEA Web site due to the firewall protection, it is the DEA's understanding that most transshippers have someone in the United States as a domestic presence facilitating the transaction who will be able to access the instructions. There is no change from the current operational system. The DEA is explicitly stating in §§ 1312.31 and 1312.32 that a separate filing is required for each shipment, conforming the requirements of this section with the requirements for imports and exports of controlled substances in part 1312.

9. Transshipment of Listed Chemicals

Advance notification is still allowed to be submitted to the DEA via paper in accordance with the existing procedures under § 1313.31 for persons seeking to import a listed chemical that meets or exceeds the threshold reporting requirements into the United States for transshipment. Advance notification is also still allowed to be submitted to the DEA via paper in accordance with the existing procedures under § 1313.31 for persons seeking to transfer, or transship listed chemicals within the United States for immediate exportation. The electronic application and filing process is not feasible in such circumstances because foreign IP addresses are blocked by the Department of Justice's firewall and are prevented from accessing the secure network application on the DEA Diversion Control Division Web site. While a broker or trader for an international transaction might be able to electronically submit the required information from a domestic IP address, for consistency and fairness across all transshipment activities, the DEA is allowing paper applications and notices to continue for all transshipment transactions. Although the transshippers themselves would not have direct access to the instructions on the DEA Web site due to the firewall protection, it is the DEA's understanding that most transshippers have someone in the United States as a domestic presence facilitating the transaction who will be able to access the instructions. There is no change from the current operational system.

D. List of Changes in the Final Rule

This section discusses the minor changes implemented by this final rule that were not discussed in the NPRM. The minor changes include, among others, correcting minor typographical errors and updating citation listings and internal organizational changes within the DEA.

The effective date of this final rule remains 30 days from the date of publication. However, the compliance date was extended to 180 days after the publication of the final rule for all transactions, not only for tableting and encapsulating machines.

The DEA has eliminated the definitions of shipment and split shipment that were proposed in the NPRM. Because of the elimination of these definitions, the DEA has amended §§ 1312.13(e) and 1312.23(e) in a manner that is different than proposed. The language added to this section emphasizes that a shipment of controlled substances is limited to a single transaction between a single importer or exporter and a single consignee on a single loading document, but also that the shipment must occur on a single conveyance as opposed to multiple conveyances. In addition, the language will coincide with current policy by prohibiting a load of goods from being divided into multiple parts to be placed onto more than one conveyance, even if the goods are on the same loading document. A single permit could not be used for this situation above.

In §§ 1310.05, 1312.12, 1312.18, 1312.22, 1312.27, 1313.17, and 1313.27, the 24-hour reporting requirement to the DEA for the denial of imported/exported controlled substances, listed chemicals, tableting or encapsulating machines, has been changed to five business days.

In revised §§ 1312.22(d)(1), 1312.31(d)(4), and 1312.32(b), the phrase ''and the attestation has been notarized'' has been deleted.

II. Discussion of Comments

The DEA received 12 comments on the NPRM. Eleven commenters generally supported this rule while also raising issues of concern and one commenter expressed opposition to the NPRM. Three comments were not posted due to the entire comment containing confidential business information; one comment was not posted because it was unrelated to the NPRM; thus, only eight comments were posted. All of the relevant comments are summarized below, along with the DEA's responses.

A. Electronic Applications and Filings, Generally (5 Issues)

[1] *Comment:* Two commenters asked for clarification regarding the signature requirement applicable to declarations and applications submitted via the DEA Diversion Control Division secure network application.

Response: The user will login to the DEA Diversion Control Division secure network application using the user name and password. Upon completion of any of the forms associated with this rule, the user must submit the form by acknowledging the information on the form is complete and accurate. The acknowledgement serves as a signature. The DEA believes the use of electronic forms will eliminate the need for manual signatures and result in an overall reduction in burden. In addition, this rule does not alter the signature requirements for other documents; the definitions of ''digital signature'' and ''electronic signature'' (as defined in § 1300.03), and the requirements for signatures associated with electronic orders and electronic prescriptions (as found in part 1311) remain unchanged.

[2] *Comment:* Three commenters suggested that the DEA should provide for the continued availability and use of paper forms and hard copy reporting for imports and exports. Two commenters stated that other DEA systems such as CSOS and ARCOS have similar provisions, and in the event that the DEA's electronic system was unavailable for any reason, an alternate method of applying for and approving imports and exports is needed as a

contingency. However, the commenter stated that the DEA needs to have a stable electronic declaration system with no programming issues, because if a glitch in the system occurs, this could result in delayed shipments and significant cost for industry. The commenter stated that it was essential for importers and exporters to continue to have the paper option for more time to correct any information derived from other databases that may be inaccurate. The commenters also requested that CBP provide additional guidance on how and by whom the electronic [CBP] certifications should be submitted, in order to ensure that companies are able to meet all of the DEA legal requirements.

Response: Upon review of results from the ITDS Pilot Program, the DEA is extending the compliance date of the final rule to 180 days after publication for all provisions contained in the rule.[8] The ITDS Pilot Program (discussed above and in the General Notice at 81 FR 46058, July 15, 2016) has been underway since August 2016. Although no system failures or processing errors occurred during the ITDS Pilot Program, the DEA believes that more electronic transactions will provide a better test of the secure network application. The DEA anticipates that, during the extended compliance period, registrants and regulated persons will utilize both the secure network application and the current paper-based system. This will allow DEA to continue to test the integrity of the secure network application and enable DEA to correct any systemic issues while also ensuring an alternate method to conduct business is available so that trade is not impeded.

In response to the request that CBP provide additional guidance on how the electronic certifications should be submitted and by whom, the DEA recommends reviewing the ITDS implementation guidelines on CBP's Web site, *https://www.cbp.gov/document/guidance/dea-implementation-guide-ace.*

[3] *Comment:* Three commenters stated that currently, the only way to submit a Declaration/Application for import/export from an analytical laboratory registrant is by sending a hard copy to the DEA, and that the DEA Diversion Control Division secure network application does not support imports/exports from analytical laboratory registrants. The commenter noted that, since an analytical laboratory is not required to register drug codes on the registration, the drop down list on the secure network application would need to be extensive or a free text box would need to be added. In addition, because there are many drug impurity reference standards that are imported/exported, the commenter suggested that the continued use of a paper-based system for imports/exports from analytical laboratory registrants is necessary until a free text box is added to the secure network application.

Response: As discussed, the DEA is extending the compliance date of the final rule to 180 days after publication for all provisions contained in the rule. The ITDS Pilot Program (as discussed and in the General Notice at 81 FR 46058, July 15, 2016) has been underway since August 2016. Although no system failures or processing errors occurred during the ITDS Pilot Program, the DEA believes an extended compliance date will enable more electronic transactions to test the integrity of the secure network application and ensure DEA can address any systemic issues before mandatory compliance. However, with the implementation of ITDS, the DEA Diversion Control Division secure network application will enable analytical laboratory registrants to provide all of the required information electronically. Any registrant, including analytical laboratories, unable to complete the necessary import/export forms for any reason may contact Diversion Control Division's Regulatory Section at 202–307–7194 or *CSIMEX@usdoj.gov.* Unforeseen issues that prevent any registrant from completing the necessary import/export forms will be resolved on a case-by-case basis.

[4] *Comment:* Two commenters expressed concern that requiring registrants to report the date that the product was released by a customs official as well as the amount released by a customs official is repetitive since the Automated Commercial Environment (ACE) systems will include this information. The commenters requested that the DEA remove this requirement from the proposed rule. In support of their request, the commenters stated that it would be difficult for the registrant to obtain this information since these activities are handled by their brokers, and the registrant does not have access to the ACE system. The commenters went on to say that traditionally, the registrant reports when the substances leave their facility as this is the only date the registrant has direct knowledge of.

Response: The DEA appreciates the commenter's concerns. The DEA believes the release date is available. Some importers/exporters may need to obtain this information from their brokers. To remove the ambiguity created from the ''date of import,'' the DEA chose the date of release by a customs officer. In addition, the DEA is requiring the date the shipment arrives (for imports) or leaves (for exports) the registered location or place of business. These two dates provide the proper accountability of the amounts of controlled substances or listed chemicals.

[5] *Comment:* One commenter expressed concern about the protection of data submitted electronically. The commenter supported the use of electronic submissions to streamline customs procedures, and requested additional information regarding how electronically submitted confidential business information would be protected, especially in light of the significant security and competitive business interests at stake regarding the data contained in such transmissions. The commenter stated that it was essential that CBP take adequate measures to secure and protect this data from public access and release, and suggested that CBP implement training and certification procedures for employees with access to such information.

Response: The DEA cannot respond to questions regarding CBPs information system security practices. All questions regarding CBPs information system security practices should be directed to CBP.

B. Import and Export Permits for Controlled Substances (5 Issues)

[1] *Comment:* One commenter requested that the DEA eliminate the proposed requirement that a translation be notarized when a translation of a foreign government-issued import license or Permit is necessary, because the wording in the current DEA regulations is sufficient. The commenter stated that the requirement that any such translation be notarized is not necessary, because it would place an additional burden on exporters without a commensurate benefit.

Response: The DEA proposed that translations be notarized in order to ensure that translations are complete and accurate. However, the DEA has reviewed this comment and after further consideration has removed the

[8] The final rule will be effective 30 days after publication in the **Federal Register** so registrants and regulated persons may opt to either submit forms and report information electronically via the secure network application in anticipation of the mandatory compliance date, or registrants and regulated persons may continue with paper submissions until the mandatory compliance date. This will not affect DEA's ability to continue to submit data to the ITDS/ACE.

requirement for a notarized translation in §§ 1312.22, 1312.31, and 1312.32. The DEA is retaining the requirement that the translator certify the translation. For the purposes of this requirement, certified translation means that the translator has signed the translation legally attesting to the accuracy of the translation. The regulatory text in §§ 1312.22(d)(1), 1312.31(d)(4), and 1312.32(b) have been modified to reflect this change.

[2] *Comment:* One commenter asked for clarification about what is meant by ''serial number'' and how this information would be used to identify the foreign consignee. The commenter also wanted to know what to do if no such designation is present on the current packaging. Finally, the commenter wanted to know what the definition of ''narcotic'' was in this context.

Response: The DEA proposed to modify § 1312.26 because it required exporters to keep Copy 3 of the export permit along with ''any serial numbers that might appear on packages of narcotic drugs in quantities of one ounce or more in such a manner as will identify the foreign consignee.'' As discussed in the NPRM, with the implementation of ITDS, Copy 3 is obsolete and with this final rule, exporters will be required to keep an ''official record of the export permit,'' rather than Copy 3, with any such serial numbers. As the NPRM did not propose or discuss any other modifications to § 1312.26, the comment will be considered as a basis for potential modifications in the future.

[3] *Comment:* Two commenters sought further modification of the pre-NPRM and pre-final rule regulation at § 1312.22(d)(7) (implemented as § 1312.22(h)(6) by this final rule) which requires that a controlled substance ''will be exported from the first country to the second country (or second countries) no later than 180 days after the controlled substance was exported from the United States.'' As these commenters noted, this 180-day requirement was established by the DEA in the 2007 regulation implementing the Controlled Substance Export Reform Act of 2005 (CSERA), but was not imposed by the CSERA itself. Noting that the 2015 Act contains a provision (21 U.S.C. 953(g)(1)) that eliminates the 180-day requirement for reexports within the EEA, some commenters requested that the DEA remove this requirement for all markets (not just the EEA countries) as they view it as an unnecessary hindrance. One commenter requested that the DEA increase the 180-day requirement to 365 days for reexports outside of the EEA.

Response: This category of comments is outside the scope of the NPRM. As indicated above, the 180-day requirement was implemented in a rulemaking that concluded in 2007 (72 FR 72921, December 26, 2007), and this requirement was *not* issued for public comment in the NPRM. For the reasons stated above and in the NPRM, consistent with the 2015 Act, the DEA eliminated the 180-day requirement for reexports within the EEA. However, the 2015 Act left intact the reexport requirements for reexports outside of the EEA and, accordingly, the NPRM did not reopen for public comment the regulatory requirements for reexports outside the EEA. Rather, with regard to reexports, the NPRM only sought comments on the new regulations that were necessitated by the 2015 Act.[9] While the 180-day requirement for reexports outside the EEA is therefore outside the scope of the NPRM, DEA continues to believe that the justification for the requirement set forth in the 2006 proposed rule (71 FR 61436, October 18, 2006) and 2007 final rule remains valid.

[4] *Comment:* One commenter asked for clarification in reference to adding a reexport market to the list of countries on the Export Declaration after the initial U.S. Export.

Response: All countries that are parties to any of the Conventions referred to in 21 U.S.C. 953(f)(1) will be included in the list of countries when completing forms 161R and 161R–EEA. Countries that are not parties to any of the Conventions will not be included as, consistent with the statute, reexport permits would not be granted for shipments to those countries.

[5] *Comment:* One commenter commented on the DEA's proposed definition of shipment. This commenter stated that the definition of shipment conflicts with how it is used in the DEA's regulations. First, the commenter reasoned that because the definition of shipment is placed in §§ 1300.01 and 1300.02 then this definition will apply to all parts of the DEA's regulations. Second, this commenter noted that the definition of shipment applies only to goods that are imported or exported. By defining shipment in this manner, the commenter reasoned that the term shipment can no longer be used in reference to domestic transactions involving controlled substances and listed chemicals. In addition, the commenter stated that shipment as defined conflicts with the definition of international transaction as set forth in 21 U.S.C. 802(42). International transaction is defined in part as, ''a transaction involving the shipment of listed chemicals across an international border (other than a United States Border) * * *.'' As such, this commenter noted that the CSA contemplates shipments that are not imports into the United States or exporters from the United States.

Response: The DEA appreciates this comment. Based on this comment the DEA has decided to modify the regulation text in a way that is different than what was proposed. To remove the possibility of having the definition of shipment apply to all of DEA's regulations, the DEA is removing the definition of shipment from the definition sections of §§ 1300.01 and 1300.02. In addition, the DEA is removing the definition of split shipment from the same sections. The DEA has modified the text of §§ 1312.13(e) and 1312.23(e) relating to the issuance of import and export permits. The language added in these sections allows for the same intended effect as the proposed language while eliminating the possibility of having the definition of shipment apply to all DEA regulations. Therefore, the introduction of this language will emphasize that a shipment of controlled substances is limited to a single transaction between a single importer or exporter and a single consignee on a single loading document, but also that the shipment must occur on a single conveyance (*e.g.,* one plane, one ship, or one freight train—but not each rail car), as opposed to multiple conveyances (*e.g.,* two planes, two ships, two freight trains, or any combination thereof). In addition, the language will coincide with current policy by prohibiting a load of goods from being divided into multiple parts to be placed onto more than one conveyance, even if the goods are on the same loading document. A single permit could not be used for this situation above.

C. Import and Export Declarations for Controlled Substances (1 Issue)

[1] *Comment:* One commenter requested that the DEA clarify whether an import or export declaration is effective immediately upon assignment of a Transaction Identification Number by the DEA so that the importer or exporter does not need to wait the full 15 days. The commenter also asked for additional clarification to make clear

[9] For formatting purposes, the NPRM renumbered certain regulations relating to reexports outside the EEA, and thus the text of such regulations was included in the proposed rule section of the NPRM. However, the substance of such regulations was not altered from that promulgated in the 2007 final rule.

that if the DEA has not issued a Transaction Identification Number within 15 days of submission of the declaration, the import or export can be shipped, as is currently allowed. The commenter stated that if this was not the case then importers or exporters could have to wait much longer than 15 days for DEA to issue the Transaction Identification Number, which would be a significant change from current practice.

Response: Controlled substances may be imported or exported as soon as a Transaction Identification Number (TIN) is issued. The DEA works expeditiously to confirm the accuracy of the declarations and will issue a TIN as soon as possible. When the TIN is issued for a controlled substances declaration in less than 15 days the importers and exporters may immediately request release by a customs official and do not need to wait for the expiration of the 15 days. Any delay in issuing a TIN is generally due to incomplete or inaccurate information on the declaration form and the submitters delay in providing complete and correct information. The declaration is deemed submitted when a TIN is issued; therefore, in the rare instances where 15 days have elapsed without the issuance of a TIN, the importer or exporter must wait for the TIN and may not request release by a customs official. As a practical matter, in the new ITDS/ACE system the customs official will not release a shipment without DEA's transmission of the TIN (among other data) to CBP.

D. Import and Export Declarations and Notices for Listed Chemicals (13 Issues)

[1] *Comment:* One commenter was concerned with the proposal to require electronic filing of the DEA Form 486 via the Diversion Control Division secure network application. The commenter was concerned whether steps have or will be taken to reduce confusion or delays in releasing an import or export declaration that may be associated with multiple electronic DEA Form 486s but only a single invoice. In addition, the commenter wanted clarification on whether the DEA had consulted with foreign competent national authorities regarding the impact of requiring the processing of multiple electronic DEA Form 486s relating to the same order, in light of the fact that foreign competent authority applications are not limited to a specific number of lines for a particular order or license application.

Response: The DEA appreciates the commenter's concerns. The concerns raised by the commenter are beyond the scope of this rulemaking and will not be addressed. However the DEA does not take issue with the use of multiple Form 486s.

[2] *Comment:* One commenter requested clarification on the differing requirements for an import or export transaction to proceed upon receipt of the TIN. The commenter wanted to know if the DEA intended for exporters to request release from customs immediately after issuance of the TIN as explicitly stated for importers.

Response: The DEA intends to treat importers and exporters the same in regards to the import or export transaction proceeding upon receipt of the TIN. However, allowing listed chemicals to ship before the 15-day notification requirement would be in conflict with 21 U.S.C. 971(a). Referring to import declarations, § 1313.12(b) states that listed chemicals that meet or exceed threshold quantities identified in § 1310.04(f), or which do have an established threshold, may not be imported until a transaction identification number (TIN) has been issued, and the Administrator shall be notified of the importation of the listed chemical not later than 15 days before it takes place. Referring to export declarations, § 1313.21(b) states that exporters may not request that the listed chemical be released until a transaction identification number (TIN) has been issued. The Administrator shall be notified of the importation of the listed chemical not later than 15 days before it takes place. Therefore prior to export or import a TIN has to be issued and importers and exporters have to wait the 15-day period.

[3] *Comment:* Four commenters recommended that the DEA establish a regulatory timeframe by which the agency will issue transaction identification numbers to allow for business certainty. One commenter recommended an initial deadline of three business days for the DEA to review a transaction and issue the transaction identification number. The commenters expressed a concerned about business decisions and timing. They stated that the lack of a definite deadline to issue the transaction identification number will cause delayed or canceled shipments and lost revenues.

Response: The DEA understands the commenters' sensitivity to time and potential for competitive advantage/disadvantage based on timely shipment of products. However, the DEA declines to set a specific timeframe for the issuance of a TIN. The DEA works expeditiously to confirm the accuracy of the declarations and will issue a TIN as soon as possible. Any delay in issuing a TIN is generally due to incomplete or inaccurate information on the declaration form and the submitters' delay in providing complete and correct information.

[4] *Comment:* Two commenters requested that the DEA clarify the discrepancy between whether the timeframe is three calendar days or three business days advance notification before the date of release by customs officers at the port of entry. One commenter suggested that since the time period is so small, the DEA should use its proposed text to require three business days to allow sufficient time for businesses to react to the unexpected delays or unexpected promptness of shipments. The commenter recommends that the DEA add appropriate language within the text of the rule clarifying its statement in the preamble that registrants can proceed with the import or export transaction as soon as the transaction identification number has been issued regardless of whether the three days have passed.

Response: The DEA appreciates the opportunity to correct any errors. After reviewing the language in the preamble the DEA, in two instances, erroneously stated 3 ''calendar'' days, rather than ''business'' days. The DEA has corrected the language in the preamble. The term three ''business'' days is also discussed repeatedly in the preamble and clearly stated in the regulatory text. However, importers and exporters may proceed with the transaction as soon as the TIN is issued regardless of whether the three days have elapsed. The regulatory text has been updated to clarify this requirement.

[5] *Comment:* One commenter requested that the DEA issue waivers/exemptions with respect to the proposed revisions in §§ 1313.12, 1313.14, and 1313.17. These proposed revisions would require that all imported shipments first go to the registered location before being subsequently shipped to the final destination (referred to within the industry as ''drop shipment''). The commenter cited potential shipping risks and the substantial economic hardships small U.S. businesses would face in the competitive world market as a result of the proposed revisions. The commenter also expressed concern about the fact that the proposed revision to § 1313.14, did not specify whether it applied to List I or List II chemicals or both.

Response: The DEA appreciates the commenter's concerns. The proposed revision to § 1313.14 still applies to List I chemicals. ''Drop shipments'' have always been permitted for List II chemicals, and this rulemaking will not change that. However with respect to List I chemicals, page 63598 of the published NPRM stated,

> The final destination for an import of a list I chemical must be the registered location of the registered importer. The import must be received at the registered address of the importer before being moved to another location of the importer or delivered to a customer. The receipt of imported goods is a principal activity of registered list I chemical importers. Pursuant to 21 U.S.C. 958(h), a separate registration is required at each principal place of business where applicants import or export list I chemicals. Accordingly, the final destination of a shipment of an imported list I chemical is the registered location of the registrant. Drop shipments, *i.e.,* deliveries made by an importer directly to a customer without passing through the registered location of the importer, are explicitly prohibited under the proposed revisions to § 1313.14.

[6] *Comment:* Five commenters suggested that the DEA allow listed chemicals to be relieved of the 15-day waiting period as allowed for controlled substances. The commenters stated that the DEA did not explain the reasoning behind this decision, and that it was inconsistent with other DEA regulations that treat controlled substances with stronger regulation than listed chemicals. The commenters recommended that the DEA modify the proposed rule to state that listed chemicals can also proceed with the import or export transaction as soon as the transaction identification number has been issued, regardless of whether the 15 calendar days have elapsed since its issuance

Response: After careful consideration, the DEA has decided not to allow the shipment to proceed when the TIN is issued. As stated above prior to export or import a TIN has to be issued and importers and exporters have to wait the 15-day period.

[7] *Comment:* One commenter stated that the proposed amendments to §§ 1313.12(d) and 1313.21(d) to require an import or export declaration on DEA Form 486 or 486A at least three business day before the date of release by a customs officer exceeds the statutory authority granted to DEA under 21 U.S.C. 971(b). The commenter stated that the previous versions of §§ 1313.12(d) and 1313.21(d) are consistent with the statutory limit on the timing of the waiver for transactions involving regular importers and regular customers.

Response: The DEA appreciates this comment. However, the DEA continues to believe that this modification is within its statutory authority pursuant to 21 U.S.C. 971. As stated in the NPRM it is necessary for DEA to provide customs officers with the necessary information first so that the customs officers can then clear a shipment of relevant listed chemicals. Because of this, the DEA determined that three business days is needed to review all pertinent information relating to the shipment and transmit the data accurately to the ITDS. As a result, the waiver of the entire 15 day period can no longer be applied in these specific instances.

As stated in the NPRM accompanying this final rule, 21 U.S.C. 971(b) provides the DEA with authority to waive the 15 day requirement, by regulation, for imports of listed chemicals by regular importers and exports of listed chemicals between regulated persons and regular customers. The DEA is exercising this authority in the final rule. The DEA does acknowledge that 21 U.S.C. 971(b)(1) requires regulated persons subject to waivers to notify the DEA of the transaction ''at the time of any importation or exportation.'' To maintain the effect of this provision the DEA is allowing registrants to proceed with the import and export transaction as soon as the transaction identification number is issued, regardless of whether the three-calendar day period has concluded. In addition, the DEA considers the notification provided to the DEA by the customs officers at the time of release to meet the requirements of 21 U.S.C. 971(b)(1). With these two allowances the DEA believes that it is meeting the statutory requirements and is setting forth reasonable requirements.

[8] *Comment:* One commenter stated that the wording used in revised §§ 1313.12(d) and 1313.21(d) is ambiguous. The commenter noted that the ''name and description'' of a listed chemical may not appear on the product label, and that DEA labeling requirements apply to controlled substances and not listed chemicals. The commenter suggested that the phrase ''name and description of each listed chemical'' would be better phrased as ''trade name of the listed chemical or mixture containing one or more listed chemical.'' The commenter argues that this wording would be consistent with § 1310.13, which requires an applicant for exemption from registration to provide the DEA with the trade name(s) of it chemical mixture(s).

Response: Under the DEA labeling requirements, the ''name and description'' of a listed chemical does not necessarily mean the trade name. The DEA is looking to determine what the listed chemical is. Therefore the trade name is not the only description that can be used.

[9] *Comment:* One commenter suggested an amendment to the DEA Form Data. The commenter stated that the current wording could require that any waiting period in the consignee country be completed before beginning any waiting period in the United States. The commenter stated that variations in national requirements may result in situations where the consignee is not required to have a permit; this would accommodate situations in which the competent national authority of a consignee may require documentation of a bona fide intent to import prior to issuing a permit; finally this would expedite shipments by allowing concurrent waiting periods in both countries.

Response: The registrant would still be required to abide by the laws of the country of import.

[10] *Comment:* Two commenters expressed concern over the proposed amendment to the language in §§ 1313.17 and 1313.27 to require an importer or exporter to notify the DEA within 24 hours of the denial of the release of an import or export of listed chemicals. The commenters asked that the DEA remove the 24-hour period, because the need for the shortened time frame was not apparent, and cited instances where it might been unworkable because the consignor and customs agents are working different schedules, the denial occurs late Friday or over the weekend, or the business office is closed for 24 or more hours during which customs may have denied the release.

Response: Thank you for your comment. Two commenters expressed similar concerns, and the DEA has decided to change the 24-hour reporting requirement to a 5-business-day reporting requirement. The DEA believes that this will give registrants enough time to notify the DEA and work with Customs to secure a release. See regulation text changes in §§ 1310.05, 1312.12, 1312.18, 1312.22, 1312.27, 1313.17, and 1313.27.

[11] *Comment:* In proposed 21 CFR 1310.05(b)(1), the DEA added several factors that regulated persons may consider when determining whether a loss or disappearance of a listed chemical was unusual or excessive. One commenter stated that they are not certain the added language provides clarity to persons that handle listed chemicals or the DEA field staff. Specifically, the commenter suggested that the determination of whether a loss or disappearance of a listed chemical is unusual or excessive is fact specific and

could vary even within a specific entity. Against this backdrop the commenter suggested that the DEA remove these factors from 21 CFR 1310.05(b)(1). The commenter also suggested that the inclusion of these factors, while being similar to those factors in 21 CFR 1301.74(c), might cause DEA field staff to consider these factors mandatory.

In the alternative to removing the factors from the regulatory text, this same commenter submitted two suggestions. The commenter suggested that listed chemical handlers should consider these factors only if the factors help the handler determine whether a loss is unusual or excessive. In addition, the commenter suggested that the factors should only be applied as to the specific facts surrounding the loss or disappearance.

Lastly, this commenter requested that the DEA discuss its reasoning for using slightly different factors than the agency uses in 21 CFR 1301.74(c) and to discuss the impact to regulated persons based on this change, including the interpretation.

Response: The DEA appreciates this comment. As noted in the text of 21 CFR 1310.05(b)(1) the consideration of these factors is not mandatory. The DEA states that regulated persons should consider, among others, the factors enumerated. The DEA recognizes that each business entity is unique and has different business practices. As a result, by enumerating these factors the DEA is providing factors that may assist the regulated person. The DEA recognizes and recommends that each regulated person will tailor their system to detect unusual or excessive loss or disappearance of listed chemicals to meet their specific business model. As a result, if the regulated person's business practice allows for the consideration of these factors then the DEA would expect the regulated person to consider the factors in determining if the loss or disappearance of a listed chemical is excessive or unusual. The language used by the DEA in § 1310.05(b)(1) allows for this flexibility. Furthermore, the DEA does not believe that the inclusion of these factors will cause DEA field staff to consider these factors mandatory. It should be noted that the factors used in § 1301.74(c) are not mandatory. Based on the above reasoning the DEA does not think it is prudent to amend the language in § 1310.05(b)(1).

[12] *Comment:* One commenter stated that the DEA's Combat Methamphetamine Epidemic Act (CMEA) provided that listed chemicals could only be imported if a valid customer order was in place. The commenter stated that although they had been abiding by the new language, it was challenging and presented an economic disadvantage due to the business nature of the chemicals they were handling.

Response: This comment is outside the scope of this rulemaking, and the DEA has no authority to modify the requirements of the CMEA.

[13] *Comment:* One commenter asked for electronic IDs for two locations—one for the List I Chemical Registered address and one for the List II Place of Business. The commenter stated that they had been told that all electronic entries are to be under the List I registered address electronic ID. The commenter objected to this, stating that the regulations and accepted addresses are different for List I and List II chemicals. For this reason, the commenter stated that there should be two electronic IDs to differentiate List I chemicals from List II chemicals, and that this should be addressed in the regulations since the DEA was requiring electronic filing of the DEA 486 Forms.

Response: The DEA allows more than one system account, one for List I registered location and one for List II place of business. To resolve any issues regarding system account setup or any other questions regarding listed chemicals declarations, please contact the Regulatory Section at 202–307–7194 or *Chemical.IMEX@usdoj.gov.*

E. Reexportation of Controlled Substances Among Members of the European Economic Area (3 Issues)

[1] *Comment:* Several commenters expressed the view that DEA should strike the proposed regulatory text (§ 1312.22(g)(2)) that requires persons who reexport within the EEA to report to DEA, within 30 days after each reexportion, information concerning the consignee, country, and product that was reexported. According to these commenters, this requirement is difficult, if not impossible, for them to comply with because, according to the commenters, they are unable to track the controlled substances once they are transferred to another owner. As to this point, one of the commenters attached a letter from four members of Congress, written seven months after the bill was enacted, stating that holding the manufacturer responsible for complying with this reporting requirement after a product has ''left the manufacturer's ownership'' would be contrary to the intent of the 2015 Act. In addition, commenters assert that the requirement is unnecessary from a diversion control standpoint and that it could cause them to lose sales to foreign competitors who are not subject to this requirement. As to the letter point, some of the commenters assert that the purpose of the reexport provisions of the 2015 Act is to encourage U.S. commerce abroad and to prevent U.S. drug firms from moving U.S. manufacturing jobs overseas. Some of the commenters also contended that their request to strike this requirement is supported by the provision of the 2015 Act (21 U.S.C. 953(g)) that prohibits DEA from issuing any regulation ''which impedes re-exportation of any controlled substance among [EEA] countries.''

Response: While DEA has considered carefully the concerns of the commenters regarding their compliance with the 30-day reporting requirement, the law precludes the interpretation offered by these commenters that would eliminate this requirement once the controlled substances are no longer owned by the exporter. As stated in 21 U.S.C. 953(f)(6)(B), ''In the case of re-exportation among members of the European Economic Area, *within 30 days after each re-exportation,* the person who exported the controlled substance from the United States delivers to the Attorney General documentation certifying that such re-exportation has occurred and information concerning the consignee, country, and product.'' (Emphasis added.) The language of this statute is clear and there is no mention of ownership being a condition precedent to reporting pursuant to 21 U.S.C. 953(f)(6)(B).

As the United States Supreme Court has repeatedly held, ''If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'' *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843 (1984). Because 21 U.S.C. 953(f)(6)(B) unambiguously requires reporting ''within 30 days after each re-exportation'' within the EEA, and because the statute makes no exception to this requirement based on lack of ownership, DEA is obligated to incorporate this requirement in its regulations.

With regard to the letter from four members of Congress attached by one of the commenters, because this letter was written after the law was enacted, it cannot be considered legislative history. But even if it were part of the legislative history, *Chevron* indicates that the agency cannot rely on it if is inconsistent with the plain language of the statute.

The provision of 21 U.S.C. 953(g) prohibiting DEA from promulgating any regulation that ''impedes'' reexportation within the EEA does not alter this conclusion. Congress could not have meant by this provision that DEA cannot enforce a requirement that Congress itself explicitly enacted. Rather, the logical interpretation of this clause is that DEA cannot impose any *additional* requirements (beyond those imposed by Congress) that would impede reexports within the EEA. As explained in the NPRM, DEA has adhered to this requirement by, for example, omitting from the EEA reexport regulations the requirement in the 2007 regulations that bulk substances undergo further manufacturing processes in the first country before reexporting to the second country.

[2] *Comment:* Two commenters requested that the shipping date should still be acceptable for reexports reported to the DEA, because customs clearance dates are not readily accessible by exporters in the first countries. One commenter expressed concern that requiring first country customs clearance dates would be burdensome and lead to reporting delays. Another commenter stated that for reexports within the EEA, subsequent reexports beyond the second country should not be reportable to the DEA, because this information serves no purpose for the DEA and would be unduly burdensome for U.S. exporters to collect and report.

Response: As stated earlier, the requirement to report the date of release by a customs official remains as proposed. Some importers/exporters may need to obtain this information from their brokers. To remove the ambiguity created from the ''date of import'' and ''date of export,'' the DEA chose the date of release by a customs officer. In addition, the DEA is requiring the date the shipment arrives (for imports) or leaves (for exports) the registered location or place of business. These two dates provide the proper accountability of the amounts of controlled substances or listed chemicals.

[3] *Comment:* One commenter requested that the European Economic Area (EEA) should apply to member countries as of November 25, 2015. For example, this commenter noted that when the 2015 Act was passed on November 25, 2015, the United Kingdom was still a member of the European Union. The commenter suggested that it is unclear whether or not the United Kingdom's EEA membership will be affected after it separates from the European Union. To provide stability in implementing the 2015 Act's provisions, the commenter requested that the DEA consider, for purposes of the 2015 Act, that the EEA countries include those that were members on November 25, 2015.

Response: The 2015 Act is devoid of any language stating that the EEA includes those members as of November 25, 2015. Accordingly, the DEA interprets that for the EEA provisions to apply, the country must be a member at the time the export leaves the United States.

F. Miscellaneous Comments (2 Issues)

Two comments were received that were not within the scope of this rulemaking, and will not be addressed. Both addressed drug scheduling actions that were outside the subject area of this final rule.

III. Section by Section Summary of the Final Rule

A. 21 CFR Part 1300

For purposes of clarity and transparency, the DEA is updating its regulations for consistency of terminology (within DEA regulations, between DEA regulations and the CSA, and between DEA regulations and the regulations of other agencies that regulate imports and exports), to reflect name changes to referenced entities, and to add new definitions. These changes involve both technical and substantive amendments. Additionally, the DEA is making a technical change to more concisely incorporate U.S. obligations under international treaties of drug control, as statutorily codified in the CSA.

B. 21 CFR Part 1301

The DEA is amending §§ 1301.24, 1301.26, to denote the responsibility of customs services of Insular Areas, and not just CBP, to enforce the import and export requirements of the CSA. When controlled substances, listed chemicals, and tableting or encapsulating machines are imported into, or exported from, a U.S. territory (or possession) or an Insular Area of the United States that is not part of the customs territory of the United States, these items are cleared by the customs service of an Insular Area and not CBP.

The DEA is also adding the following citations to be directed to the DEA **Federal Register** Representative: § 1301.34(a)—Filing of written comments regarding application for importation of Schedule I and II substances.

This topic has been added so that comments corresponding to **Federal Register** publications can be sent directly to the **Federal Register** Representative whose responsibility it is to review comments and make them publicly available, as appropriate. The DEA is additionally amending this portion of the table to revise the attention line of the mailing address for the DEA Federal Register Representative. The address will be changed from ''Drug Enforcement Administration, Attn: Federal Register Representative/DRL, 8701 Morrissette Drive, Springfield, VA 22152'' to ''Drug Enforcement Administration, Attn: Federal Register Representative/DRW, 8701 Morrissette Drive, Springfield, VA 22152.'' Additionally, this rule adds the Web address for the Federal eRulemaking Portal, *http://www.regulations.gov,* under the heading ''DEA Federal Register Representative.'' This Web address provides the ability to type short comments directly into the comment field on the Web page or to attach a file for lengthier comments. This change conforms to the DEA's current practice, referenced in the DEA's recent **Federal Register** publications, which requires that comments either be submitted through *http://www.regulations.gov* or be directed to the DEA Federal Register Representative.

C. 21 CFR Part 1302

Corresponding to the removal of ''jurisdiction of the United States'' and the revised definitions of ''export'' and ''import,'' the DEA is making a corresponding technical change to § 1302.07 to reflect those definitional changes. The sealing requirement would be separately stated for imports and exports. This change allows the import statement to clearly reflect that the sealing requirement for imported controlled substances applies regardless of whether the import occurred inside or outside of the customs territory of the United States. Separating the import and export requirements also makes clear that the distinction between the customs territory and the non-customs territory is only applicable to imports and not exports.

D. 21 CFR Part 1303

Corresponding to recent internal DEA reorganization, the mailing addresses for §§ 1303.12(b) and (d), 1303.22, 1304.31(a), 1304.32(a), 1315.22, 1315.32(e) and (g), 1315.34(d), and 1315.36(b), regarding quota applications and reporting, will be moved from the DEA Drug & Chemical Evaluation Section to the UN Reporting & Quota Section under a new corresponding header.

E. 21 CFR Part 1304

The DEA is making a technical amendment to § 1304.02 to reflect that definitions found in § 1300.02, ''Definitions relating to listed chemicals,'' are not applicable to part 1304, that addresses the records and reports that are required of controlled substance handlers. (21 CFR part 1310 addresses records and reports of listed chemicals and certain machines.)

The DEA is also making a technical amendment to amend § 1304.21(d) to separately state reporting requirements concerning imports and exports of controlled substances. The record date for receipt, distribution, other transfer, or destruction will not change. The regulation will be amended to state that the record date for imports or exports of controlled substances is the anticipated date of release by a customs officer for permits and declarations and the date on which the controlled substance was released by a customs officer at the port of entry or port of export.

F. 21 CFR Part 1308

The DEA is making two technical updates to part 1308. First, the DEA is amending § 1308.01 to denote that part 1308 also includes nonnarcotic substances, chemical preparations, veterinary anabolic steroid implant products, prescription products, and anabolic steroid products excluded pursuant to 21 U.S.C. 811. Second, the DEA is amending § 1308.49 to reflect the current requirements of the CSA regarding issuance of temporary scheduling orders. 21 U.S.C. 811(h) was amended by section 1153 of the Food and Drug Administration Safety and Innovation Act of 2012, Public Law 112–144, July 9, 2012, to make temporary scheduling orders effective for two years, with an option to extend for up to one year during the pendency of proceeding under 21 U.S.C. 811(a). The CFR was not updated when the law changed. The DEA is also realigning the paragraphs of § 1308.49 to properly separate the discussion of the circumstances in which a temporary scheduling order will be vacated.

G. 21 CFR Part 1309

The DEA is amending § 1309.32(d) to add ''manufactured'' to the list of business activities each application can include for each list I chemical. Adding ''manufactured'' would accurately reflect an ''activity'' that an applicant could conduct with list I chemicals if appropriately registered. No change is required to DEA Form 510 because ''manufacturer'' is already listed as an option.

The DEA is correcting and updating the cross-reference in § 1309.46(d) by removing the reference ''§ 1309.54'' and replacing it with the reference ''§ 1309.53.'' Section 1309.46(d) currently instructs an applicant to file a request for a hearing pursuant to § 1309.54. However, § 1309.54 is entitled ''Burden of Proof,'' and therefore is an inaccurate cross-reference.

The DEA is correcting and updating the cross-reference in § 1309.51(a) by removing the cross-reference to § 1309.57 and replacing it with the cross-reference ''§ 1309.55.'' Currently, § 1309.57 is a misleading cross-reference since it does not exist in title 21, chapter II of the CFR. The ''Hearings'' section in part 1309 concludes at § 1309.55. The DEA is therefore changing the cross-reference in § 1309.51(a) from ''1309.57'' to ''§ 1309.55.'' Finally, the DEA is correcting two minor typographic issues in § 1309.71: capitalizing the first word of paragraph (b)(5) and adding an ''and'' at the end of paragraph (b)(7).

H. 21 CFR Part 1310

i. Mail Order Reporting for Ephedrine, Pseudoephedrine, Phenylpropanolamine, and Gamma-Hydroxybutyric Acid

The DEA is incorporating mandatory electronic reporting requirements into part 1310 for monthly reports of mail-order transactions involving ephedrine, pseudoephedrine, phenylpropanolamine, and gamma-hydroxybutyric acid (including drug products containing these chemicals or controlled substance) required to be filed in accordance with § 1310.03(c) pursuant to 21 U.S.C. 830(b)(3). To standardize and streamline the electronic filing requirement of these monthly mail-order reports, the DEA is implementing usage of a new form, DEA Form 453. The new form is accessed, completed, and submitted by regulated persons entirely through the DEA Diversion Control Division secure network application. 21 CFR 1310.03(c) is further revised to reflect that reports would not be deemed filed until the Administration issues a transaction identification number unless they are complete upon submission. This change is designed to ensure that electronically submitted reports are indeed received by the DEA, are complete, and can be appropriately tracked and monitored; to streamline the report filing process; and to eliminate potential duplicate filings. The current § 1310.06(i) is revised to reflect that the monthly mail-order information required to be submitted would now be submitted on the DEA Form 453 and is designated as § 1310.06(k). 21 CFR 1310.03(c) is further revised by separately listing the requirement for monthly reports to be submitted by regulated persons who engage in the specified domestic mail-order transactions and export transactions. This revision also more plainly lays out the requirement that the regulated person must be engaged in a transaction with one of the specified chemicals or controlled substance and use or attempt to use the U.S. Postal Service or any private or commercial carrier for both activities in order to be required to file the monthly report. This revision is not intended to impose any different requirements than the current regulation, but only to ease understanding of the reporting requirements. 21 CFR 1310.05(e) would correspondingly be amended to reflect the implementation of the mandatory electronic filing requirement.

The DEA is making a technical amendment to § 1310.05(d) to revise the mailing information in the second sentence and to replace the term ''shall'' in three locations without changing the substantive requirements.

ii. Listed Chemicals and Tableting and Encapsulating Machines

The DEA is amending § 1310.05 to require reports of unusual or excessive loss or disappearance of a listed chemical to be filed through the DEA Diversion Control Division secure network application. When determining whether a loss is unusual or excessive, the guidelines that the regulated person should consider are: (1) The actual quantity of a listed chemical; (2) the specific listed chemical involved; (3) whether the loss or disappearance of the listed chemical can be associated with access to those listed chemical by specific individuals, or whether the loss or disappearance can be attributed to unique activities that may take place involving the listed chemical; and (4) a pattern of losses or disappearances over a specific time period, whether the losses or disappearances appear to be random, and the result of efforts taken to resolve the losses. If known, the regulated person would also need to report whether (1) the specific listed chemical was a likely candidate for diversion and (2) local trends and other indicators of the diversion potential of the listed chemical. This language is similar to the current regulatory language relating to theft and loss of controlled substances in § 1301.74(c).

In addition, the DEA is clarifying in the revised § 1310.05(b)(1) that regulated persons must submit a report of unusual or excessive loss or disappearance whether or not the listed chemical is subsequently recovered. The DEA also has revised § 1310.05(b)(1) to clarify which party has the responsibility for reporting during domestic and international transactions. These changes will streamline the data collection process and allow the DEA to more efficiently respond to diversion as well as to respond to reporting requests concerning these items from the United Nations.

The DEA is also removing the phrase ''whenever possible'' from the oral reporting requirements of the current § 1310.05(b). The DEA believes that the phrase is redundant given the stated requirement that such reports be made ''at the earliest practicable opportunity.'' Removing this phrase would better align the reporting requirements with the statutory language of 21 U.S.C. 830(b)(1).

In response to the above discussed changes, the DEA is restructuring § 1310.05(a) and (b) to reflect the revised reporting structure. Paragraph (a) is addressing those reports made solely to the local DEA office in accordance with the current and revised § 1310.05(a)(1) and (2). Paragraph (b) is addressing those reports made orally to the local DEA office with written reports being submitted through the DEA Diversion Control Division secure network application. The reporting requirements now located in § 1310.05(b) will be transferred to paragraphs (a)(1) and (2), and (b)(1) and (2), as applicable. This change consolidates the reporting requirements for each of the applicable reports into their applicable paragraphs; readers would no longer be required to look at both paragraphs to determine when and how they must initially report these transactions. In addition, the DEA is clarifying § 1310.05(a)(2) that regulated persons must report orally, not in writing, any proposed regulated transaction with a person whose description or other identifying characteristic the Administration has provided to the regulated person. Regulated persons are required to orally report the other types of actions at the earliest practicable opportunity to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located.

21 CFR 1310.06 is revised to reflect the various changes in §§ 1310.03–1310.05. Cross-citations have been amended to reflect where regulations have been moved and new forms instituted. In § 1310.06(a)(3) regulated persons are required to include the NDC number of the product containing the listed chemical, if applicable, in all records required by § 1310.03(a). If the record contains the NDC number, information about the ''form of packaging'' would not be necessary. The restructuring of § 1310.05(a) also corrects a long-standing typographical error in the previous § 1310.06(c), which incorrectly referenced § 1310.05(a)(4) instead of § 1310.05(a)(3). 21 CFR 1310.06(c) previously stated that a report submitted pursuant to § 1310.05(a)(4), domestic regulated transactions, must include a description of the circumstances leading the regulated person to make the report. However, the corresponding example relates to an unusual loss, which is addressed in the previous § 1310.05(a)(3) (now § 1310.05(b)(1)). The DEA also is making technical amendments in § 1310.06, including replacing the term ''shall'' in paragraphs (a) and (b).

The DEA is standardizing submissions of domestic and import and export regulated transaction reports involving tableting and encapsulating machines through the introduction of a new form, the DEA Form 452. In the revised § 1310.05(b)(2), the DEA is making the oral reporting mandatory and mandating the electronic filing of the written report. The DEA also is providing specific guidelines on when those reports must be given. The revised § 1310.05(b)(2) requires regulated persons to orally report domestic regulated transactions in a tableting machine or an encapsulating machine when an order is placed rather than at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. The written report (DEA Form 452) is required to be filed within 15 calendar days after the order has been shipped by the seller.

The previous standard was originally adopted for reporting of domestic regulated transactions for uniformity with the reporting timeframe standard imposed by 21 U.S.C. 830(b)(1)(A) for transactions involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or other suspicious circumstances. However, the DEA is exercising its authority under 21 U.S.C. 830(b)(1) to impose a different reporting timeframe standard for machines. The revised standards are not only less ambiguous for regulated persons to follow; they also ensure the DEA receives the information in time to take appropriate action as may be necessary. The new DEA Form 452, covers not only import and export regulated transactions of tableting and encapsulating machines required under the current § 1310.05(c) but also the domestic regulated transactions of tableting machines or encapsulating machines required by the previous § 1310.05(a)(4). The requirements for the content of domestic reports were moved from § 1310.06(d) to a new § 1310.06(f), while the requirements for reports of importations and exportations are all contained within § 1310.06(e). The DEA also is amending the recordkeeping requirements in § 1310.06(a) and reporting requirements in § 1310.06(e) and (f) to require the inclusion of information about whether the machine is manual or electric. In § 1310.06(e)(1)(vi) and (f)(3), the DEA is requiring reports of importations and domestic transactions to include any proposed changes to the identifying information of imported machines that will occur after the importation or other transaction.

The DEA also is amending § 1310.06 to require regulated persons who import or export a tableting or encapsulating machine to report return information to the Administration within 30 calendar days of the release of the shipment by customs at the port of entry or port of export, or within 10 calendar days after receipt of a written request by the Administration. The DEA has included the provision for the requirement to submit return information earlier than the 30 days for two reasons. First, it conforms to the changes for controlled substances and listed chemicals in parts 1312 and 1313. Uniformity of requirements should simplify procedures and ease understanding of the requirements by regulated industry. Second, the option to request advance return information allows the DEA to receive information that may be needed for time-sensitive requirements, such as investigations that may need to result in immediate action to protect the public health and safety. Return information is required to be submitted electronically through the DEA Diversion Control Division secure network application on the DEA Form 452. Reports would not be deemed filed until a transaction identification number has been issued by the DEA. Pursuant to § 1310.06(h), importers are required to report specifics on their return, including dates of the transaction, quantities of machines involved, and descriptions of the machines. Consistent with the current requirements, importers also are required to report subsequent transfers of the machines under § 1310.05(b)(2). Reports of transfers after import may be submitted with the return information or separately.

The revisions relating to tableting and encapsulating machines that would standardize the submission of reports of regulated transactions, whether domestic or import/export, and require return information, would enhance the monitoring of these machines and allow the DEA greater ability to detect and prevent their use for the illicit manufacture of controlled substances. While tableting machines and encapsulating machines are commonly used by legitimate companies to produce pharmaceuticals and nutritional supplements, they are also used by traffickers to produce single dosage units of illicit synthetic substances such as methylenedioxymethamphetamine (''MDMA'') (aka ''Molly'' or ''ecstasy''), and other synthetic designer drugs classified as schedule I controlled substances or analogue substances. These machines have also been known to be used by marijuana dispensaries, steroid labs, and counterfeit drug manufacturers.

Regulatory changes in the final rule require importers and exporters to report to the DEA when a shipment has been denied release by a customs officer for any reason, whether or not the denial was based on a violation of DEA regulations. In response to commenters who stated that the 24 hour notification requirement related to import or export denials was unreasonable, the DEA has modified this requirement from 24 hours to 5 business days. The DEA believes that 5 business days strikes a balance between investigative needs without unduly burdening the regulated community. Likewise, by unifying the reporting format for regulated transactions in tableting machines, whether domestic, import, or export, the DEA will be able to monitor the flow of these machines through the distribution chain. This will allow the DEA to better understand and monitor the trade in these machines and to adopt more efficient means of stopping the diversion of tableting and encapsulating machines, and prevent their use in the illicit manufacture of controlled substances.

I. 21 CFR Part 1312

The DEA is making a technical amendment to §§ 1312.11 and 1312.22 to insert a cross-reference to part 1301 of chapter II of title 21 of the Code of Federal Regulations when referencing the registration requirements for the importation of controlled substances.

The DEA is amending § 1312.14 to account for revised distribution procedures for import permits. The DEA is retaining the requirement that an official record of the permit (a ''copy'' under current DEA regulatory terms) accompany the shipment of controlled substances. This is an important tool utilized by the DEA for ensuring compliance with the closed system of distribution by allowing quick initial visual indication of compliance with requirements with the CSA. However, because customs officers will be able to electronically validate the legitimacy of the import permit through ITDS, customs officers will not need to physically detach the official record of the permit for validation. An official record of the permit must instead accompany the shipment until it reaches its final destination. The DEA is also amending § 1312.14 to omit the discussion of the circumstances in which customs officers will refuse entry of a shipment.

The final destination for an import must be the registered location of the importer. (The import must be received at the registered address of the importer before being moved to another location of the importer or delivered to a customer.) The receipt of imported goods is a principal activity of registered importers. Pursuant to 21 U.S.C. 958(h), a separate registration is required at each principal place of business where applicants import or export controlled substances. Accordingly, the final destination of a shipment of imported controlled substances is the registered location of the registrant or regulated person. Drop shipments, *i.e.,* deliveries made by an importer directly to a customer without passing through the registered location of the importer, are explicitly prohibited under the revisions to § 1312.19. Similarly, consistent with current requirements, deliveries may not be made directly to a warehouse exempted from registration pursuant to § 1301.12(b)(1); they must arrive first at the registered location.

A technical amendment to paragraph (a) of § 1312.15 is made to cross-reference § 1312.16, concerning shipments that may be in greater or lesser amount than what is authorized by the import permit.

Associated with the foregoing changes, as discussed earlier in this document, the DEA is amending its regulations regarding expiration dates associated with imports and exports of controlled substances. The DEA is changing the current expiration period of import and export permits found in §§ 1312.16 and 1312.25 from not more than six months to not more than 180 calendar days after the date of issuance. This change will standardize expiration procedures as not all months have the same number of days. The DEA is also amending §§ 1312.18 and 1312.27 to specify an expiration date for import and export declarations for controlled substances. Such declarations do not currently have an expiration date assigned to them; however, permits to import and export controlled substances expire not more than six months after approved under the current regulation. 21 CFR 1312.16 and 1312.25. Similar to permits, at times declarations filed with the DEA are never actually utilized. The DEA is concerned that absence of an expiration date for these declarations may lead to incomplete or inaccurate records in the ITDS. Therefore, the DEA is requiring that declarations expire 180 calendar days after the date the declaration is deemed filed with the Administration.

The DEA is modifying the condition previously found in § 1312.22(a) that requires an application for a permit to export controlled substances to contain an affidavit that the packages of controlled substances for export are labeled in conformance with obligations of the United States under international treaties, conventions, or protocols ''in effect on May 1, 1971.'' The regulation is amended to instead require that such affidavit state that packages of controlled substances for export are labeled in conformance with obligations of the United States under international treaties, conventions, or protocols which are in effect at the time of export or reexport. The DEA does not believe that this change will have any current effect on the regulated community because it is not a new requirement. However, the DEA is taking this opportunity in revising its other import and export regulations to account for any changes in international treaties, conventions, or protocols which might be made in the future.

This final rule includes changes to harmonize, to the extent possible, return information requirements for import and export regulations throughout parts 1310, 1312, and 1313 for tableting and encapsulating machines, controlled substances, and listed chemicals. Although these provisions are similarly structured, the actual content of the return information varies across the regulations to account for international reporting requirements for machines, controlled substances, and listed chemicals. Variations in return reporting requirements also vary among controlled substances, listed chemicals, and tableting and encapsulating machines to maximize the detection, investigation, and prevention of diversion. The DEA has reviewed the return information currently collected for imported and exported controlled substances and is proposing changes.

The DEA is amending §§ 1312.12, 1312.18, 1312.22, and 1312.27 to require registrants or regulated persons, and those exempt from registration to report return information to the Administration following imports and exports of controlled substances authorized by permits and conducted pursuant to filed declarations. The DEA is requiring this information to be submitted within 30 calendar days, or within 10 calendar days after a request from the Administration, whichever is sooner. This regulatory text change is consistent with existing business practice, as importers and exporters generally submit such information to the DEA at the conclusion of transactions. The submission of such reports will allow the United States to meet its obligations under article 19 (Estimates of drug requirements) and article 20 (Statistical returns to be furnished to the Board) of the Single Convention on Narcotic Drugs, 1961, and article 16 (Reports to be furnished by the Parties) of the Convention on Psychotropic Substances, 1971. The DEA will continue to independently collect such return information outside of the single window as the ITDS does not capture all elements of the return information that the DEA needs to submit under those treaty obligations and otherwise adequately monitor the closed system of distribution of imports and exports to detect and prevent diversion. 21 U.S.C. 871(b). Additionally, the timing and frequency of required return information reporting is outside the scope of the single window. Requirements for return information to be submitted to the DEA are already specifically included in § 1312.22(d)(6) for reexported controlled substances pursuant to 21 U.S.C. 953(f)(6).

For imported and exported controlled substances there are four principal pieces of information that the DEA is requiring importers and exporters supply to the DEA in the returns: The date on which the controlled substances arrived/departed the registered location, the date on which a customs officer released the shipment, the actual quantity of controlled substances that arrived/left the registered location, and the actual quantity of controlled substances that a customs officer actually released. The current text in 21 CFR 1312.22 relating to controlled substances exported for subsequent reexportation requires the reporting of the ''date shipped.'' This requirement has been interpreted differently, sometimes as the date it left the facility and sometimes as the date of release by customs. Both dates are needed to adequately monitor the closed system of distribution for import and export transactions.

The DEA is revising §§ 1312.12, 1312.18, 1312.22, and 1312.27 to prohibit the importation/exportation of any shipment of controlled substances denied release by customs at the port of entry or port of export for any reason without resubmission of the permit application or declaration and issuance of a new permit or transaction identification number by the DEA. This change is needed to strengthen the DEA's ability to monitor and detect practices that may render an importer's or exporter's registration inconsistent with the public safety, especially in relation to the DEA's statutory obligation to take into consideration an applicant's compliance with applicable State and local laws and other relevant factors. 21 U.S.C. 823(a), 958(a).

The DEA is amending § 1312.22 to reflect that the Administration has discretion whether to issue a permit for reexport pursuant to 21 U.S.C. 953(f). The revision to § 1312.22(g)(8), like the current regulation, specifies that the exporter must provide ''a brief summary of the facts that warrant the return'' of an export that has been refused or is otherwise unacceptable or undeliverable. The DEA Diversion Control Division secure network application contains a field appropriate for this information within the DEA Form 357. Likewise, the ''written request for reexport'' of a controlled substance subject to declaration requirements, currently required in § 1312.27(b)(5)(iv), can be submitted in a field of the DEA Form 236 in the DEA Diversion Control Division secure network application. As in the current regulations, a refused or otherwise unacceptable or undeliverable controlled substance subject to the declaration requirements could be imported only after the DEA issues ''affirmative authorization in writing.'' A transaction identification number does not serve as such ''affirmative authorization in writing.''

The DEA is amending §§ 1312.22, 1312.31, and 1312.32 to require a certified translation of authorizations issued by foreign competent national authorities that are not issued either entirely in English or bilingual with English. If the foreign authorization, or the certified copy of such, is not written in English or bilingual with another language and English, the registrant must submit with their application or notice a certified translation of the permit or license. For the purposes of this requirement, certified translation will mean that the translator has signed the translation legally attesting to the accuracy of the translation. This change is meant to ensure that these foreign authorizations are complete and accurate, and that the information that they contain are accurately understood and applied to DEA import/export policies and procedures.

In response to commenters who stated that the 24 hour notification requirement related to import or export denials was unreasonable, the DEA has modified this requirement from 24 hours to 5 business days. The DEA believes that 5 business days strikes a balance between investigative needs without unduly burdening the regulated community.

As mentioned above, in response to comments the DEA amended §§ 1312.13(e) and 1312.23(e) in a manner that is different than proposed. The language added to this section will emphasize that a shipment of controlled substances is limited to a single transaction between a single importer or exporter and a single consignee on a single loading document, but also that the shipment must occur on a single conveyance as opposed to multiple conveyances. In addition, the language will coincide with current policy by prohibiting a load of goods from being divided into multiple parts to be placed onto more than one conveyance, even if the goods are on the same loading document. A single permit could not be used for this situation above.

J. 21 CFR Part 1313

The DEA is adding a new § 1313.03 that will consolidate the DEA Form information applicable to part 1313 in a corresponding change for the new § 1312.03. The new § 1313.03 will consist of a table referencing the DEA Form number, form name, information about where the form may be accessed, and where the completed form should be submitted.

The DEA is amending § 1313.12(b) to require that all declarations (DEA Form 486/486A) must be complete and accurate when submitted. Under § 1304.21, registrants must maintain complete and accurate records for controlled substances. That requirement applies to import and export declarations for controlled substances. This revision will impose the same requirement for import/export declarations as for listed chemicals.

Declarations (DEA Forms 486/486A) will not be deemed filed until the transaction identification number has been issued by the DEA. Upon receipt and review, the DEA will assign each declaration a transaction identification number (a unique identifier). Once the declaration is accepted and assigned a transaction identification number, registrants will be able to use the assigned transaction identification number to access the official record of the declaration. While current DEA regulations do not require confirmation of receipt from the DEA prior to importation or exportation pursuant to a declaration, the change is consistent with current practices. Currently, the DEA assigns a Web Tracking Number to each declaration when it is submitted and accepted. The regulatory codification of the issuance of a transaction identification number is designed to ensure that electronically submitted declarations are indeed received by the DEA, are completed, and can be appropriately tracked and monitored; to streamline the declaration filing process; and to eliminate duplicate filings. The fact that the DEA issues a transaction identification number after reviewing the filing does not waive the Administration's right to suspend a shipment under § 1313.41.

The DEA wishes to clarify that import or export transactions may not proceed as soon as the transaction identification number has been issued, because the 15-calendar-day requirement since the filing of DEA Form 486/486A has not changed. Import or export transactions for which the 15-calendar-day notification has been waived, may proceed as soon as the transaction identification number has been issued, regardless of whether the 3 business days have elapsed since filing of DEA Form 486/486A.

The DEA is making changes in the regulatory text to reflect that 21 U.S.C. 830 has been changed to require official records of import declarations involving listed chemicals to be retained for two years.

As discussed above, return information requirements have been harmonized across parts 1310, 1312, and 1313, to the extent possible. The DEA is requiring that return information must be reported within 30 calendar days after release by a customs officer at the port of entry, export, or reexport. All return information for applications or other initial filings that are required to be made electronically through the DEA Diversion Control Division secure network application would likewise be required to be filed electronically through the same system. As with controlled substance return information, the DEA is requiring listed chemical importers and exporters to include both the date a customs officer releases an imported item or releases an item for export, and the date that the shipment arrived at the location of the importer or exporter, the actual quantities of product both when released by a customs officer and at the time of shipment from the exporter's location or arrival at the importer's location, and the actual port of entry or export. These revised reporting requirements will better allow the DEA to track the flow of listed chemicals, and detect and prevent diversion. For example, by tracking and comparing diversion of listed chemicals against the actual port of entry or exit, the DEA will be better able to detect potential weak spots in the import/export system and direct more resources to that region. The DEA also is revising the regulatory text to clarify that the references to ''chemical'' and ''container'' apply to the reporting of subsequent transfers.

The final destination for an import of a list I chemical must be the registered location of the registered importer. The import must be received at the registered address of the importer before being moved to another location of the importer or delivered to a customer. The receipt of imported goods is a principal activity of registered list I chemical importers. Pursuant to 21 U.S.C. 958(h), a separate registration is required at each principal place of business where applicants import or export list I chemicals. Accordingly, the final destination of a shipment of an imported list I chemical is the registered location of the registrant. Drop shipments, *i.e.,* deliveries made by an importer directly to a customer without passing through the registered location of the importer, are explicitly prohibited under the revisions to § 1313.14. Similarly, consistent with current requirements, deliveries may not be made directly to a warehouse exempted from registration pursuant to § 1309.23(b)(1); they must arrive first at the registered location.

The DEA is amending § 1313.22(a) to add a cross-reference to § 1310.04(g) relating to listed chemicals that may be exported. This change will harmonize § 1313.22(a) with § 1313.21(a).

In response to commenters who stated that the 24 hour notification requirement related to import or export denials was unreasonable, the DEA has modified this requirement from 24 hours to 5 business days. The DEA believes that 5 business days strikes a balance between meeting investigative needs and not unduly burdening the regulated community.

K. 21 CFR Part 1314

Corresponding to recent internal DEA reorganization, in § 1314.110, in paragraphs (a)(1) and (2), the phrase ''Import/Export Unit,'' will be removed and in its place ''Regulatory Section, Diversion Control Division,'' will be added.

L. 21 CFR Part 1315

Corresponding to recent internal DEA reorganization, the mailing addresses for §§ 1303.12(b) and (d), 1303.22, 1304.31(a), 1304.32(a), 1315.22, 1315.32(e) and (g), 1315.34(d), and 1315.36(b), regarding quota applications and reporting, will be moved from the DEA Drug & Chemical Evaluation Section to the UN Reporting & Quota Section under a new corresponding header.

M. 21 CFR Part 1316

The DEA is amending § 1316.47(a) to align with the DEA's current practice referenced in all recent **Federal Register** publications that requests for a hearing are to be sent directly to the Hearing Clerk. Specifically, this amendment will remove ''Attention: DEA Federal Register Representative'' from the template letter. Since the paragraph before the template letter states that persons requesting a hearing should refer to § 1321.01 for current mailing addresses, the DEA is not adding an ''Attention'' field in the template letter.

The DEA is amending § 1316.48 so that the filing of notices of appearance corresponds with the DEA's practice that requests for hearing shall be sent to the Hearing Clerk. Specifically, the DEA would remove ''Attention: Federal Register Representative'' from the template letter. Since the paragraph before the template letter states that persons requesting a hearing should see § 1321.01 for current mailing addresses, the DEA is not adding an ''Attention'' field in the template letter.

The DEA is amending § 1316.48 to provide that notices of appearance should be sent to the DEA Hearing Clerk instead of the DEA Administrator so that notices of appearance will be filed in a more efficient manner. The DEA is also amending § 1316.47 to provide that requests for hearing should be sent to the DEA Hearing Clerk instead of the DEA Federal Register Representative so that such requests will be filed in a more efficient manner. In the Table of DEA Mailing Addresses in § 1321.01, DEA is making the corresponding change, and to add §§ 1301.43, 1303.34, 1308.44, and 1316.47(a), regarding requests for hearing or appearance and/or waivers, under the DEA Hearing Clerk heading. These items are being directed to the DEA Hearing Clerk to expedite the hearing process and will lead to fewer delays. The DEA is additionally revising this portion of the table to correct the attention line of the mailing address for the DEA Hearing

Clerk. The address will be changed from ''Drug Enforcement Administration, Attn: Hearing Clerk/LJ, 8701 Morrissette Drive, Springfield, VA 22152'' to ''Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, VA 22152.''

The DEA is adding the following citations to be directed to the DEA Federal Register Representative: § 1301.34(a)—Filing of written comments regarding application for importation of Schedule I and II substances; § 1303.11(c)—Filing of written comments regarding notice of an aggregate production quota; and § 1303.13(c)—Filing of written comments regarding adjustments of aggregate production quotas. These topics have been added so that comments corresponding to **Federal Register** publications can be sent directly to the Federal Register Representative whose responsibility it is to review comments and make them publicly available, as appropriate. The DEA is additionally amending this portion of the table to revise the attention line of the mailing address for the DEA Federal Register Representative. The address will be changed from ''Drug Enforcement Administration, Attn: Federal Register Representative/DRL, 8701 Morrissette Drive, Springfield, VA 22152'' to ''Drug Enforcement Administration, Attn: Federal Register Representative/DRW, 8701 Morrissette Drive, Springfield, VA 22152.'' Additionally, this rule adds the Web address for the Federal eRulemaking Portal, *http://www.regulations.gov,* under the heading ''DEA Federal Register Representative.'' This Web address provides the ability to type short comments directly into the comment field on the Web page or to attach a file for lengthier comments. This change conforms to the DEA's current practice, referenced in the DEA's recent **Federal Register** publications, which requires that comments either be submitted through *http://www.regulations.gov* or be directed to the DEA Federal Register Representative.

N. 21 CFR Part 1321

The DEA is amending the Table of DEA Mailing Addresses found in § 1321.01 to account for changes in this rule as part of the implementation of ITDS. The DEA is also taking this opportunity to implement various technical amendments to the Table of DEA Mailing Addresses.

Pursuant to this final action all import and export applications and filings would be submitted through the DEA Diversion Control Division secure network application. The DEA will amend the Table of DEA Mailing Addresses to retain a reference to the notifications that, prior to this rule, could be made by mail, but will note with an asterisk that those filings must now be made electronically. The CFR sections listed under the DEA Import/Export Unit will be merged with those under the DEA Regulatory Section and placed under the header of ''DEA Regulatory Section.''

The mailing addresses for §§ 1308.21(a), 1308.23(b), 1308.25(a), 1308.31(a), 1308.33(b), and 1310.13(b) will be transferred from the DEA Diversion Control Division to the DEA Drug & Chemical Evaluation Section (DRE), the subject matter experts on excluded and exempted products. This change will allow these matters to be processed in a more efficient manner. The reference to § 1307.22, ''Disposal of Controlled substances by the Administration delivery application,'' will be revised to ''Delivery of surrendered and forfeited controlled substances'' in conformity with the final rule, Disposal of Controlled Substances, 79 FR 53520, Sept. 9, 2014. Corresponding to recent internal DEA reorganization, the mailing addresses for §§ 1303.12(b) and (d), 1303.22, 1304.31(a), 1304.32(a), 1315.22, 1315.32(e) and (g), 1315.34(d), and 1315.36(b), regarding quota applications and reporting, will be moved from the DEA Drug & Chemical Evaluation Section to the UN Reporting & Quota Section under a new corresponding header.

IV. Regulatory Analyses

Executive Orders 12866, Regulatory Planning and Review, and 13563, Improving Regulation and Regulatory Review

This final rule was developed in accordance with the principles of Executive Orders 12866 and 13563. The DEA has determined that this final rule is a significant regulatory action, and accordingly this rule has been submitted to the Office of Management and Budget for review.

By business activity, the DEA estimates this rule will result in a combined annual savings of $424,640 for controlled substances importers, exporters, researchers, and analytical labs; a combined annual cost of $5,011 for listed chemical importers and exporters and tableting and encapsulating machine importers and exporters; and no economic impact for brokers, domestic transactions in tableting and encapsulating machines, and mail order transactions of ephedrine (EPH), pseudoephedrine (PSE), phenylpropanolamine (PPA), or gamma-hydroxybutyric acid (GHB). Therefore, the estimated net annual impact of this rule is a cost savings of $419,629 and the estimated combined annual economic effect is $429,650. The DEA does not anticipate that this rulemaking will 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. An economic analysis of the final rule can be found in the rulemaking docket at *http://www.regulations.gov,* under FDMS Docket ID: DEA–2016–0017 (Docket No. DEA–403).

Executive Order 12988, Civil Justice Reform

The regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications warranting the application of Executive Order 13132. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This final rule is in accordance with the February 19, 2014, Executive Order 13659, ''Streamlining the Export/Import Process for America's Businesses,'' 79 FR 10657, Feb. 25, 2014. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities between the Federal Government and Indian tribes.

Regulatory Flexibility Act

The Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), has reviewed this rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities.

Below is a summary of the threshold analyses conducted by the DEA to support the certification statement above. The complete threshold analysis is available at *http://www.regulations.gov* for easy reference. The DEA specifically solicited written comments regarding the DEA's economic threshold analysis of the impact of these proposed changes. The DEA requested that commenters provide detailed descriptions in their comment of any expected economic impacts, especially to small entities. Commenters were asked to provide empirical data to illustrate the nature and scope of such impact. No comments were received; thus, the analysis that accompanied the NPRM remains unchanged below.

In accordance with the RFA, the DEA evaluated the impact of this rule on small entities. This final rule affects all entities who import or export, or seek to import or export, controlled substances, listed chemicals, tableting and encapsulating machines, or who broker international transactions (from foreign country to another foreign country while in the United States). Additionally, this final rule affects all persons who would be required to report unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person in accordance with proposed revised § 1310.05(b)(1), all persons who are required to report domestic regulated transactions in tableting or encapsulating machines in accordance with proposed revised 21 CFR 1310.05(b)(2), and all persons who are required to report mail order transactions of EPH, PSE, PPA, or GHB in accordance with 21 CFR 1310.03(c). The affected entities include DEA registrants and non-registrants. A DEA registration is required to import or export any controlled substance and most list I chemicals. A DEA registration is not required to import or export some list I chemicals or any list II chemical, to import or export tableting and encapsulating machines, or to broker international transactions. Also, a DEA registration is not required to conduct domestic transactions in tableting and encapsulating machines or mail order transactions of EPH, PSE, or PPA. (Registration is required for mail order transactions of GHB as GHB is a schedule I controlled substance.) The affected entities (DEA registrants and non-registrants) are grouped into ''business activities,'' based on types of activities performed by the entities. The business activities described in this analysis that are required to have DEA registrations are importers/exporters, researchers, analytical labs, and chemical importers/exporters that deal in the list I chemicals requiring registration (referred to as ''DEA-registered listed chemical importers/exporters''). The business activities described in this analysis that are not required to have DEA registrations are chemical importers/exporters that deal in list I chemicals not requiring registration and list II chemicals (referred to as ''non-registered listed chemical importers/exporters''), tableting/encapsulating machine importers/exporters, brokers of international transactions, tableting/encapsulating machine domestic suppliers, and entities selling EPH, PSE, and/or PPA by mail order.

The DEA estimates that 7,840 entities are affected by this rule, which consist of 331 controlled substances importers/exporters; 5,884 researchers; 1,200 analytical labs; 231 DEA-registered listed chemical importers/exporters; 76 non-registered listed chemical importers/exporter; 56 tableting/encapsulating machine importers/exporters; 12 brokers of international transactions; 46 tableting/encapsulating machine domestic suppliers; and 4 entities selling EPH, PSE, PPA, and/or GHB by mail order. Regulated persons potentially reporting unusual or excessive loss or disappearance of a listed chemical would be included in one of the business activities above.

The DEA estimates 7,321 (93.4%) of total 7,840 affected entities are small entities. Specifically, the DEA examined the impact of the proposed changes regarding (1) mandatory electronic permit applications and filings, and (2) 180-calendar-day expiration for all declarations for the 7,321 small entities affected by the final rule, which consist of 310 controlled substances importers/exporters; 5,474 researchers; 1,134 analytical labs; 218 DEA-registered listed chemical importers/exporters; 72 non-registered listed chemical importers/exporters; 54 tableting/encapsulating machine importers/exporters; 11 brokers of international transactions; 44 tableting/encapsulating machine domestic suppliers; and 4 entities selling EPH, PSE, PPA, and/or GHB by mail order.

The DEA is mandating the electronic submission of all permit applications and other required filings and reports associated with the importation or exportation of tableting and encapsulating machines, controlled substances, and listed chemicals. Additionally, the DEA is mandating the electronic submission of all reports associated with the unusual or excessive loss or disappearance of a listed chemical, domestic regulated transactions in tableting or encapsulating machines, and mail order transactions of EPH, PSE, PPA, and GHB. The DEA would cease to accept paper filing of controlled substances import/export permit applications (other than transshipments), controlled substances import/export declarations, listed chemicals import/export declarations, and certain filings and reports specified as discussed previously in this document. Currently, some electronic forms associated with these activities are available online and are in use. Usage rates vary for each form and also vary by business activities. However, as virtually all paper submissions of permit applications and declarations are currently delivered via express common carrier with pre-paid return envelope or account information, savings are anticipated because of this change.

The DEA estimates that each conversion to electronic filing from paper controlled substances import/export permit application and controlled substances import/export declaration will result in an estimated cost savings of $58.75 and $9.75, respectively. Based on DEA's registration data, the DEA assumes all affected entities have information systems capable of completing and submitting online forms and downloading, printing, and transmitting electronic documents at nominal additional cost. Among the affected establishments that hold DEA registrations, 92% of previous applications for registration or renewal of registration were made online. Furthermore, even though the email address is an optional data field, 99% of the registrations have an email address on record. Based on these facts and the high rate of internet penetration in the general U.S. population,[10] it is reasonable to assume virtually all regulated establishments, registrants and non-registrants, have information systems capable of completing and submitting online forms and downloading, printing, and transmitting electronic documents at minimal additional cost. No special software or equipment will be needed to access the DEA Diversion Control Division secure network application.

There are no anticipated cost savings for the conversion to electronic filing from paper for the listed chemicals import/export declarations and tableting

[10] *See* note 15 of the accompanying Economic Impact Analysis (''An estimated 78.1 percent of people in U.S. households had a high-speed Internet connection in 2013. ''Computer and Internet Use in the United States: 2013,'' U.S. Census Bureau, *http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf.*'').

and encapsulating machine import/export notifications since virtually all are currently submitted via online, facsimile, or email, without the use of a common carrier. However, the DEA anticipates an additional cost associated with the new requirement for tableting/encapsulating machine importers/exporters to submit return information within 30 calendar days after the release by a customs officer has taken place or within 10 calendar days after receipt of a written request by the Administration to the exporter/importer, whichever is sooner.

The DEA estimates there will be no economic impact associated with the electronic submission of all reports associated with the unusual or excessive loss or disappearance of a listed chemical, domestic regulated transactions in tableting or encapsulating machines, and mail order transactions of EPH, PSE, PPA, and GHB. While the written reports would be required to be made online, the labor cost of making the report is expected to be the same, whether on paper or online.

Based on the varying number of annual occurrences estimated for each of the business activities, the DEA estimates importers/exporters as a group would save $383,857, researchers as a group would save $4,316, and analytical labs as a group would save $37,567. The DEA estimates tableting/encapsulating machine importers/exporters as a group would have an additional cost of $3,978, for a total net savings of $421,761 for the electronic submissions requirement. (Figures are rounded). Based on the number of affected entities and the cost savings to the business activities as a group, the DEA estimated the average annual cost savings for each affected entity. The DEA estimates importers/exporters, researchers, and analytical labs will save on average $1,160, $1, and $31 per year, respectively, and tableting/encapsulating machine importers/exporters would have a cost of $71 per year.

In addition, the DEA is specifying that all controlled substance and listed chemical declarations expire in 180 calendar days, consistent with the controlled substance import/export permits. If release by a customs officer will occur more than 180 calendar days after the declaration is deemed filed, the declarant must submit a new declaration for the transaction. The 180-calendar-day expiration provision for all controlled substance and listed chemical declarations is estimated to cause a small increase in the number of re-submissions of the declarations. The DEA estimates approximately 1% of all declarations would require re-submissions to replace the expiring declaration, requiring a total of an additional 85 controlled substance declarations and 132 listed chemical declarations per year. The estimated cost of each re-submission of controlled substance declarations and listed chemical declarations, based on estimated labor rates and time to complete the forms, is $13.02 and $7.81, respectively. There is no cost to tableting/encapsulating machine importers/exporters and brokers of international transactions, as this provision does not apply to these business activities. Based on the varying number of annual re-submissions estimated for each of the business activities, the DEA estimates this provision, if promulgated, would cost importers/exporters as a group $1,023, researchers as a group $24, analytical labs as a group $54, chemical importers/exporters as a group $689, and non-registered chemical importers/exporters as a group $344, for a total of $2,132. Based on the number of affected entities and the cost to the business activities as a group, the DEA estimated the average annual cost for each affected entity. The DEA estimates importers/exporters, researchers, analytical labs, chemical importers/exporters, and non-registered chemical importers/exporters will have an average cost impact of $3; $0; $0; $3; and $5 per year, respectively. (Figures are rounded).

In summary, the DEA combined the impact of the two provisions to estimate the net impact to the affected small entities. The DEA estimates an average annual net savings of $1,157 for the 310 controlled substance importers/exporters, an average annual net savings of $1 for the 5,474 researchers, an average annual net savings of $31 for the 1,134 analytical labs, an average annual net cost of $3 for the 218 DEA-registered listed chemical importers/exporters, an average annual net cost of $5 for the 72 non-registered listed chemicals importers/exporters, an annual net cost of $71 for the 54 tableting/encapsulating machine importers/exporters, no economic impact for the 11 brokers of international transactions, no economic impact for the 44 tableting/encapsulating machine domestic suppliers, and no economic impact for 4 entities selling EPH, PSE, PPA, and GHB by mail order.

The DEA evaluated the net economic impact by size category for each of the business activities. The DEA estimates that the average annual cost savings of $1,157 for controlled substance importers/exporters is economically significant, cost savings greater than 1% of annual revenue, for 32 of 310 small importer/exporter entities. None of the remaining 7,011 small entities of the remaining business activities are estimated to be significantly impacted by this final rule. This rule will have a significant economic impact, in form of cost savings, on 32 (0.4%) of the 7,321 affected small entities. It is the DEA's assessment that 0.4% of small entities does not constitute a substantial number. The DEA's evaluation of economic impact by size category indicates that the final rule will not have a significant effect on a substantial number of these small entities.

Unfunded Mandates Reform Act of 1995

The estimated annual impact of this rule is $429,650; thus, the DEA has determined in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* that this action would not result in any federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted for inflation) in any one year. Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of UMRA.

Paperwork Reduction Act of 1995

Pursuant to section 3507(d) of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), the DEA has identified the following collections of information related to this final rule and has submitted this collection request to the Office of Management and Budget (OMB) for review and approval. This final rule updates the DEA regulations for import and export of controlled substances, listed chemicals, and tableting and encapsulating machines. The rule also clarifies certain policies and reflects current procedures and technological advancements. It allows for the implementation of the President's Executive Order on streamlining the export/import process, requiring the government-wide utilization of the International Trade Data System (ITDS). The DEA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if one is required. Copies of existing information collections approved by OMB may be obtained at *http://www.reginfo.gov/public/do/PRAMain.*

A. Collections of Information Associated With the Final Rule

The DEA is revising existing information collections 1117–0004, 1117–0009 and 1117–0013 by establishing mandatory filing of return information for imports and exports of controlled substances.

Additionally, the DEA is also revising existing information collection 1117–0024 by establishing two new forms for the reporting of transactions with listed chemicals, tableting machines, and encapsulating machines. Specifically, the DEA is creating new DEA Form 452, ''Reports for Regulated Machines.'' The DEA Form 452 will be used by regulated persons to report both domestic regulated transactions as well as import and export regulated transactions of tableting and encapsulating machines. The DEA is also establishing mandatory filing of return information for the importing and exporting of tableting and encapsulating machines that would be incorporated into the DEA Form 452. Additionally, the DEA is revising existing information collection 1117–0024 by establishing a new form for the reporting of unusual or excessive loss or disappearance of a listed chemical. Regulated persons would report this information on new DEA Form 107, ''Reports of Loss or Disappearance of Listed Chemicals.''

The DEA is revising existing information collection 1117–0033 by establishing a new form for reporting mail-order transactions involving specified listed chemicals. Specifically, the DEA is creating new DEA Form 453, ''Report of Mail Order Transactions.'' The DEA Form 453 will be used by regulated persons required to file monthly reports of transactions with nonregulated persons with EPH, PSE, PPA, or GHB (including drug products containing these chemicals or controlled substance) and use or attempt to use the U.S. Postal Service or any private or commercial carrier as well as regulated persons required to file monthly reports of export transactions with EPH, PSE, PPA, or GHB (including drug products containing these chemicals or controlled substance) and use or attempt to use the U.S. Postal Service or any private or commercial carrier.

1. Title: Application for Permit To Export Controlled Substances—DEA Form 161/Application for Permit To Export Controlled Substances for Subsequent Reexport—DEA Form 161R/ Application for Permit To Export Controlled Substances for Subsequent Reexport Among Members of the European Economic Area—DEA Form 161R–EEA

OMB Control Number: 1117–0004.

Form Number: DEA Form 161, 161R, 161R–EEA.

As part of the implementation of the ITDS, the DEA is mandating electronic filing of return information for any person who desires to export or reexport controlled substances listed in schedule I or II, any narcotic substance listed in schedules III or IV, or any non-narcotic substance in schedule II which the Administrator has specifically designated by regulation in § 1312.30, or any non-narcotic substance in schedule IV or V which is also listed in schedule I or II of the Convention on Psychotropic Substances, 1971.

The DEA is amending § 1312.22 to provide clear instructions on the process of return information for controlled substances subject to export permit requirements, which will be submitted electronically as part of the DEA Form 161. Specifically, in § 1312.22 the DEA is requiring that within 30 calendar days after a controlled substance is released by a customs officer at the port of export from the United States in accordance with the permitting process, or within 10 calendar days after receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) that such export has occurred and the specifics of the transaction.

As part of the implementation of ITDS, the DEA is establishing a new DEA Form 161R–EEA, discussed in greater detail below, to be used by registrants or regulated persons who export controlled substances for reexport among members of the European Economic Area. The existing DEA Form 161R would remain in use for exports of controlled substances that will be reexported to countries that are not members of the European Economic Area. The DEA is amending § 1312.22 to provide clear instructions on the process of return information for controlled substances subject to reexport permit requirements that will be reexported outside of the European Economic Area, which will be submitted electronically as part of the DEA Form 161R. Consistent with current requirements, the amended § 1312.22 requires that within 30 calendar days after a controlled substance is released by a customs officer at the port of export the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) that such export has occurred and the specifics of the transaction. Also consistent with current requirements, the amended text requires that the exporter must additionally electronically file a similar report of return information within 30 calendar days of the controlled substances being exported from the first country to the second country. As noted, the DEA Form 161R, and associated return information, are required to be accessed, completed, and submitted to the DEA through the DEA Diversion Control Division secure network application.

This final rule contains amendments that implement section 4, Re-exportation Among Members of the European Economic Area, of the Improving Regulatory Transparency for New Medical Therapies Act, Public Law 114–89, which was signed into law on November 25, 2015. Section 4 amended section 1003 of the Controlled Substances Import and Export Act (21 U.S.C. 953) by making changes to paragraph (f) and adding paragraph (g) that allows for reexportation of controlled substances among members of the European Economic Area. While other reexports must be completed no later than 180 days after initial export from the United States, controlled substances may continue to be reexported among members of the European Economic Area indefinitely, so long as the statutory conditions are met. As part of the implementation, the DEA is establishing a new DEA Form 161R–EEA, ''Application for Permit to Export Controlled Substances for Subsequent Reexport Among Members of the European Economic Area,'' to be used by registrants or regulated persons who export controlled substances for reexport among members of the European Economic Area. Specifically, in § 1312.22, the DEA is requiring that within 30 calendar days after the controlled substance is released by a customs officer at the port of export the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application of the particulars of the transaction. The exporter must additionally file similar return information within 30 days of the controlled substances being exported from the first country to the second country and for each subsequent reexport among members of the European Economic Area. The DEA considered but ultimately did not choose to propose that such applications would be made electronically on the DEA Form 161R based on the fact that there are different application requirements for the two types of transactions required by the CSA. Most important of these distinctions for tracking purposes are that reexports among members of the European Economic Area do not have a time period for which such transactions will ''close'' (*i.e.,* all return information submitted). While under previous § 1312.22(d)(7) (now § 1312.22(h)(6)), other reexports must be completed no later than 180 days after release by a customs officer at the port of export from the United States, the 2015 Act specifies that controlled substances may continue to be reexported among members of the European Economic Area indefinitely, so long as the statutory conditions are met. As noted, the DEA Form 161R–EEA, and associated return information, would be required to be accessed, completed, and submitted to the DEA through the DEA Diversion Control Division secure network application.

The DEA estimates that there will be 125 respondents to this information collection. The DEA estimates that the frequency of response will vary as DEA Form 161 is required to be completed by each respondent per each occurrence. The DEA estimates there will be a total of 5,386 responses. The DEA estimates, based on data from an already approved collection containing return information, that it will take 5 minutes (online) to provide return information electronically and that the total annual burden will be 449 hours. The DEA estimates that the frequency of response will vary as DEA Form 161R and DEA Form 161R–EEA are required to be completed by each respondent per each occurrence. The DEA estimates there will be a combined total of 789 responses for DEA Form 161R and DEA Form 161R–EEA. Since the distinction between DEA Form 161R and DEA Form 161R–EEA does not currently exist, the DEA does not have an estimated number of responses for the two forms separately. Actual responses will be used for future information collection requests. Since return information is currently required for reexportations, the final rule does not create a new information collection burden for reexportations.

2. Title: Controlled Substances Import/ Export Declaration—DEA Form 236

OMB Control Number: 1117–0009.
Form Number: DEA Form 236.

As part of the implementation of the ITDS, the DEA is mandating electronic filing of return information for any person who desires to import non-narcotic substances in schedules III, IV, and V or to export non-narcotic substances in schedules III and IV and any other substance in schedule V.

The DEA is amending to § 1312.18(e) to provide clear instructions on the process of return information for controlled substances imported under declaration procedures, which will be submitted electronically as part of the DEA Form 236 (Import declaration). The amended regulation would state that within 30 calendar days after actual receipt of a controlled substance at the importer's registered location, or within 10 calendar days after the receipt of a written request by the Administration to the importer, whichever is sooner, the importer must report to the Administration utilizing the secure network application available on the DEA Diversion Control Division Web site certifying that such import occurred and the details of the transaction.

The DEA is amending to § 1312.27(d) in the final rule to provide clear instructions on the process of return information for controlled substances exported and reexported under declaration procedures, which will be submitted electronically as part of the DEA Form 236 (Export declaration). The amended regulation would state that within 30 calendar days after the controlled substance is released by a customs officer at the port of export or within 10 calendar days after receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must report to the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) certifying that such export has occurred and the details of the transaction. For reexports under declaration procedures, the amended regulation states that within 30 calendar days after the controlled substance is exported from the first country to the second country, or within 10 calendar days after the receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must report to the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) certifying that such export from the first country has occurred and the details of the transaction.

The DEA estimates that there will be 341 respondents to this information collection. The DEA estimates that the frequency of response will vary as DEA Form 236 is required to be completed by each respondent per each occurrence. The DEA estimates there will be a total of 6,026 responses. The DEA estimates, based on data from an already approved collection containing return information, that it will take 5 minutes (online) to provide return information electronically and that the total annual burden will be 502 hours.

3. Title: Application for Permit To Import Controlled Substances for Domestic and/or Scientific Purposes Pursuant to 21 U.S.C. 952

OMB Control Number: 1117–0013.
Form Number: DEA Form 357.

As part of the implementation of the ITDS, the DEA is mandating electronic filing of return information for any person who desires to import any controlled substance listed in schedule I or II or any narcotic controlled substance listed in schedule III, IV, or V or any non-narcotic controlled substance in schedule III which the Administrator has specifically designed by regulation in 21 CFR 1312.30 or any non-narcotic controlled substance in schedule IV or V which is also listed in schedule I or II of the Convention on Psychotropic Substances.

The DEA is adding § 1312.12(d) to provide clear instructions on the process of return information for controlled substances imported under permit procedures, which will be submitted electronically as part of the DEA Form 357. Specifically, in § 1312.12(d), the DEA is requiring that within 30 calendar days of actual receipt of a controlled substance at the importer's registered location, or within 10 calendar days after receipt of a written request by the Administration, whichever is sooner, the importer must report to the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) that such import occurred and the details of the transaction.

The DEA estimates that there will be 148 respondents to this information collection. The DEA estimates that the frequency of response will vary as DEA Form 357 is required to be completed by each respondent per each occurrence. The DEA estimates there will be a total of 1,024 responses. The DEA estimates, based on data from an already approved collection containing return information, that it will take 5 minutes (online) to provide return information electronically and that the total annual burden will be 85 hours.

4. Title: Reports of Loss or Disappearance of Listed Chemicals—DEA Form 107, and Regulated Transactions in Tableting/Encapsulating Machines—DEA Form 452

OMB Control Number: 1117–0024.
Form Number: DEA Form 107 and DEA Form 452.

As part of the implementation of the ITDS, the DEA is establishing a new DEA Form 452 to be used by regulated persons involved in regulated transactions in tableting or encapsulating machines. The DEA would standardize the current report required in the previous § 1310.05(a)(4) for domestic regulated transactions in a tableting or encapsulating machine as well as the report required in the previous § 1310.05(c) for import and export of tableting and encapsulating machines. DEA Form 452 would be required to be accessed, completed, and submitted to the DEA through the DEA Diversion Control Division secure network application.

Moreover, under both the previous and revised regulation, each regulated person must orally report any domestic regulated transaction in a tableting machine or an encapsulating machine to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located. The DEA now clarifies that the report must be made when the order is placed with the seller. The regulated person must subsequently file a written report of the domestic regulated transaction (on DEA Form 452) with the Administration through the DEA Diversion Control Division secure network application within 15 calendar days after the order has been shipped by the seller. A report (on DEA Form 452) may contain multiple line entries for more than one transaction.

Additionally, the DEA is mandating filing of return information for the import and export of tableting and encapsulating machines which will be electronically submitted as part of the DEA Form 452. The amended regulation states that within 30 calendar days of the shipment being released by a customs officer at the port of entry or port of export, or within 10 calendar days after the receipt of a written request by the Administration to the importer/exporter, whichever is sooner, the importer/exporter must report to the Administration through the DEA Diversion Control Division secure network application (available on the DEA Diversion Control Division Web site) certifying that such import/export occurred and the details of the transaction. Previously, § 1310.05(c) instructed that regulated persons needed to provide notification of the import or export of a tableting machine or encapsulating machine on or before the date of exportation. However, the DEA has amended § 1310.05(c) in order for DEA Form 452 to be submitted to the DEA at least 15 calendar days before the date of release by a customs officer at the port of entry or port of export in order to allow time for the DEA to review the information and transmit it into the ITDS prior to the actual import or export.

As part of the implementation of the ITDS, the DEA is establishing a new DEA Form 107 to be used by regulated persons involved in reporting unusual or excessive loss or disappearance of a listed chemical. The DEA would standardize the current report required to be filed in the previous § 1310.05(a)(3). Each regulated person must report to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person. The regulated person will orally report to the Special Agent in Charge of the DEA Divisional Office at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. The regulated person must also file a complete and accurate DEA Form 107 with the Administration through the DEA Diversion Control Division secure network application within 15 calendar days after becoming aware of the circumstances requiring the report. Unusual or excessive losses or disappearances must be reported whether or not the listed chemical is subsequently recovered or the responsible parties are identified and action taken against them. DEA Form 107 would be required to be accessed, completed, and submitted to the DEA through the DEA Diversion Control Division secure network application. While the report would be electronic, the filing requirements are essentially unchanged. The DEA estimates that the reporting burden would continue to be 20 minutes for each report.

Specifically, based on publicly available information and historical data, the DEA estimates that there will be 130 respondents to this information collection, 60 for domestic transactions and 70 for imports or exports. The DEA estimates that the frequency of response will vary as DEA Form 452 is required to be completed by each respondent per each occurrence. As the DEA does not have a strong basis to estimate the number of responses for domestic transactions, the DEA makes an initial estimate (to be refined later) of 52 responses per week for each of 60 respondents, or a total of 3,120 domestic transaction related responses. Based on historical data, the DEA estimates there will be 917 import or export related responses for a grand total of 4,037 responses for domestic transactions, imports, and exports. Because of the information required on the DEA Form 452, the DEA estimates that this form will take 20 minutes to complete, including the oral report for domestic transactions and return information for imports and exports, and that the total annual burden will be 1,346 hours.

5. Title: Report of Mail Order Transactions—DEA Form 453

OMB Control Number: 1117–0033.
Form Number: DEA Form 453.

As part of the implementation of the ITDS, the DEA is establishing a new DEA Form 453, ''Report of Mail Order Transactions,'' to be used by regulated persons required to file monthly reports of transactions with nonregulated persons with ephedrine, pseudoephedrine, phenylpropanolamine, or gamma-hydroxybutyric acid (including drug products containing these chemicals or controlled substance) and use or attempt to use the U.S. Postal Service or a private or commercial carrier as well as regulated persons required to file monthly reports of export transactions with ephedrine, pseudoephedrine, phenylpropanolamine, or gamma-hydroxybutyric acid (including drug products containing these chemicals or controlled substance) and use or attempt to use the U.S. Postal Service or a private or commercial carrier. The DEA would require reports under the previous §§ 1310.03(c) and 1310.06(i) to be submitted on a new DEA Form 453 which would be required to be accessed and submitted to the DEA through the DEA Diversion Control Division secure network application.

Additionally, the form would require the following information: The mail order transaction supplier name and registration number; the purchaser's name and address; the name and address shipped to (if different from purchaser's name and address); the name of the chemical contained in the scheduled listed chemical product and total quantity shipped (*e.g.,* pseudoephedrine, 3 grams); the date of shipment; the product name; the dosage form (*e.g.,* tablet, liquid, powder); the dosage strength; the number of dosage units; the package type; the number of packages; and the lot number. Previously, § 1310.05(e) instructed that regulated persons submit a written report, containing the information listed above, on or before the 15th day of each month following the month in which the distributions took place. However, the DEA is amending part 1310 in order for DEA Form 453 to be submitted to the DEA electronically on or before the 15th day of each month following the month in which the distributions took place.

Specifically, based on historical data, the DEA estimates that there will be 7 respondents to this information collection. The respondents will provide 12 responses per year. The DEA estimates there will be a total of 84 responses per year. The DEA estimates that this form will take 15 minutes to complete and that the total annual burden will be 21 hours.

Rule Text

List of Subjects

21 CFR Part 1300

Chemicals, Drug traffic control.

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Exports, Imports, Security measures.

21 CFR Part 1302

Drug traffic control, Exports, Imports, Labeling, Packaging and containers.

21 CFR Part 1303

Administrative practice and procedure, Drug traffic control.

21 CFR Part 1304

Drug traffic control, Reporting and recordkeeping requirements.

21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Exports, Imports, Reporting and recordkeeping requirements.

21 CFR Part 1309

Administrative practice and procedure, Drug traffic control, Exports, Imports.

21 CFR Part 1310

Drug traffic control, Exports, Imports, Reporting and recordkeeping requirements.

21 CFR Part 1312

Administrative practice and procedure, Drug traffic control, Exports, Imports, Reporting and recordkeeping requirements.

21 CFR Part 1313

Administrative practice and procedure, Drug traffic control, Exports, Imports, Reporting and recordkeeping requirements.

21 CFR Part 1314

Drug traffic control, Reporting and recordkeeping requirements.

21 CFR Part 1315

Administrative practice and procedure, Chemicals, Drug traffic control, Imports, Reporting and recordkeeping requirements.

21 CFR Part 1316

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

21 CFR Part 1321

Administrative practice and procedure.

For the reasons stated in the preamble, the DEA amends 21 CFR parts 1300, 1301, 1302, 1303, 1304, 1308, 1309, 1310, 1312, 1313, 1314, 1315, 1316, and 1321 as follows:

PART 1300—DEFINITIONS

■ 1. The authority citation for part 1300 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 822, 829, 871(b), 951, 958(f).

■ 2. In § 1300.01(b):

■ a. Revise definitions of ''Export'' and ''Import'';

■ b. Add definitions of ''Competent national authority'', ''Customs officer'', ''Port of entry'', ''Port of export'', ''Return information'', and ''United States'', in alphabetical order; and

■ c. Remove the definition of ''Jurisdiction of the United States''.

The revisions and additions read as follows:

§ 1300.01 Definitions relating to controlled substances.

* * * * *

(b) * * *

Competent national authority, for purposes of importation and exportation of controlled substances and listed chemicals, means an entity lawfully entitled to authorize the import and export of controlled substances, and to regulate or enforce national controls over listed chemicals, and included as such in the directory of ''Competent National Authorities Under the International Drug Control Treaties'' published by the United Nations Office on Drugs and Crime. For purposes of exports of narcotic drugs, the term also includes freely associated states authorized to receive such exports pursuant to 48 U.S.C. 1972.

* * * * *

Customs officer means either an Officer of the Customs as defined in 19 U.S.C. 1401(i) (that is, of the U.S. Customs and Border Protection), or any individual duly authorized to accept entries of merchandise, to collect duties, and to enforce the customs laws of any commonwealth, territory, or possession of the United States.

* * * * *

Export means, with respect to any article, any taking out or removal of such article from the United States (whether or not such taking out or removal constitutes an exportation within the meaning of the customs laws, export control laws enforced by other agencies, or related laws of the United States).

* * * * *

Import means, with respect to any article, any bringing in or introduction of such article into the customs territory of the United States from any place outside thereof (but within the United States), or into the United States from any place outside thereof (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States).

* * * * *

Port of entry means, unless distinguished as being a foreign port of entry, any place at which a customs officer is duly authorized to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs laws of the United States (whether or not such place is a port of entry as defined in title 19 of the United States Code or its associated implementing regulations). Examples of ports of entry include, but are not limited to, places designated as ports of entry or customs stations in title 19 of the *Code of Federal Regulations* or by the governing customs authority of that area. When shipments are transported under U.S. Customs and Border Protection's immediate transportation procedures, the port of entry shall be the port of final destination.

Port of export means, unless distinguished as being a foreign port of export, any place under the control of a customs officer where goods are loaded on an aircraft, vessel or other conveyance for export outside of the United States. For goods loaded aboard an aircraft or vessel in the United States, that stops at several ports before departing the United States, the port of export is the first port where the goods were actually loaded. For goods off-loaded from the original conveyance to another conveyance (even if the aircraft or vessel belongs to the same carrier) at any port subsequent to the port where the first on-loading occurred in the United States, the port where the goods were loaded onto the last conveyance before departing the United States is the port of export.

* * * * *

Return information means supplemental information required to be reported to the Administration following an import or export transaction containing the particulars of the transaction and any other information as the Administration may specify.

* * * * *

United States, when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States, which, in addition to the customs territory of the United States, include but are not limited to the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

■ 3. In § 1300.02(b):

■ a. Add definitions of ''Competent national authority'', ''Customs officer'', ''Export'', ''Import'', ''Port of entry'', ''Port of export'', ''Return information'', and ''United States'', in alphabetical order; and

■ b. Remove definitions of ''Chemical import'' and ''Jurisdiction of the United States''.

The additions read as follows:

§ 1300.02 Definitions relating to listed chemicals.

* * * * *

(b) * * *

Competent national authority, for purposes of importation and exportation of controlled substances and listed chemicals, means an entity lawfully entitled to authorize the import and export of controlled substances, and to regulate or enforce national controls over listed chemicals, and included as such in the directory of ''Competent National Authorities Under the International Drug Control Treaties'' published by the United Nations Office on Drugs and Crime.

Customs officer means either an Officer of the Customs as defined in 19 U.S.C. 1401(i) (that is, of the U.S. Customs and Border Protection), or any individual duly authorized to accept entries of merchandise, to collect duties, and to enforce the customs laws of any commonwealth, territory, or possession of the United States.

* * * * *

Export means, with respect to any article, any taking out or removal of such article from the United States (whether or not such taking out or removal constitutes an exportation within the meaning of the customs laws, export control laws enforced by other agencies, or related laws of the United States).

* * * * *

Import means, with respect to any article, any bringing in or introduction of such article into the customs territory of the United States from any place outside thereof (but within the United States), or into the United States from any place outside thereof (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States).

* * * * *

Port of entry, unless distinguished as being a foreign port of entry, means any place at which a customs officer is duly authorized to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs laws of the United States (whether or not such place is a port of entry as defined in title 19 of the United States Code or its associated implementing regulations). Examples of ports of entry include, but are not limited to, places designated as ports of entry or customs stations in title 19 of the *Code of Federal Regulations* or by the governing customs authority of that area. When shipments are transported under U.S. Customs and Border Protection immediate transportation procedures, the port of entry shall be the port of final destination.

Port of export means, unless distinguished as being a foreign port of export, any place under the control of a customs officer where goods are loaded on an aircraft, vessel or other conveyance for export outside of the United States. For goods loaded aboard an aircraft or vessel in the United States that stops at several ports before departing the United States, the port of export is the first port where the goods were loaded. For goods off-loaded from the original conveyance to another conveyance (even if the aircraft or vessel belongs to the same carrier) at any port subsequent to the port where the first on-loading occurred in the United States, the port where the goods were loaded onto the last conveyance before departing the United States is the port of export. For reporting purposes, in the case of an otherwise lawful export occurring by mail, the port of export is the place of mailing.

* * * * *

Return information means supplemental information required to be reported to the Administration following an import or export transaction containing the particulars of the transaction and any other information as the Administration may specify.

* * * * *

United States, when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States, which, in addition to the customs territory of the United States, include but are not limited to the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

* * * * *

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

■ 4. The authority citation for part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 831, 871(b), 875, 877, 886a, 951, 952, 953, 956, 957, 958, 965.

■ 5. In § 1301.12, revise paragraph (b)(3) to read as follows:

§ 1301.12 Separate registrations for separate locations.

* * * * *

(b) * * *

(3) An office used by a practitioner (who is registered at another location in the same State in which he or she practices) where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, and where no supplies of controlled substances are maintained.

* * * * *

■ 6. In § 1301.24, revise paragraph (a)(1) to read as follows:

§ 1301.24 Exemption of law enforcement officials.

(a) * * *

(1) Any officer or employee of the Administration, any customs officer, any officer or employee of the U.S. Food and Drug Administration, and any other Federal or Insular officer who is lawfully engaged in the enforcement of any Federal law relating to controlled substances, drugs, or customs, and is duly authorized to possess or to import or export controlled substances in the course of his/her official duties; and

* * * * *

■ 7. In § 1301.26, revise paragraph (b) introductory text to read as follows:

§ 1301.26 Exemption from import or export requirements for personal medical use.

* * * * *

(b) The individual makes a declaration to an appropriate customs officer stating:

* * * * *

■ 8. In § 1301.34, revise paragraph (c)(2) to read as follows:

§ 1301.34 Application for importation of Schedule I and II substances.

* * * * *

(c) * * *

(2) Employment of security procedures to guard against in-transit losses.

* * * * *

■ 9. In § 1301.74, revise paragraph (c) introductory text to read as follows:

§ 1301.74 Other security controls for non-practitioners; narcotic treatment programs and compounders for narcotic treatment programs.

* * * * *

(c) The registrant must notify the Field Division Office of the Administration in his or her area, in writing, of any theft or significant loss of any controlled substances within one business day of discovery of the theft or loss. Unless the theft or loss occurs during an import or export transaction, the supplier is responsible for reporting all in-transit losses of controlled substances by their agent or the common or contract carrier selected pursuant to paragraph (e) of this section, within one business day of discovery of such theft or loss. In an import transaction, once a shipment has been released by the customs officer at the port of entry, the importer is responsible for reporting all in-transit losses of controlled substances by their agent or the common or contract carrier selected pursuant to paragraph (e) of this section, within one business day of discovery of such theft or loss. In an export transaction, the exporter is responsible for reporting all in-transit losses of controlled substances by their agent or the common or contract carrier selected pursuant to paragraph (e) of this section within one business day of discovery of such theft or loss, until the shipment has been released by the customs officer at the port of export. The registrant must also complete, and submit to the Field Division Office in his or her area, DEA Form 106 regarding the theft or loss. Thefts and significant losses must be reported whether or not the controlled substances are subsequently recovered or the responsible parties are identified and action taken against them. When determining whether a loss is significant, a registrant should consider, among others, the following factors:

* * * * *

PART 1302—LABELING AND PACKAGING REQUIREMENTS FOR CONTROLLED SUBSTANCES

■ 10. The authority citation for part 1302 continues to read as follows:

Authority: 21 U.S.C. 821, 825, 871(b), 958(e).

■ 11. Revise § 1302.07 to read as follows:

§ 1302.07 Labeling and packaging requirements for imported and exported substances.

(a) The symbol requirements of §§ 1302.03 through 1302.05 apply to every commercial container containing, and to all labeling of, controlled substances imported into the customs territory of the United States from any place outside thereof (but within the United States), or imported into the United States from any place outside thereof.

(b) The symbol requirements of §§ 1302.03 through 1302.05 do not apply to any commercial containers containing, or any labeling of, a controlled substance intended for export.

(c) The sealing requirements of § 1302.06 apply to every bottle, multiple dose vial, or other commercial container of any controlled substance listed in schedule I or II, or any narcotic controlled substance listed in schedule III or IV imported into the customs territory of the United States from any place outside thereof (but within the United States), or imported into the United States from any place outside thereof. The sealing requirements of § 1302.06 apply to every bottle, multiple dose vial, or other commercial container of any controlled substance listed in schedule I or II, or any narcotic controlled substance listed in schedule III or IV, exported or intended for export from the United States. These sealing and labeling requirements are in addition to any sealing requirements required under applicable customs laws.

PART 1303—QUOTAS

■ 12. The authority citation for part 1303 continues to read as follows:

Authority: 21 U.S.C. 821, 826, 871(b).

§ 1303.12 [Amended]

■ 13. In § 1303.12:

■ a. In paragraph (b), remove ''Drug and Chemical Evaluation Section, Drug Enforcement Administration'' and add in its place ''UN Reporting and Quota Section, Diversion Control Division''; and

■ b. In paragraph (d), remove ''Drug & Chemical Evaluation Section, Drug Enforcement Administration'' and add in its place ''UN Reporting and Quota Section, Diversion Control Division''.

§ 1303.22 [Amended]

■ 14. In § 1303.22 introductory text, remove ''Drug & Chemical Evaluation Section, Drug Enforcement Administration'' and add in its place ''UN Reporting and Quota Section, Diversion Control Division''.

PART 1304—RECORDS AND REPORTS OF REGISTRANTS

■ 15. The authority citation for part 1304 continues to read as follows:

Authority: 21 U.S.C. 821, 827, 831, 871(b), 958 (e)–(g), and 965, unless otherwise noted.

■ 16. Revise § 1304.02 to read as follows:

§ 1304.02 Definitions.

Any term contained in this part shall have the definition set forth in section 102 of the Act (21 U.S.C. 802) or § 1300.01, § 1300.03, § 1300.04, or § 1300.05 of this chapter.

■ 17. In § 1304.21, revise paragraph (d) to read as follows:

§ 1304.21 General requirements for continuing records.

* * * * *

(d) In recording dates of receipt, distribution, other transfers, or destruction, the date on which the controlled substances are actually received, distributed, otherwise transferred, or destroyed will be used as the date of receipt, distribution, transfer, or destruction (*e.g.,* invoices or packing slips, or DEA Form 41). In maintaining records concerning imports and exports, the registrant must record the anticipated date of release by a customs official for permit applications and declarations and the date on which the controlled substances are released by a customs officer at the port of entry or port of export for return information.

* * * * *

§ 1304.31 [Amended]

■ 18. In § 1304.31(a), remove ''Drug and Chemical Evaluation Section, Drug Enforcement Administration'' and add in its place ''UN Reporting and Quota Section, Diversion Control Division''.

§ 1304.32 [Amended]

■ 19. In § 1304.32(a), remove ''Drug and Chemical Evaluation Section, Drug Enforcement Administration'' and add in its place ''UN Reporting and Quota Section, Diversion Control Division''.

■ 20. In § 1304.33, revise paragraphs (a) and (f)(1) to read as follows:

§ 1304.33 Reports to Automation of Reports and Consolidated Orders System (ARCOS).

(a) *Reports generally.* All reports required by this section shall be filed with the Pharmaceutical Investigations Section, Diversion Control Division, Drug Enforcement Administration on DEA Form 333, or on media which contains the data required by DEA Form 333 and which is acceptable to the Administration. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address.

* * * * *

(f) *Exceptions.* (1) A registered institutional practitioner that repackages or relabels exclusively for distribution or that distributes exclusively to (for dispensing by) agents, employees, or affiliated institutional practitioners of the registrant may be exempted from filing reports under this section by applying to the Pharmaceutical Investigations Section, Diversion Control Division, Drug Enforcement Administration. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address.

* * * * *

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 21. The authority citation for part 1308 is revised to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 22. Revise § 1308.01 to read as follows:

§ 1308.01 Scope of this part.

Schedules of controlled substances established by section 202 of the Act (21 U.S.C. 812) and nonnarcotic substances, chemical preparations, veterinary anabolic steroid implant products, prescription products, anabolic steroid products, and cannabis plant material and products made therefrom that contain tetrahydrocannabinols excluded pursuant to section 201 of the Act (21 U.S.C. 811), as they are changed, updated, and republished from time to time, are set forth in this part.

§ 1308.21 [Amended]

■ 23. In § 1308.21(a), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

§ 1308.23 [Amended]

■ 24. In § 1308.23(b), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

§ 1308.25 [Amended]

■ 25. In § 1308.25(a), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

§ 1308.31 [Amended]

■ 26. In § 1308.31(a), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

§ 1308.33 [Amended]

■ 27. In § 1308.33(b), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

■ 28. Revise § 1308.49 to read as follows:

§ 1308.49 Temporary scheduling.

(a) Pursuant to 21 U.S.C. 811(h) and without regard to the requirements of 21 U.S.C. 811(b) relating to the scientific and medical evaluation of the Secretary of Health and Human Services, the Drug Enforcement Administration may place a substance into Schedule I on a temporary basis, if it determines that such action is necessary to avoid an imminent hazard to the public safety. An order issued under this section may not be effective before the expiration of 30 calendar days from:

(1) The date of publication by the Administration of a notice in the **Federal Register** of its intention to issue such order and the grounds upon which such order is to be issued; and

(2) The date the Administration has transmitted notification to the Secretary of Health and Human Services of the Administration's intention to issue such order.

(b) An order issued under this section will be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under section 201(a) (21 U.S.C. 811(a)) with respect to such substance or at the end of two years from the effective date of the order scheduling the substance, except that during the pendency of proceedings under section 201(a) (21 U.S.C. 811(a)) with respect to the substance, the Administration may extend the temporary scheduling for up to one year.

PART 1309—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, IMPORTERS AND EXPORTERS OF LIST I CHEMICALS

■ 29. The authority citation for part 1309 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 822, 823, 824, 830, 871(b), 875, 877, 886a, 952, 953, 957, 958.

■ 30. In § 1309.26, revise paragraph (a)(1) to read as follows:

§ 1309.26 Exemption of law enforcement officials.

(a) * * *

(1) Any officer or employee of the Administration, any customs officer, any officer or employee of the U.S. Food and Drug Administration, and any Federal or Insular officer who is lawfully engaged in the enforcement of any federal law relating to listed chemicals, controlled substances, drugs, or customs, and is duly authorized to possess and distribute List I chemicals in the course of his/her official duties; and

* * * * *

■ 31. In § 1309.32, revise paragraph (d) to read as follows:

§ 1309.32 Application forms; contents; signature.

* * * * *

(d) Each application for registration must include the Administration Chemical Code Number, as set forth in § 1310.02 of this chapter, for each List I chemical to be manufactured, distributed, imported, or exported.

* * * * *

§ 1309.46 [Amended]

■ 32. In § 1309.46(d), remove ''§ 1309.54'' and add in its place ''§ 1309.53''.

§ 1309.51 [Amended]

■ 33. In § 1309.51(a), remove ''1309.57'' and add in its place ''1309.55''.

■ 34. In § 1309.71, revise paragraphs (b)(5) and (7) to read as follows:

§ 1309.71 General security requirements.

* * * * *

(b) * * *

(5) The extent of unsupervised public access to the facility;

* * * * *

(7) The procedures for handling business guests, visitors, maintenance personnel, and nonemployee service personnel in areas where List I chemicals are processed or stored; and

* * * * *

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES; IMPORTATION AND EXPORTATION OF CERTAIN MACHINES

■ 35. The authority citation for part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 827(h), 830, 871(b), 890.

■ 36. Revise the heading of part 1310 to read as set forth above.

■ 37. In § 1310.03:

■ a. In paragraph (b), remove ''Section 1310.05'' and add in its place ''§ 1310.05''; and

■ b. Revise paragraph (c).

The revision reads as follows:

§ 1310.03 Persons required to keep records and file reports.

* * * * *

(c)(1) Each regulated person who engages in a transaction with a nonregulated person which:

(i) Involves ephedrine, pseudoephedrine, phenylpropanolamine, or gamma hydroxybutyric acid (including drug products containing these chemicals or controlled substance); and

(ii) Uses or attempts to use the U.S. Postal Service or any private or commercial carrier must, on a monthly basis, report to the Administration each such transaction conducted during the previous month as specified in §§ 1310.05(e) and 1310.06(k) on DEA Form 453 through the DEA Diversion Control Division secure network application.

(2) Each regulated person who engages in an export transaction which:

(i) Involves ephedrine, pseudoephedrine, phenylpropanolamine, or gamma hydroxybutyric acid (including drug products containing these chemicals or controlled substance); and

(ii) Uses or attempts to use the U.S. Postal Service or any private or commercial carrier must, on a monthly basis, report each such transaction conducted during the previous month as specified in §§ 1310.05(e) and 1310.06(k) on DEA Form 453 through the DEA Diversion Control Division secure network application.

■ 38. In § 1310.05, revise paragraphs (a), (b), (c), (d) and (e) to read as follows:

§ 1310.05 Reports.

(a)(1) Each regulated person must report to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of this part. The regulated person will orally report to the Special Agent in Charge of the DEA Divisional Office at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved and as much in advance of the conclusion of the transaction as possible. The regulated person must file a written report of the transaction(s) with the Special Agent in Charge of the DEA Divisional Office as set forth in § 1310.06 within 15 calendar days after the regulated person becomes aware of the circumstances of the event.

(2) Each regulated person must report to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located any proposed regulated transaction with a person whose description or other identifying characteristic the Administration has previously furnished to the regulated person. The regulated person will orally report to the Special Agent in Charge of the DEA Divisional Office at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. A transaction may not be completed with a person whose description or identifying characteristic has previously been furnished to the regulated person by the Administration unless the transaction is approved by the Administration.

(b)(1) Each regulated person must report to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person. The regulated person will orally report to the Special Agent in Charge of the DEA Divisional Office at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. Unless the loss or disappearance occurs during an import or export transaction, the supplier is responsible for reporting all in-transit losses of any listed chemical by their agent or the common or contract carrier. In an import transaction, once a shipment has been released by the customs officer at the port of entry, the importer is responsible for reporting all in-transit losses of any listed chemical by their agent or the common or contract carrier. In an export transaction, the exporter is responsible for reporting all in-transit losses of any listed chemical by their agent or the common or contract carrier until the shipment has been released by the customs officer at the port of export. The regulated person must also file a complete and accurate DEA Form 107, in accordance with § 1310.06(d), with the Administration through the DEA Diversion Control Division secure network application within 15 calendar days after becoming aware of the circumstances requiring the report. Unusual or excessive losses or disappearances must be reported whether or not the listed chemical is subsequently recovered or the responsible parties are identified and action taken against them. When determining whether a loss or disappearance of a listed chemical was unusual or excessive, the regulated persons should consider, among others, the following factors:

(i) The actual quantity of a listed chemical;

(ii) The specific listed chemical involved;

(iii) Whether the loss or disappearance of the listed chemical can be associated with access to those listed chemicals by specific individuals, or whether the loss or disappearance can be attributed to unique activities that may take place involving the listed chemical; and

(iv) A pattern of losses or disappearances over a specific time period, whether the losses or disappearances appear to be random, and the result of efforts taken to resolve the losses.

(v) If known, the regulated person should also consider whether the specific listed chemical was a likely candidate for diversion as well as local trends and other indicators of the diversion potential of the listed chemical.

(2) Each regulated person must orally report any domestic regulated transaction in a tableting machine or an encapsulating machine to the Special Agent in Charge of the DEA Divisional Office for the area in which the regulated person making the report is located when the order is placed with the seller. The regulated person also must file a report of the transaction (on DEA Form 452) with the Administration through the DEA Diversion Control Division secure network application within 15 calendar days after the order has been shipped by the seller. A report (DEA Form 452) may list more than one machine for a single transaction. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until a

transaction identification number has been issued by the Administration.

(c) *Imports and exports of tableting machines and encapsulating machines.* (1) Each regulated person who imports or exports a tableting machine, or encapsulating machine, must file a report of such importation or exportation on DEA Form 452 with the Administration through the DEA Diversion Control Division secure network application, at least 15 calendar days before the anticipated arrival at the port of entry or port of export. In order to facilitate the importation or exportation of any tableting machine or encapsulating machine and implement the purpose of the Act, regulated persons may report to the Administration as far in advance as possible. A separate report (DEA Form 452) must be filed for each shipment, in accordance with § 1310.06(e). Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until a transaction identification number has been issued by the Administration. The importer or exporter may only proceed with the transaction once the transaction identification number has been issued. Any tableting machine or encapsulating machine may be imported or exported if that machine is needed for medical, commercial, scientific, or other legitimate uses. However, an importation or exportation of a tableting machine or encapsulating machine may not be completed with a person whose description or identifying characteristic has previously been furnished to the regulated person by the Administration unless the transaction is approved by the Administration.

(2) *Denied release at the port of entry.* In the event that a shipment of tableting or encapsulating machine(s) has been denied release by a customs officer at the port of entry for any reason, the importer who attempted to import the shipment must, within 5 business days of the denial, report to the Administration that the shipment was denied, the basis for denial, and such other information as is required by § 1310.06(g). Such report must be transmitted to the Administration through the DEA Diversion Control Division secure network application. Upon the importer's report of a denied entry, DEA will assign the report a transaction identification number and the original import notification will be void and of no effect. No shipment of tableting machines or encapsulating machines denied entry for any reason will be allowed entry without a subsequent refiling of an amended DEA Form 452 by the regulated person. In such circumstances, the regulated person may proceed with the release of the tableting machines or encapsulating machines upon receipt of a transaction identification number for the refiled and amended DEA Form 452 without regard to the 15-day advance filing requirement in paragraph (c)(1) of this section, so long as the article is otherwise cleared for entry under U.S. customs laws.

(d) Each regulated bulk manufacturer of a listed chemical must submit manufacturing, inventory and use data on an annual basis as set forth in § 1310.06(j). This data must be submitted annually to the Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration, on or before the 15th day of March of the year immediately following the calendar year for which submitted. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. A business entity which manufactures a listed chemical may elect to report separately by individual location or report as an aggregate amount for the entire business entity provided that they inform the DEA of which method they will use. This reporting requirement does not apply to drugs or other products that are exempted under paragraph (1)(iv) or (v) of the definition of regulated transaction in § 1300.02 of this chapter except as set forth in § 1310.06(i)(5). Bulk manufacturers that produce a listed chemical solely for internal consumption are not required to report for that listed chemical. For purposes of these reporting requirements, internal consumption consists of any quantity of a listed chemical otherwise not available for further resale or distribution. Internal consumption includes (but is not limited to) quantities used for quality control testing, quantities consumed in-house, or production losses. Internal consumption does not include the quantities of a listed chemical consumed in the production of exempted products. If an existing standard industry report contains the information required in § 1310.06(j) and such information is separate or readily retrievable from the report, that report may be submitted in satisfaction of this requirement. Each report must be submitted to the DEA under company letterhead and signed by an appropriate, responsible official. For purposes of this paragraph (d) only, the term regulated bulk manufacturer of a listed chemical means a person who manufactures a listed chemical by means of chemical synthesis or by extraction from other substances. The term bulk manufacturer does not include persons whose sole activity consists of the repackaging or relabeling of listed chemical products or the manufacture of drug dosage forms of products which contain a listed chemical.

(e) Each regulated person required to report pursuant to § 1310.03(c) must file a report containing the transaction identification number for each such transaction (if the regulated person is required to obtain a transaction identification number under part 1313 of this chapter) and information set forth in § 1310.06(k), on or before the 15th day of each month following the month in which the distributions took place.

* * * * *

■ 39. Revise § 1310.06 to read as follows:

§ 1310.06 Content of records and reports.

(a) Each record required by § 1310.03(a) must include the following:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address (es), etc.), and, if required, DEA registration number of each party to the regulated transaction.

(2) The date of the regulated transaction.

(3) The quantity, chemical name, and, if applicable, National Drug Code (NDC) number. If NDC number is not applicable, the form of packaging of the listed chemical or a description of the tableting machine or encapsulating machine (including make, model, serial number, if any, and whether the machine is manual or electric).

(4) The method of transfer (company truck, picked up by customer, etc.).

(5) The type of identification used by the purchaser and any unique number on that identification.

(b) For purposes of this section, normal business records will be considered adequate if they contain the information listed in paragraph (a) of this section and are readily retrievable from other business records of the regulated person. For prescription drug products, prescription and hospital records kept in the normal course of medical treatment will be considered adequate for satisfying the requirements of paragraph (a) of this section with respect to dispensing to patients, and records required to be maintained pursuant to the U.S. Food and Drug Administration regulations relating to the distribution of prescription drugs, as set forth in 21 CFR part 205, will be considered adequate for satisfying the requirements of paragraph (a) of this section with respect to distributions.

(c)(1) Each report required by § 1310.05(a) must include the information as specified by paragraph (a) of this section, the basis for making the report, and, where obtainable, the registration number of the other party, if such party is registered. A report of an uncommon method of payment or delivery submitted in accordance with § 1310.05(a)(1) must also include a reason why the method of payment or delivery was uncommon.

(2) A suggested format for the reports in § 1310.05(a)(1) is provided below:

Supplier:
Registration Number (if registered) ____
Name ____
Address ____
City ____
State ____
Zip ____
Contact Information: ____

Purchaser:
Registration Number (if registered) ____
Name ____
Address ____
City ____
State ____
Zip ____
Contact Information ____
Identification ____

Shipping Address (if different than purchaser Address):
Street ____
City ____
State ____
Zip ____
Date of Shipment ____

Description of Listed Chemical:
Chemical Name ____
Quantity ____
National Drug Code (NDC) Number(s), or Form(s) of Packaging ____

Other:
The basis (*i.e.,* reason) for making the report: ____
Any additional pertinent information:

(d) Each report of an unusual or excessive loss or disappearance of a listed chemical required by § 1310.05(b)(1) (on DEA Form 107), must include the following information:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address (es), etc.), and, if applicable, DEA registration number of each party to the regulated transaction.

(2) The date (or estimated date) on which unusual or excessive loss or disappearance occurred, and the actual date on which the unusual or excessive loss or disappearance was discovered by the regulated person.

(3) The quantity, chemical name, and National Drug Code (NDC) number, if applicable or if not the form of packaging of the listed chemical.

(4) The type of business conducted by the regulated person, (*e.g.,* grocery store, pharmacy/drug store, discount department store, warehouse club or superstore, convenience store, specialty food store, gas station, mobile retail vendor, mail-order, etc.) if the regulated person is not a DEA registrant.

(e)(1) Each report of an importation of a tableting machine or an encapsulating machine required by § 1310.05(c)(1) (on DEA Form 452) must include the following information:

(i) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the regulated person; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the import broker or forwarding agent, if any;

(ii) A description of each machine (including make, model, serial number, if any, and whether the machine is manual or electric) and the number of machines being received;

(iii) The anticipated date of arrival at the port of entry, and the anticipated port of entry;

(iv) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignor in the foreign country of exportation;

(v) The intended medical, commercial, scientific, or other legitimate use of the machine; and

(vi) Any proposed changes in identifying information of the imported machines (*e.g.,* name, brand, serial number, if any, etc.) that will take place after importation.

(2) Each report of an exportation of a tableting machine or an encapsulating machine required by § 1310.05(c)(1) (on DEA Form 452) must include the following information:

(i) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the regulated person; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the export broker (if applicable);

(ii) A description of each machine (including make, model, serial number, if any, and whether the machine is manual or electric) and the number of machines being received;

(iii) The anticipated date of arrival at the port of export, the foreign port and country of entry; and

(iv) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignee in the country where the shipment is destined; the name(s)/business name(s) and address(es)/business address(es), and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the intermediate consignee(s) (if any).

(f) Each report of a domestic regulated transaction in a tableting machine or encapsulating machine required by § 1310.05(b)(2) (on DEA Form 452) must include the following information:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the regulated person; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the purchaser;

(2) A description of each machine (including make, model, serial number, if any, and whether the machine is manual or electric) and the number of machines being received; and

(3) Any changes made by the regulated person in identifying information of the machines (*e.g.,* name, brand, serial number, etc.).

(g) Each report of a denied release by a customs officer at the port of entry of a tableting machine or an encapsulating machine required by § 1310.05(c)(2) must include the following information: the quantity of machines denied release; a concise description of the machines denied release; the date on which release was denied; the port where the denial of release was issued from; and the basis for the denial.

(h) *Return information.* (1) Within 30 calendar days after actual receipt of a tableting or encapsulating machine, or within 10 calendar days after receipt of a written request by the Administration to the importer, whichever is sooner, the importer must file a report with the Administration (on DEA Form 452) specifying the particulars of the transaction utilizing the DEA Diversion Control Division secure network application. This report must include the following information: The date on which a customs officer at the port of entry released the machine(s); the date on which the machine(s) arrived at the final destination; the port of entry where the machine(s) were actually released by a customs officer; the actual quantity of machines released by a customs officer; the actual quantity of machines that arrived at the final destination; a description of each tableting or encapsulating machine imported (including make, model, and serial number, if any); any changes in identifying information of the imported machines (*e.g.,* name, brand, serial number, if any, etc.) that will take place after importation; and any other information as the Administration may from time to time specify. Upon receipt and review, the Administration will assign a transaction identification number to a completed report. The report will not be deemed filed until the Administration has issued a transaction identification number. A single return declaration may include the particulars of both the importation and distribution. For DEA reporting purposes, import responsibilities are concluded upon the receipt of the machines by the importer. Once machines are received by the importer, domestic transaction reporting requirements commence. Distributions of tableting and encapsulating machines from the importer to their customers must be reported as domestic regulated transactions in accordance with § 1310.05(b)(2).

(2) Within 30 calendar days after the tableting or encapsulating machine is released by a customs officer at the port of export, or within 10 calendar days after receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must file a report with the Administration (on DEA Form 452) through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the machine(s) was (were) released by a customs officer at the port of export; the actual quantity of machines released; a description of each tableting or encapsulating machine released (including make, model, serial number, if any, and whether the machine is manual or electric); and any other information as the Administration may from time to time specify.

(i) Declared exports of machines which are refused, rejected, or otherwise deemed undeliverable may be returned to the U.S. exporter of record. A brief written report outlining the circumstances must be filed with the Administration through the DEA Diversion Control Division secure network application, following the return at the earliest practicable opportunity after the regulated person becomes aware of the circumstances involved. This provision does not apply to shipments that have cleared foreign customs, been delivered, and accepted by the foreign consignee. Returns to third parties in the United States will be regarded as imports.

(j) Each annual report required by § 1310.05(d) must provide the following information for each listed chemical manufactured:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) and chemical registration number (if any) of the manufacturer.

(2) The aggregate quantity of each listed chemical that the company manufactured during the preceding calendar year.

(3) The year-end inventory of each listed chemical as of the close of business on the 31st day of December of each year. (For each listed chemical, if the prior period's ending inventory has not previously been reported to DEA, this report should also detail the beginning inventory for the period.) For purposes of this requirement, inventory shall reflect the quantity of listed chemicals, whether in bulk or non-exempt product form, held in storage for later distribution. Inventory does not include waste material for destruction, material stored as an in-process intermediate or other in-process material.

(4) The aggregate quantity of each listed chemical used for internal consumption during the preceding calendar year, unless the chemical is produced solely for internal consumption.

(5) The aggregate quantity of each listed chemical manufactured which becomes a component of a product exempted from paragraph (1)(iv) or (v) of the definition of regulated transaction in § 1300.02 of this chapter during the preceding calendar year.

(6) Data shall identify the specific isomer, salt or ester when applicable but quantitative data shall be reported as anhydrous base or acid in kilogram units of measure.

(k) Each monthly report required by §§ 1310.03(c) and 1310.05(e) (on DEA Form 453) must provide the following information for each transaction:

(1) Supplier name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) and registration number.

(2) Purchaser's name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.).

(3) Name/business name, address/business address shipped to (if different from purchaser's name/address).

(4) Chemical name, National Drug Code (NDC) number, if applicable, and total amount shipped.

(5) Date of shipment.

(6) Product name (if drug product).

(7) Dosage form (if drug product) (*e.g.,* pill, tablet, liquid).

(8) Dosage strength (if drug product) (*e.g.,* 30mg, 60mg, per dose etc.).

(9) Number of dosage units (if drug product) (*e.g.,* 100 doses per package).

(10) Package type (if drug product) (*e.g.,* bottle, blister pack, etc.).

(11) Number of packages (if drug product) (*e.g.,* 10 bottles).

(12) Lot number (if drug product).

(l) Information provided in reports required by § 1310.05(e) which is exempt from disclosure under section 552(a) of title 5, by reason of section 552(b)(6) of title 5, will be provided the same protections from disclosure as are provided in section 310(c) of the Act (21 U.S.C. 830(c)) for confidential business information.

§ 1310.13 [Amended]

■ 40. In § 1310.13(b), remove ''Office of Diversion Control, Drug Enforcement Administration'' and add in its place ''Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration''.

PART 1312—IMPORTATION AND EXPORTATION OF CONTROLLED SUBSTANCES

■ 41. The authority citation for part 1312 continues to read as follows:

Authority: 21 U.S.C. 952, 953, 954, 957, 958.

■ 42. Add § 1312.03 to read as follows:

§ 1312.03 Forms applicable to this part.

Form	Access/ submission
DEA Form 35, Permit to Import	electronic.
DEA Form 36, Permit to Export	electronic.
DEA Form 161, Application for Permit to Export Controlled Substances	electronic.
DEA Form 161R, Application for Permit to Export Controlled Substances For Subsequent Reexport	electronic.
DEA Form 161R–EEA, Application for Permit to Export Controlled Substances for Subsequent Reexport Among Members of the European Economic Area.	electronic.
DEA Form 236, Controlled Substances Import/Export Declaration	electronic.

Form	Access/ submission
DEA Form 357, Application for Permit to Import Controlled Substances for Domestic And/Or Scientific Purposes	electronic.

■ 43. Revise § 1312.11 to read as follows:

§ 1312.11 Requirement of authorization to import.

(a) No person shall import, or cause to be imported, into the customs territory of the United States from any place outside thereof (but within the United States), or into the United States from any place outside thereof, any controlled substances listed in Schedule I or II, or any narcotic controlled substance listed in Schedule III, IV, or V, or any non-narcotic controlled substance listed in Schedule III which the Administrator has specifically designated by regulation in § 1312.30 or any non-narcotic controlled substance listed in Schedule IV or V which is also listed in Schedule I or II of the Convention on Psychotropic Substances, 1971, unless and until such person is properly registered under the Act (or, in accordance with part 1301 of this chapter, exempt from registration) and the Administration has issued him or her a permit to do so in accordance with § 1312.13.

(b) No person shall import, or cause to be imported, into the customs territory of the United States from any place outside thereof (but within the United States), or into the United States from any place outside thereof, any non-narcotic controlled substance listed in Schedule III, IV, or V, excluding those described in paragraph (a) of this section, unless and until such person is properly registered under the Act (or, in accordance with part 1301 of this chapter, exempt from registration) and has filed an import declaration to do so in accordance with § 1312.18.

(c) A separate permit or declaration is required for each shipment of a controlled substance to be imported.

■ 44. Revise § 1312.12 to read as follows:

§ 1312.12 Application for import permit; return information.

(a) Registered importers, other registrants authorized to import as a coincident activity of their registrations, and persons who in accordance with part 1301 of this chapter are exempt from registration, seeking to import a controlled substance in schedule I or II; any narcotic drug in schedule III, IV, or V; any non-narcotic drug in schedule III that has been specifically designated by regulation in § 1312.30; or any non-narcotic substance listed in schedule IV or V that is also listed in schedule I or II of the Convention on Psychotropic Substances, 1971, must submit an application for a permit to import controlled substances on DEA Form 357. All applications and supporting materials must be submitted to the Administration through the DEA Diversion Control Division secure network application. The application must be signed and dated by the importer and must contain the importer's registered address to which the controlled substances will be imported.

(b) The applicant must include on the DEA Form 357 the registration number of the importer and a detailed description of each controlled substance to be imported including the drug name, dosage form, National Drug Code (NDC) number, the Administration Controlled Substance Code Number as set forth in part 1308 of this chapter, the number and size of the packages or containers, the name and quantity of the controlled substance contained in any finished dosage units, and the quantity of any controlled substance (expressed in anhydrous acid, base or alkaloid) given in kilograms or parts thereof. The application must also include the following:

(1) The name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.), and business of the consignor, if known at the time the application is submitted, but if unknown at that time, the fact should be indicated and the name and address afterwards furnished to the Administration as soon as ascertained by the importer;

(2) The foreign port and country of initial exportation (*i.e.,* the place where the article will begin its journey of exportation to the United States);

(3) The port of entry into the United States;

(4) The latest date said shipment will leave said foreign port or country;

(5) The stock on hand of the controlled substance desired to be imported;

(6) The name of the importing carrier or vessel (if known), or if unknown it should be stated whether the shipment will be made by express, freight, or otherwise, imports of controlled substances in Schedules I or II and narcotic drugs in Schedules III, IV, or V by mail being prohibited);

(7) The total tentative allotment to the importer of such controlled substance for the current calendar year; and

(8) The total number of kilograms of said allotment for which permits have previously been issued and the total quantity of controlled substance actually imported during the current year to date.

(c) If desired, alternative foreign ports of exportation within the same country may be indicated upon the application (*e.g.,* 1. Kolkata, 2. Mumbai). If a permit is issued pursuant to such application, it will bear the names of the two ports in the order given in the application and will authorize shipment from either port. Alternative ports in different countries will not be authorized in the same permit.

(d) *Return information.* Within 30 calendar days after actual receipt of a controlled substance at the importer's registered location, or within 10 calendar days after receipt of a written request by the Administration to the importer, whichever is sooner, the importer must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date the controlled substance was released by a customs officer at the port of entry; the date on which the controlled substance arrived at the registered location; the actual quantity of the controlled substance released by a customs officer at the port of entry; and the actual quantity of the controlled substance that arrived at the registered location. Upon receipt and review, the Administration will assign a transaction identification number to a completed report. The report will not be deemed filed until the Administration has issued a transaction identification number.

(e) *Denied release at the port of entry.* In the event that a shipment of controlled substances has been denied release by a customs officer at the port of entry for any reason, the importer who attempted to have the shipment released must, within 5 business days of the denial, report to the Administration that the shipment was denied and the reason for denial. Such report must be transmitted to the Administration through the DEA Diversion Control

Division secure network application. This report must include the following information: The quantity of the controlled substance denied release; the date on which release was denied; and the basis for the denied release. Upon the importer's report of a denied release at the port of entry, the DEA will assign the report a transaction identification number and the import permit will be void and of no effect. No shipment of controlled substances denied release for any reason will be allowed to be released into the United States unless the importer submits a new DEA Form 357 and the Administration issues a new import permit.

■ 45. In § 1312.13, revise paragraph (e) to read as follows:

§ 1312.13 Issuance of import permit.

* * * * *

(e) If an importation is approved, the Administrator will issue an import permit bearing his or her signature or that of his or her delegate. Each permit will be assigned a unique permit number. A permit must not be altered or changed by any person after being signed. Any change or alteration upon the face of any permit after it has been signed renders it void and of no effect. Permits are not transferable. The Administrator or his/her delegate will date and certify on each permit that the importer named therein is thereby permitted as a registrant under the Act, to import, through the port of entry named, one shipment of not to exceed the specified quantity of the named controlled substances, shipment to be made before a specified date. Only one shipment may be made on a single import permit. A single import permit shall authorize a quantity of goods to be imported/exported at one place, at one time, for delivery to one consignee, on a single conveyance, at one place, on one bill of lading, air waybill, or commercial loading document; a single permit shall not authorize a quantity of goods to be imported/exported if the goods are divided onto two or more conveyances. The permit must state that the Administration is satisfied that the consignment proposed to be imported is required for legitimate purposes.

* * * * *

■ 46. Revise § 1312.14 to read as follows:

§ 1312.14 Distribution of import permits.

The Administration shall transmit the import permit to the competent national authority of the exporting country and shall make an official record of the import permit available to the importer through secure electronic means. The importer, or their agent, must submit an official record of the import permit and/ or required data concerning the import transaction to a customs officer at the port of entry in compliance with all import control requirements of agencies with import control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act. The importer must maintain an official record of the import permit (available from the DEA Diversion Control Division secure network application after issuance) in accordance with part 1304 of this chapter as the record of authority for the importation and shall transmit an official record of the permit to the foreign exporter. If required by the foreign competent national authority, the importer shall ensure that an official record of the import permit is provided (*e.g.,* by transmitting an official record of the permit to the foreign exporter who shall transmit such record to the competent national authority of the exporting county). The importer must ensure that an official record of the permit accompanies the shipment of controlled substances to its final destination, the registered location of the importer (*i.e.,* drop shipments are prohibited).

§ 1312.15 [Amended]

■ 47. In § 1312.15:

■ a. In paragraph (a):

■ i. Remove the phrase ''the U.S. Customs Service'' and add in its place ''U.S. Customs and Border Protection or customs service of an Insular Area''; and

■ ii. At the end of the first sentence, add the phrase ''in accordance with § 1312.16(a)''; and

■ b. In paragraph (b):

■ i. Remove the phrase ''the U.S. Customs Service'' and add in its place ''U.S. Customs and Border Protection or customs service of an Insular Area''; and

■ ii. In the final sentence, remove ''Director of the Administration'' and add in its place ''Administrator''.

■ 48. Revise § 1312.16 to read as follows:

§ 1312.16 Amendment, cancellation, expiration of import permit.

(a) Importers may only request that an import permit or application for an import permit be amended in accordance with paragraphs (a)(1) through (7) of this section. Requests for an amendment must be submitted through the DEA Diversion Control Division secure network application. Except as provided in paragraph (a)(5) of this section and § 1312.15(a), importers must submit all requests for an amendment at least one full business day in advance of the date of release by a customs officer. Importers must specifically request that an amendment be made; supplementary information submitted by an importer through the DEA Diversion Control Division secure network application will not automatically trigger the amendment process. While the request for an amendment is being reviewed by the Administration, the original permit will be temporarily stayed and may not be used to authorize entry of a shipment of controlled substances. If the importer's request for an amendment to an issued permit is granted by the Administration, the Administration will immediately cancel the original permit and re-issue the permit, as amended, with a revised permit number. The DEA and importer will distribute the amended permit in accordance with § 1312.14. If a request for an amendment is denied by the Administration, the temporary stay will be lifted; once lifted, the originally issued permit may immediately be used to authorize entry of a shipment in accordance with the terms of the permit, subject to the shipment being compliant with all other applicable laws.

(1) An importer may request that an import permit or application for a permit be amended to change the National Drug Control number, description of the packaging, or trade name of the product, so long as the description is for the same basic class of controlled substance as in the original permit.

(2) An importer may request that an import permit or application for a permit be amended to change the proposed port of entry, the date of release by a customs officer, or the method of transport.

(3) An importer may request that an import permit or application for a permit be amended to change the justification provided as to why an import shipment is needed to meet the legitimate scientific or medical needs of the United States.

(4) An importer may request that an import permit or application for a permit be amended to change any registrant notes.

(5) Prior to departure of the shipment from its original foreign location, an importer may request that an import permit or application for a permit be amended to increase the total base weight of a controlled substance. At the U.S. port of entry, an importer may request that an import permit be amended in accordance with § 1312.15(a). Importers are not required to amend an import permit for the sole purpose of decreasing the total base weight of a controlled substance

authorized to be imported. However, the balance of any unimported authorized quantity of controlled substances on an import permit is void upon entry of a shipment on the issued permit or upon expiration of the unused permit in accordance with paragraph (b) of this section, whichever is sooner. Other than for an amendment to an import permit under § 1312.15(a), importers must submit a request for an amendment to increase the total base weight of a controlled substance at least three business days in advance of the date of release by a customs officer.

(6) An importer may request that an import permit be amended to remove a controlled substance from the permit. However, an importer may not amend an import permit to add or replace a controlled substance/Administration controlled substance code number to the item(s) to be imported. Importers who desire to import a different controlled substance than that contained on their issued import permit or permit application must submit a request for the permit or permit application to be canceled and request a new permit in accordance with § 1312.12.

(7) An importer may not amend the importer's name (as it appears on their DEA certificate of registration) or the name of the foreign exporter as provided in the DEA Form 357. Importers who need to make any changes to any of these fields must submit a request for the permit or permit application to be canceled and request a new permit in accordance with § 1312.12.

(b) An import permit will be void and of no effect after the expiration date specified therein, and in no event will the date be more than 180 calendar days after the date the permit is issued. Amended import permits will retain the original expiration date.

(c) An import permit may be canceled after being issued, at the request of the importer submitted to the Administration through the DEA Diversion Control Division secure network application, provided that no shipment has been made thereunder.

Nothing in this part will affect the right, hereby reserved by the Administration, to cancel a permit at any time for proper cause.

■ 49. In § 1312.18:

■ a. Revise the section heading and paragraphs (b), (c) introductory text, and (c)(3); and

■ b. Add paragraphs (e) through (h).

The revisions and additions read as follows:

§ 1312.18 Import declaration.

* * * * *

(b) Any person registered or authorized to import and seeking to import any non-narcotic controlled substance listed in Schedules III, IV, or V which is not subject to the requirement of an import permit as described in paragraph (a) of this section, must file a controlled substances import declaration (DEA Form 236) with the Administration through the DEA Diversion Control Division secure network application not later than 15 calendar days prior to the anticipated date of release by a customs officer and distribute an official record of the declaration as hereinafter directed in § 1312.19. The declaration must be signed and dated by the importer and must specify the address of the final destination for the shipment, which must be the importer's registered location. Upon receipt and review, the Administration will assign a transaction identification number to each completed declaration. The import declaration is not deemed filed, and therefore is not valid, until the Administration has issued a transaction identification number. The importer may only proceed with the import transaction once the transaction identification number has been issued.

(c) DEA Form 236 must include the following information:

* * * * *

(3) The anticipated date of release by a customs officer at the port of entry, the foreign port and country of exportation to the United States, the port of entry, and the name, address, and registration number of the recipient in the United States; and

* * * * *

(e) *Return information.* Within 30 calendar days after actual receipt of a controlled substance at the importer's registered location, or within 10 calendar days after receipt of a written request by the Administration to the importer, whichever is sooner, the importer must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the controlled substance was released by a customs officer at the port of entry; the date on which the controlled substance arrived at the registered location; the actual quantity of the controlled substance released by a customs officer at the port of entry; the actual quantity of the controlled substance that arrived at the registered location; and the actual port of entry. Upon receipt and review, the Administration will assign a transaction identification number to a completed report. The report will not be deemed filed until the Administration has issued a transaction identification number.

(f) An importer may amend an import declaration in the same circumstances in which an importer may request amendment to an import permit, as set forth in § 1312.16(a)(1) through (7). Amendments to declarations must be submitted through the DEA Diversion Control Division secure network application. Except as provided in §§ 1312.16(a)(5) and 1312.15(a), importers must submit all amendments at least one full business day in advance of the date of release by a customs officer. Importers must specifically note that an amendment is being made; supplementary information submitted by an importer through the DEA Diversion Control Division secure network application will not automatically be considered an amendment. While the amendment is being processed by the Administration, the original declaration will be temporarily stayed and may not be used to authorize release of a shipment of controlled substances. Upon receipt and review, the Administration will assign each completed amendment a transaction identification number. The amendment will not be deemed filed until the Administration issues a transaction identification number. The DEA and importer will distribute the amended declaration in accordance with § 1312.19. A filed amendment will not change the date that the declaration becomes void and of no effect pursuant to paragraph (g) of this section.

(g) An import declaration may be canceled after being filed with the Administration, at the request of the importer by the importer submitting to the Administration the request through the DEA Diversion Control Division secure network application, provided that no shipment has been made thereunder. Import declarations shall become void and of no effect 180 calendar days after the date the declaration is deemed filed with the Administration.

(h) *Denied release at the port of entry.* In the event that a shipment of controlled substances has been denied release by a customs officer at the port of entry for any reason, the importer who attempted to have the shipment released, within 5 business days of the denial, report to the Administration that the shipment was denied release and the reason for denial. Such report must be transmitted to the Administration through the DEA Diversion Control Division secure network application.

This report must include the following information: The quantity of the controlled substance denied release; the date on which release was denied; and the basis for the denied release. Upon the importer's report of a denied release, the DEA will assign the report a transaction identification number and the import declaration will become void and of no effect. No shipment of controlled substances denied release for any reason will be allowed to be released into the United States until the importer has filed a new import declaration and the Administration has issued a new transaction identification number.

■ 50. Revise § 1312.19 to read as follows:

§ 1312.19 Distribution of import declaration.

The importer must furnish an official record of the declaration (available through the DEA Diversion Control Division secure network application after the Administration issues a transaction identification number) to the foreign shipper. The foreign shipper must submit an official record of the declaration to the competent national authority of the exporting country, if required as a prerequisite to export authorization. The importer, or their agent, must submit an official record of the declaration and/or required data concerning the import transaction to a customs officer at the port of entry in compliance with all import control requirements of agencies with import control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act. The importer must ensure that an official record of the declaration accompanies the shipment to its final destination, which must only be the registered location of the importer (*i.e.,* drop shipments are prohibited). The importer must maintain an official record of the declaration in accordance with part 1304 of this chapter.

■ 51. Revise § 1312.21 to read as follows:

§ 1312.21 Requirement of authorization to export.

(a) No person shall in any manner export, or cause to be exported, from the United States any controlled substance listed in Schedule I or II, or any narcotic controlled substance listed in Schedule III or IV, or any non-narcotic controlled substance in Schedule III which the Administrator has specifically designated by regulation in § 1312.30 or any non-narcotic controlled substance in Schedule IV or V which is also listed in Schedule I or II of the Convention on Psychotropic Substances, 1971, unless and until such person is properly registered under the Act (or, in accordance with part 1301 of this chapter, exempt from registration) and the Administrator has issued him or her a permit to do so in accordance with § 1312.23.

(b) No person shall in any manner export, or cause to be exported, from the United States any non-narcotic controlled substance listed in Schedule III, IV, or V, excluding those described in paragraph (a) of this section, or any narcotic controlled substance listed in Schedule V, unless and until such person is properly registered under the Act (or, in accordance with part 1301 of this chapter, exempt from registration) and has furnished an export declaration as provided by section 1003 of the Act (21 U.S.C. 953(e)) to the Administration in accordance with § 1312.28.

(c) A separate permit or declaration is required for each shipment of controlled substance to be exported.

■ 52. Revise § 1312.22 to read as follows:

§ 1312.22 Application for export or reexport permit; return information.

(a) Registered exporters, and persons who in accordance with part 1301 of this chapter are exempt from registration, seeking to export controlled substances must submit an application for a permit to export controlled substances on DEA Form 161. Registered exporters, and persons who in accordance with part 1301 of this chapter are exempt from registration, seeking to reexport controlled substances must submit an application for a permit to reexport controlled substances on DEA Form 161R or DEA Form 161R–EEA, whichever applies. All applications and supporting materials must be submitted to the Administration through the DEA Diversion Control Division secure network application. The application must be signed and dated by the exporter and contain the exporter's registered address from which the controlled substances will be exported. Controlled substances may not be exported until a permit number has been issued.

(b) Exports of controlled substances by mail are prohibited.

(c) *Applications.* (1) Except as provided in paragraph (c)(2) of this section, each application for a permit to export or reexport must include the following information:

(i) The exporter's name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address (es), etc.);

(ii) The exporter's registration number, address, and contact information (*e.g.,* telephone number(s), etc.) from which the controlled substances will be exported;

(iii) A detailed description of each controlled substance to be exported including the drug name, dosage form, National Drug Code (NDC) number, Administration Controlled Substance Code Number as set forth in part 1308 of this chapter, the number and size of the packages or containers, the name and quantity of the controlled substance contained in any finished dosage units, and the quantity of any controlled substance (expressed in anhydrous acid, base, or alkaloid) given in kilograms or parts thereof;

(iv) The name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.) and business of the consignee in the first country (the country to which the controlled substance is exported from the United States), foreign port and country of entry/first country of entry, the port of export, the anticipated date of release by a customs officer at the port of export, the name of the exporting carrier or vessel (if known), or if unknown it should be stated whether the shipment will be made by express, freight, or otherwise), the date and number, if any, of the supporting foreign import license or permit accompanying the application, and the authority by whom such foreign license or permit was issued; and

(v) An affidavit that the packages or containers are labeled in conformance with obligations of the United States under international treaties, conventions, or protocols in effect at the time of the export or reexport. The affidavit shall further state that to the best of the affiant's knowledge and belief, the controlled substances therein are to be applied exclusively to medical or scientific uses within the country to which exported, will not be reexported therefrom and that there is an actual need for the controlled substance for medical or scientific uses within such country, unless the application is submitted for reexport in accordance with paragraphs (f), (g), and (h) of this section. In the case of exportation of crude cocaine, the affidavit may state that to the best of affiant's knowledge and belief, the controlled substances will be processed within the country to which exported, either for medical or scientific use within that country or for reexportation in accordance with the laws of that country to another for medical or scientific use within that country.

(2) With respect to reexports among members of the European Economic Area in accordance with section 1003(f) of the Act (21 U.S.C. 953(f)), the requirements of paragraph (c)(1) of this section shall apply only with respect to the export from the United States to the first country and not to any subsequent export from that country to another country of the European Economic Area.

(d)(1) Except as provided in paragraph (d)(2) of this section, the applicant must also submit with the application any import license or permit or a certified copy of any such license or permit issued by the competent national authority in the country of destination, or other documentary evidence deemed adequate by the Administration, showing: That the merchandise is consigned to an authorized permittee; that it is to be applied exclusively to medical or scientific use within the country of destination; that it will not be reexported from such country (unless the application is submitted for reexport in accordance with paragraphs (f), (g), and (h) of this section); and that there is an actual need for the controlled substance for medical or scientific use within such country or countries. If the import license or permit, or the certified copy of such, is not written in English or bilingual with another language and English, the registrant must also submit with their application a certified translation of the permit or license. For purposes of this requirement, certified translation means that the translator has signed the translation legally attesting the accuracy of the translation. (In the case of exportation of bulk coca leaf alkaloid, the applicant need only include with the application the material outlined in paragraph (c) of this section.)

(2) With respect to reexports among members of the European Economic Area in accordance with section 1003(f) of the Act (21 U.S.C. 953(f)), the requirements of paragraph (d)(1) of this section shall apply only with respect to the export from the United States to the first country and not to any subsequent export from that country to another country of the European Economic Area.

(e) *Return information for exports (on a DEA Form 161).* Within 30 calendar days after the controlled substance is released by a customs officer at the port of export, or within 10 calendar days after receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must report to the Administration through the DEA Diversion Control Division secure network application the particulars of the transaction. This report must include the following information: The date on which the controlled substance left the registered location; the date on which the controlled substance was released by a customs officer at the port of export; the actual quantity of controlled substance that left the registered location; and the actual quantity of the controlled substance released by a customs officer at the port of export; the actual port of export, and any other information as the Administration may from time to time specify. Upon receipt and review, the Administration will assign a transaction identification number to a completed report. The report will not be deemed filed until the Administration has issued a transaction identification number.

(f) *Reexports outside of the European Economic Area.* Except as provided in paragraph (g) of this section, the Administration may authorize any controlled substance listed in Schedule I or II, or any narcotic drug listed in Schedule III or IV, to be exported from the United States to a country for subsequent export from that country to another country, if each of the following conditions is met, in accordance with section 1003(f) of the Act (21 U.S.C. 953(f)):

(1) Both the country to which the controlled substance is exported from the United States (referred to in this section as the ''first country'') and the country to which the controlled substance is exported from the first country (referred to in this section as the ''second country'') are parties to the Single Convention on Narcotic Drugs, 1961, and the Convention on Psychotropic Substances, 1971;

(2) The first country and the second country have each instituted and maintain, in conformity with such Conventions, a system of controls of imports of controlled substances which the Administration deems adequate;

(3) With respect to the first country, the controlled substance is consigned to a holder of such permits or licenses as may be required under the laws of such country, and a permit or license to import the controlled substance has been issued by the country;

(4) With respect to the second country, substantial evidence is furnished to the Administration by the applicant for the export permit that—

(i) The controlled substance is to be consigned to a holder of such permits or licenses as may be required under the laws of such country, and a permit or license to import the controlled substance is to be issued by the country; and

(ii) The controlled substance is to be applied exclusively to medical, scientific, or other legitimate uses within the country;

(5) The controlled substance will not be exported from the second country;

(6) The exporter has complied with paragraph (h) of this section and a permit to export the controlled substance from the United States has been issued by the Administration; and

(7) *Return information for reexports outside of the European Economic Area (on DEA Form 161R)*—(i) *Return information for export from the United States, for reexport.* Within 30 calendar days after the controlled substance is released by a customs officer at the port of export the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the controlled substance left the registered location; the date on which the controlled substance was released by a customs officer at the port of export; the actual quantity of controlled substance released by a customs officer at the port of export; and the actual port of export. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number. In determining whether the exporter has complied with the requirement to file within 30 calendar days, the report shall be deemed filed on the first date on which a complete report is filed.

(ii) *Return information for export from a first country that is or is not a member of the European Economic Area to a country outside of the European Economic Area; return information for export from a first country that is not a member of the European Economic Area to a member of the European Economic Area.* Within 30 calendar days after the controlled substance is exported from the first country to the second country the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the export from the first country. If the permit issued by the Administration authorized the reexport of a controlled substance from the first country to more than one second country, a report for each individual reexport is required. These reports must include the following information: Name of second country; actual quantity of controlled substance shipped; and the date shipped from the first country, the actual port from which the controlled substances were shipped from the first country. Upon receipt and review, the Administration will assign each completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(g) *Reexports among members of the European Economic Area (on DEA Form 161R–EEA).* The Administration may authorize any controlled substance listed in Schedule I or II, or any narcotic drug listed in Schedule III or IV, to be exported from the United States to a country of the European Economic Area for subsequent export from that country to another country of the European Economic Area, if the following conditions and the conditions of paragraphs (f)(1) through (4) and (6) of this section are met, in accordance with section 1003(f) of the Act (21 U.S.C. 953(f)):

(1)(i) The controlled substance will not be exported from the second country, except that the controlled substance may be exported from a second country that is a member of the European Economic Area to another country that is a member of the European Economic Area, provided that the first country is also a member of the European Economic Area; and

(ii) Subsequent to any reexportation described in paragraph (g)(1)(i) of this section, a controlled substance may continue to be exported from any country that is a member of the European Economic Area to any other such country, if—

(A) The conditions applicable with respect to the first country under paragraphs (f)(1) through (4) and (6) of this section and paragraph (g)(2) are met with respect to each subsequent country from which the controlled substance is exported pursuant to this paragraph (g); and

(B) The conditions applicable with respect to the second country under paragraphs (f)(1) through (4) and (6) of this section and paragraph (g)(2) of this section are met with respect to each subsequent country to which the controlled substance is exported pursuant to this paragraph (g).

(2) *Return information for reexports among members of the European Economic Area*—(i) *Return information for export from the United States, for reexport among members of the European Economic Area.* Exporters must comply with the return reporting requirements of paragraph (f)(7)(i) of this section.

(ii) *Reexports among members of the European Economic Area.* Within 30 calendar days after the controlled substance is exported from the first country to the second country, and within 30 calendar days of each subsequent reexport within the European Economic Area, if any, the U.S. exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the export. These reports must include the name of country to which the controlled substance was reexported, *i.e.,* another member of the European Economic Area; the actual quantity of controlled substance shipped; the date shipped from the first country, the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.) and business of the consignee; and the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.) and business of the exporter. Upon receipt and review, the Administration will assign each completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(h) Where a person is seeking to export a controlled substance for reexport outside of the European Economic Area in accordance with paragraph (f) of this section, the requirements of paragraphs (h)(1) through (7) of this section shall apply in addition to (and not in lieu of) the requirements of paragraphs (a) through (d) of this section. Where a person is seeking to export a controlled substance for reexport among members of the European Economic Area in accordance with paragraph (g) of this section, the requirements of paragraph (h)(4) of this section shall apply in addition to (and not in lieu of) the requirements of paragraphs (a) through (d) of this section.

(1) Bulk substances will not be reexported in the same form as exported from the United States, *i.e.,* the material must undergo further manufacturing process. This further manufactured material may only be reexported to a second country.

(2) Finished dosage units, if reexported, must be in a commercial package, properly sealed and labeled for legitimate medical use in the second country.

(3) Any proposed reexportation must be made known to the Administration at the time the initial DEA Form 161R is submitted. In addition, the following information must also be provided where indicated on the form:

(i) Whether the drug or preparation will be reexported in bulk or finished dosage units;

(ii) The product name, dosage strength, commercial package size, and quantity; and

(iii) The name of consignee, complete address, and expected shipment date, as well as the name and address of the ultimate consignee in the second country.

(4) The application must contain an affidavit that the consignee in the second country, and any country of subsequent reexport within the European Economic Area, is authorized under the laws and regulations of the second and/or subsequent country to receive the controlled substances. The affidavit must also contain the following statements, in addition to the statements required under paragraph (c) of this section:

(i) That the packages are labeled in conformance with the obligations of the United States under the Single Convention on Narcotic Drugs, 1961, the Convention on Psychotropic Substances, 1971, and any amendments to such treaties in effect;

(ii) That the controlled substances are to be applied exclusively to medical or scientific uses within the second country, or country of subsequent reexport within the European Economic Area;

(iii) That the controlled substances will not be further reexported from the second country except as provided by paragraph (f) of section 1003 of the Act (21 U.S.C. 953(f)); and

(iv) That there is an actual need for the controlled substances for medical or scientific uses within the second country, or country of subsequent reexport within the European Economic Area.

(5) If the applicant proposes that the shipment of controlled substances will be separated into parts after it arrives in the first country and then reexported to more than one second country, the applicant must so indicate on the DEA Form 161R and provide all the information required in this section for each second country.

(6) Except in the case of reexports among countries of the European Economic Area in accordance with section 1003(f) of the Act (21 U.S.C. 953(f)), the controlled substance will be reexported from the first country to the second country (or second countries) no later than 180 calendar days after the controlled substance was released by a customs officer from the United States.

(7) Shipments that have been exported from the United States and are refused by the consignee in either the

first or second country, or subsequent member of the European Economic Area, or are otherwise unacceptable or undeliverable, may be returned to the registered exporter in the United States upon authorization of the Administration. In these circumstances, the exporter in the United States must submit a written request for the return of the controlled substances to the United States with a brief summary of the facts that warrant the return, along with a completed DEA Form 357 through the DEA Diversion Control Division secure network application. The Administration will evaluate the request after considering all the facts as well as the exporter's registration status with the Administration. If the exporter provides sufficient justification, the Administration may issue an import permit for the return of these drugs, and the exporter may then obtain an export permit from the country of original importation. The substance may not be returned to the United States until after a permit has been issued by the Administration.

(i) In considering whether to grant an application for a permit under paragraphs (f), (g), and (h) of this section, the Administration shall consider whether the applicant has previously obtained such a permit and, if so, whether the applicant complied fully with the requirements of this section with respect to that previous permit.

(j) *Denied release at the port of export.* In the event that a shipment of controlled substances has been denied release by a customs officer at the port export from the United States for any reason, the exporter who attempted to have the shipment released must, within 5 business days of the denial, report to the Administration that the shipment was denied release and the reason for denial. Such report must be transmitted to the Administration through the DEA Diversion Control Division secure network application. This report must include the following information: The quantity of the controlled substance denied release; the date on which release was denied; the basis for the denied release, the port from which the denial was issued, and any other information as the Administration may from time to time specify. Upon the exporter's report of a denied release, DEA will assign the report a transaction identification number and the export permit will be void and of no effect. No shipment of controlled substances denied release for any reason will be allowed to be released from the United States unless the exporter submits a new DEA Form 161, 161R, or 161R–EEA, as appropriate, and the Administration issues a new export permit.

■ 53. In § 1312.23, revise paragraph (e) as follows:

§ 1312.23 Issuance of export permit.

* * * * *

(e) If an exportation is approved, the Administrator shall issue an export permit bearing his or her signature or that of his or her delegate. Each permit will be assigned a permit number that is a unique, randomly generated identifier. A permit shall not be altered or changed by any person after being signed. Any change or alteration upon the face of any permit after it has been signed renders it void and of no effect. Permits are not transferable. The Administrator or his/her delegate shall date and certify on each permit that the exporter named therein is thereby permitted as a registrant under the Act, to export, through the port of export named, one shipment of not to exceed the specified quantity of the named controlled substances, shipment to be made before a specified date. Only one shipment may be made on a single export permit. A single export permit shall authorize a quantity of goods to be exported at one place, at one time, for delivery to one consignee, on a single conveyance, at one place, on one bill of lading, air waybill, or commercial loading document; a single permit shall not authorize a quantity of goods to be exported if the goods are divided onto two or more conveyances. Each export permit shall be predicated upon, *inter alia,* an import certificate or other documentary evidence issued by a foreign competent national authority.

* * * * *

■ 54. Revise § 1312.24 to read as follows:

§ 1312.24 Distribution of export permit.

The Administration shall transmit the export permit to the competent national authority of the importing country and shall make available to the exporter an official record of the export permit through secure electronic means. The exporter, or their agent, must submit an official record of the export permit and/or required data concerning the export transaction to a customs officer at the port of export in compliance with all export control requirements of agencies with export control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act. The exporter must maintain an official record of the export permit (available from the secure network application on the DEA Diversion Control Division Web site after the Administration issues a transaction identification number) in accordance with part 1304 of this chapter as the record of authority for the exportation and shall transmit an official record of the export permit to the foreign importer. The exporter must ensure that an official record of the permit accompanies the shipment to its final destination. No shipment of controlled substances denied release for any reason shall be allowed to be released from the United States without subsequent authorization from the Administration.

■ 55. Revise § 1312.25 to read as follows:

§ 1312.25 Amendment, cancellation, expiration of export permit.

(a) Exporters may only request that an export permit or application for an export permit be amended in accordance with paragraphs (a)(1) through (7) of this section. Requests for an amendment must be submitted through the DEA Diversion Control Division secure network application. Except as provided in paragraph (a)(5) of this section exporters must submit all requests for an amendment at least one full business day in advance of the date of release from the port of export. Exporters must specifically request that an amendment be made; supplementary information submitted by an exporter through the DEA Diversion Control Division secure network application will not automatically trigger the amendment process. While the request for an amendment is being reviewed by the Administration, the original permit will be temporarily stayed and may not be used to authorize release of a shipment of controlled substances. If the exporter's request for an amendment to an issued permit is granted by the Administration, the Administration will immediately cancel the original permit and re-issue the permit, as amended, with a revised permit number. The DEA and exporter will distribute the amended permit in accordance with § 1312.24. If a request for an amendment is denied by the Administration, the temporary stay will be lifted; once lifted, the originally issued permit may immediately be used to authorize release of a shipment in accordance with the terms of the permit.

(1) An exporter may request that an export permit or application for a permit be amended to change the National Drug Control number, description of the packaging, or trade name of the product, so long as the description is for the same basic class of controlled substance as in the original permit.

(2) An exporter may request that an export permit or application for a permit be amended to change the proposed port of export, the anticipated date of release by a customs officer, or the method of transport.

(3) An exporter may request that an export permit or application for a permit be amended to change the justification provided as to why an export shipment is needed to meet the legitimate scientific or medical needs of the country of import.

(4) An exporter may request that an export permit or application for a permit be amended to change any registrant notes.

(5) Prior to departure of the shipment from the exporter's registered location, an exporter may request that an export permit or application for a permit be amended to increase the total base weight of a controlled substance. However, the total base weight or the strength of the product (if listed) of a controlled substance may not exceed that permitted for import as indicated on the import permit from the foreign competent national authority. Exporters are not required to amend an export permit for the sole purpose of decreasing the total base weight of a controlled substance authorized to be exported. However, the balance of any unexported authorized quantity of controlled substances on an export permit is void upon release of a shipment on the issued permit or upon expiration of the unused permit in accordance with paragraph (b) of this section, whichever is sooner. Exporters must submit a request for an amendment to increase the total base weight of a controlled substance at least three business days in advance of the date of release from the port of export.

(6) An exporter may request that an export permit be amended to remove a controlled substance from the permit. However, an exporter may not amend an export permit to add or replace a controlled substance to the item(s) to be exported. Exporters who desire to export a different controlled substance than that contained on their issued export permit or permit application must submit a request for the permit or permit application to be canceled and request a new permit in accordance with § 1312.22.

(7) An exporter may not amend the exporter's name (as it appears on their DEA certificate of registration), the name of the foreign importer(s), or the foreign permit information as provided in the DEA Form 161, 161R, or 161R–EEA. Exporters who need to make any changes to any of these fields must submit a request for the permit or permit application to be canceled and request a new permit in accordance with § 1312.22.

(b) An export permit will be void and of no effect after the date specified therein, which date must conform to the expiration date specified in the supporting import certificate or other documentary evidence upon which the export permit is founded, but in no event will the date be more than 180 calendar days after the date the permit is issued.

(c) An export permit may be canceled after being issued, at the request of the exporter submitted to the Administration through the DEA Diversion Control Division secure network application, provided that no shipment has been made thereunder. Nothing in this part will affect the right, hereby reserved by the Administration, to cancel an export permit at any time for proper cause.

■ 56. Revise § 1312.26 to read as follows:

§ 1312.26 Records required of exporter.

In addition to any other records required by this chapter, the exporter must keep a record of any serial numbers that might appear on packages of narcotic drugs in quantities of one ounce or more in such a manner as will identify the foreign consignee, along with an official record of the export permit, in accordance with part 1304 of this chapter.

■ 57. In § 1312.27:

■ a. Revise the section heading and paragraphs (a) and (b); and

■ b. Add paragraphs (d) through (g).

The revisions and additions read as follows:

§ 1312.27 Export/reexport declaration.

(a) Any person registered or authorized to export and seeking to export any non-narcotic controlled substance listed in Schedule III, IV, or V, which is not subject to the requirement of an export permit pursuant to § 1312.23(b) or (c), or any person registered or authorized to export and seeking to export any controlled substance in Schedule V, must file a controlled substances export declaration (DEA Form 236) with the Administration through the DEA Diversion Control Division secure network application not less than 15 calendar days prior to the anticipated date of release by a customs officer at the port of export, and distribute an official record of the declaration as hereinafter directed in § 1312.28. The declaration must be signed and dated by the exporter and must contain the address of the registered location from which the substances will be shipped for exportation. Upon receipt and review, the Administration will issue a completed declaration a transaction identification number. The export declaration is not deemed filed, and therefore not valid, until the Administration has issued a transaction identification number. The exporter may only proceed with the export transaction once the transaction identification number has been issued.

(b)(1) DEA Form 236 must include the following information:

(i) The name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.), and registration number, if any, of the exporter; and the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.), and registration number of the export broker, if any.

(ii) A detailed description of each controlled substance to be exported including the drug name, dosage form, National Drug Code (NDC) number, Administration Controlled Substance Code Number as set forth in part 1308 of this chapter, the number and size of the packages or containers, the name and quantity of the controlled substance contained in any finished dosage units, and the quantity of any controlled substance (expressed in anhydrous acid, base, or alkaloid) given in kilograms or parts thereof.

(iii) The anticipated date of release by a customs officer at the port of export, the port of export, the foreign port and country of entry, the carriers and shippers involved, method of shipment, the name of the vessel if applicable, and the name, address, and registration number, if any, of any forwarding agent utilized.

(iv) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignee in the country of destination, and any registration or license number if the consignee is required to have such numbers either by the country of destination or under United States law. In addition, documentation must be provided to show that:

(A) The consignee is authorized under the laws and regulations of the country of destination to receive the controlled substances; and

(B) The substance is being imported for consumption within the importing country to satisfy medical, scientific or other legitimate purposes.

(v) The reexport of non-narcotic controlled substances in Schedules III and IV, and controlled substances in

Schedule V is not permitted under the authority of 21 U.S.C. 953(e), except as provided below and in paragraph (b)(1)(vi) of this section:

(A) Bulk substances will not be reexported in the same form as exported from the United States, *i.e.,* the material must undergo further manufacturing process. This further manufactured material may only be reexported to a country of ultimate consumption.

(B) Finished dosage units, if reexported, will be in a commercial package, properly sealed and labeled for legitimate medical use in the country of destination.

(C) Any reexportation be made known to DEA at the time the initial DEA Form 236, Controlled Substances Import/Export Declaration is completed, by checking the box marked ''other'' on the certification. The following information will be furnished in the remarks section:

(*1*) Indicate ''for reexport''.

(*2*) Indicate if reexport is bulk or finished dosage units.

(*3*) Indicate product name, dosage strength, commercial package size, and quantity.

(*4*) Indicate name of consignee, complete address, and expected shipment date, as well as, the name and address of the ultimate consignee in the country to where the substances will be reexported.

(*5*) A statement that the consignee in the country of ultimate destination is authorized under the laws and regulations of the country of ultimate destination to receive the controlled substances.

(D) Shipments that have been exported from the United States and are refused by the consignee in either the first or second country, or subsequent member of the European Economic Area, or are otherwise unacceptable or undeliverable, may be returned to the registered exporter in the United States upon authorization of the Administration. In this circumstance, the exporter in the United States must file a written request for reexport, along with a completed DEA Form 236, with the Administration through the DEA Diversion Control Division secure network application. A brief summary of the facts that warrant the return of the substance to the United States along with an authorization from the country of export must be included with the request. DEA will evaluate the request after considering all the facts as well as the exporter's registration status with DEA. The substance may be returned to the United States only after affirmative authorization is issued in writing by DEA.

(vi) The reexport of non-narcotic controlled substances in Schedules III and IV, and controlled substances in Schedule V is permitted among members of the European Economic Area only as provided below:

(A) The controlled substance will not be exported from the second country or a subsequent country, except that the controlled substance may be exported from a second country or a subsequent country that is a member of the European Economic Area to another country that is a member of the European Economic Area, provided that the first country is also a member of the European Economic Area; each country is a party to the Convention on Psychotropic Substances, 1971, as amended; and each country has instituted and maintains, in conformity with such Convention, a system of controls of imports of controlled substances which the Attorney General deems adequate.

(B) Each shipment of finished dosage units, if reexported, must be in a commercial package, properly sealed and labeled for legitimate medical use in the country of destination.

(C) Any reexportation must be made known to DEA at the time the initial DEA Form 236, Controlled Substances Import/Export Declaration is completed, by checking the box marked ''other'' on the certification. In addition to the requirements of paragraph (b) of this section, the following information will be furnished in the remarks section:

(*1*) Indicate ''for reexport among members of the European Economic Area''.

(*2*) Indicate if reexport is bulk or finished dosage units.

(*3*) Indicate product name, dosage strength, commercial package size, and quantity.

(*4*) Indicate the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es) and business of the consignee in the first country).

(*5*) A statement that the consignee in the second country, and any subsequent consignee within the European Economic Area, is authorized under the laws and regulations of the second and/or subsequent country to receive the controlled substances.

(2) With respect to reexports among members of the European Economic Area, the requirements of paragraph (b)(1) of this section shall apply only with respect to the export from the United States to the first country and not to any subsequent export from that country to another country of the European Economic Area.

* * * * *

(d) *Return information*—(1) *Return information for exports.* Within 30 calendar days after the controlled substance is released by a customs officer at the port of export, or within 10 calendar days after receipt of a written request by the Administration to the exporter, whichever is sooner, the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the controlled substance left the registered location; the date on which the controlled substance was released by a customs officer; the actual quantity of the controlled substance that left the registered location; and the actual quantity of the controlled substance released by a customs officer at the port of export; the actual port of export. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(2) *Return information for reexports outside of the European Economic Area*—(i) *Return information for export from the United States, for reexport.* Within 30 calendar days after the controlled substance is released by a customs officer at the port of export the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the controlled substance left the registered location; the date on which the controlled substance was released by a customs officer at the port of export; the actual quantity of controlled substance released by a customs officer at the port of export; and the actual port of export. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(ii) *Return information for export from a first country that is or is not a member of the European Economic Area to a country outside of the European Economic Area; return information for export from a first country that is not a member of the European Economic Area to a member of the European Economic Area.* Within 30 calendar days after the controlled substance is exported from the first country to the second country the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the export from the first country. If the permit issued by the Administration authorized the reexport of a controlled substance from the first country to more than one second country, a report for each individual reexport is required. These reports must include the following information: Name of second country; actual quantity of controlled substance shipped; the date shipped from the first country; and the actual port from which the controlled substances were shipped from the first country. Upon receipt and review, the Administration will assign each completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(3) *Reexports among members of the European Economic Area*—(i) *Return information for exports from the United States, for reexport among members of the European Economic Area.* Exporters must comply with the return reporting requirements of paragraph (d)(2)(i) of this section.

(ii) *Reexports among members of the European Economic Area.* Within 30 calendar days after the controlled substance is exported from the first country to the second country, and within 30 calendar days of each subsequent reexport within the European Economic Area, if any, the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the export. These reports must include the name of country to which the controlled substance was reexported to another member of the European Economic Area; the actual quantity of controlled substance shipped; the date shipped from the first country, the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.) and business of the consignee; and the name/business name, address/business address, contact information (*e.g.,* telephone number(s), email address(es), etc.) and business of the exporter. Upon receipt and review, the Administration will assign each completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(e) An exporter may amend an export declaration in the same circumstances in which an exporter may request amendment to an export permit, as set forth in § 1312.25(a)(1) through (7). Amendments to declarations must be submitted through the DEA Diversion Control Division secure network application. Except as provided in § 1312.25(a)(5) exporters must submit all amendments at least one full business day in advance of the date of release by a customs officer. Exporters must specifically note that an amendment is being made; supplementary information submitted by an exporter through the DEA Diversion Control Division secure network application will not automatically be considered an amendment. Upon receipt and review, the Administration will assign each completed amendment a transaction identification number. The amendment will not be deemed filed until the Administration issues a transaction identification number. The DEA and the exporter will distribute the amended declaration in accordance with § 1312.28. A filed amendment will not change the date that the declaration becomes void and of no effect in accordance with paragraph (f) of this section.

(f) An export declaration may be canceled after being filed with the Administration, at the request of the exporter, provided no shipment has been made thereunder. Export declarations shall become void and of no effect 180 calendar days after the date the declaration is deemed filed with the Administration.

(g) *Denied release at the port of export.* In the event that a shipment of controlled substances has been denied release by a customs officer at the port of export for any reason, the exporter who attempted to have the shipment released must, within 5 business days of the denial, report to the Administration that the shipment was denied release and the reason for denial. Such report must be transmitted to the Administration through the DEA Diversion Control Division secure network application. This report must include the following information: The quantity of the controlled substance denied release; the date on which release was denied; and the basis for the denied release. Upon the exporter's report of a denied release, DEA will assign the report a transaction identification number and the export declaration will be void and of no effect. No shipment of controlled substances denied release for any reason will be allowed to be released unless the exporter files a new declaration and the Administration issues a new transaction identification number.

■ 58. Revise § 1312.28 to read as follows:

§ 1312.28 Distribution of export declaration.

(a) The exporter must ensure that an official record of the export declaration (available from the DEA Diversion Control Division secure network application after the Administration issues a transaction identification number) accompanies the shipment of controlled substances to its destination.

(b) The exporter, or their agent, must submit an official record of the export declaration and/or required data concerning the export transaction to a customs officer at the port of export in compliance with all export control requirements of agencies with export control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act.

(c) The exporter must maintain an official record of the export declaration and return information (both available from the Diversion Control Division secure network application after the Administration issues a transaction identification number) required pursuant to § 1312.27(d) as his or her record of authority for the exportation, in accordance with part 1304 of this chapter.

■ 59. In § 1312.31:

■ a. Revise paragraph (b) introductory text;

■ b. In paragraph (d)(2), remove the word ''and'' at the end of the paragraph;

■ c. In paragrarph (d)(3), remove the period at the end of the paragraph and add ''; and'' in its place; and

■ d. Add paragraph (d)(4).

The revision and addition read as follows:

§ 1312.31 Schedule I: Application for prior written approval.

* * * * *

(b) An application for a transshipment permit must be submitted to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration, at least 30 calendar days, or in the case of an emergency as soon as is practicable, prior to the expected date of arrival at the first port in the United States. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. A separate permit is required for each shipment of controlled substance to be imported, transferred, or transshipped. Each application must contain the following:

* * * * *

(d) * * *

(4) If the import license or permit, or the certified copy of such, is not written in English or bilingual with another language and English, the application must include a certified translation of the permit or license. For purposes of this requirement, certified translation means that the translator has signed the translation legally attesting the accuracy of the translation.

* * * * *

■ 60. Revise § 1312.32 to read as follows:

§ 1312.32 Schedules II, III, IV: Advance notice.

(a) A controlled substance listed in Schedules II, III, or IV may be imported into the United States for transshipment, or may be transferred or transshipped within the United States for immediate exportation, provided that written notice is submitted to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration, at least 15 calendar days prior to the expected date of date of arrival at the first port in the United States. See the Table of DEA mailing Addresses in § 1321.01 of this chapter for the current mailing addresses.

(b) A separate advance notice is required for each shipment of controlled substance to be imported, transferred, or transshipped. Each advance notice must contain those items required by § 1312.31(b) and (c). If the export license, permit, or other authorization, issued by a competent national authority of the country of origin, is not written in English or bilingual with another language and English, the notice must be accompanied by a certified translation of the export license, permit, or other authorization. For purposes of this requirement, certified translation means that the translator has signed the translation legally attesting the accuracy of the translation.

PART 1313—IMPORTATION AND EXPORTATION OF LIST I AND LIST II CHEMICALS

■ 61. The authority citation for part 1313 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 871(b), 971.

■ 62. Add § 1313.03 to read as follows:

§ 1313.03 Forms applicable to this part.

Form	Access/ submission
DEA Form 486, Import/Export Declaration for List I and List II Chemicals.	electronic.
DEA Form 486A Import Declaration for ephedrine, pseudoephedrine, and phenylpropanolamine (including drug products containing these chemicals).	electronic.

■ 63. In § 1313.12, revise the section heading and paragraphs (a), (b), (c) introductory text, (d), and (e) introductory text to read as follows:

§ 1313.12 Notification prior to import.

(a) Each regulated person who seeks to import a listed chemical that meets or exceeds the threshold quantities identified in § 1310.04(f) of this chapter or is a listed chemical for which no threshold has been established as identified in § 1310.04(g) of this chapter, must notify the Administration of the intended import by filing an import declaration (on DEA Form 486/486A) not later than 15 calendar days before the date of release by a customs officer at the port of entry. Regulated persons who seek to import a listed chemical below the threshold quantities identified in § 1310.04(f) are not required to file an import declaration in advance of the release by a customs officer.

(b) A complete and accurate declaration (DEA Form 486/486A) must be filed with the Administration through the DEA Diversion Control Division secure network application not later than 15 calendar days prior to the date of release by a customs officer at the port of entry. The declaration must be signed and dated by the importer and must contain the address of the final destination for the shipment, which for List I chemicals must be a registered location of the importer. Upon receipt and review, the Administration will assign a transaction identification number to each completed declaration. The 15 calendar days shall begin on the date that the regulated person submits a completed declaration, without regard to the date that the Administration assigns a transaction identification number. Listed chemicals meeting or exceeding the threshold quantities identified in § 1310.04(f) of this chapter or for which no threshold has been established may not be imported until a transaction identification number has been issued.

(c) The 15-calendar-day advance notification requirement for listed chemical imports may be waived, in whole or in part, for the following:

* * * * *

(d) For imports meeting the requirements of paragraph (c)(1) of this section, the declaration (DEA Form 486/486A) must be filed with the Administration through the DEA Diversion Control Division secure network application at least three business days before the date of release by a customs officer at the port of entry. The declaration must be signed and dated by the importer and must contain the address of the final destination for the shipment, which must be a registered location of the importer (for List I chemicals). Upon receipt and review, the Administration will assign a transaction identification number to each completed declaration. The importer may proceed with the import transaction only once the transaction identification number has been issued.

(e) For importations where advance notification is waived pursuant to paragraph (c)(2) of this section no DEA Form 486 is required; however, the regulated person must submit quarterly reports to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration, not later than the 15th day of the month following the end of each quarter. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. The report shall contain the following information regarding each individual importation:

* * * * *

■ 64. Revise § 1313.13 to read as follows:

§ 1313.13 Requirements of import declaration.

(a) Any List I or List II chemical listed in § 1310.02 of this chapter may be imported if that chemical is necessary for medical, commercial, scientific, or other legitimate uses within the United States. Chemical importations into the United States for immediate transfer/transshipment outside the United States must comply with the procedures set forth in § 1313.31 and all other applicable laws.

(b) The DEA Form 486/486A must include the following information:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the chemical importer; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the broker or forwarding agent (if any); and

(2) The name and description of each listed chemical as it appears on the label or container, the name of each chemical as it is designated in § 1310.02 of this chapter, the size or weight of container,

the number of containers, the net weight of each listed chemical given in kilograms or parts thereof, and the gross weight of the shipment given in kilograms or parts thereof; and

(3) The date of release by a customs officer at the port of entry, the foreign port and country of export, and the port of entry; and

(4) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignor in the foreign country of exportation; and

(5) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the person or persons to whom the importer intends to transfer the listed chemical and the quantity to be transferred to each transferee.

(c) Any regulated person importing ephedrine, pseudoephedrine, or phenylpropanolamine must submit, on the import declaration (DEA Form 486A), all information known to the importer on the chain of distribution of the chemical from the manufacturer to the importer. Ephedrine, pseudoephedrine, or phenylpropanolamine include each of the salts, optical isomers, and salts of optical isomers of the chemical.

(d) Import declarations shall become void and of no effect 180 calendar days after the date the declaration is deemed filed with the Administration.

■ 65. Revise § 1313.14 to read as follows:

§ 1313.14 Disposition of import declaration.

The importer, or their agent, must submit an official record of the import declaration and/or required data concerning the import transaction to a customs officer at the port of entry in compliance with all import control requirements of agencies with import control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act. For List I chemicals, the final destination of the import transaction must only be the registered location of the importer (*i.e.,* drop shipments are prohibited). A regulated person must maintain an official record of the declaration (available from the DEA Diversion Control Division secure network application after the Administration issues a transaction identification number) in accordance with part 1310 of this chapter as the record of the import. Official records of import declarations involving listed chemicals must be retained for two years.

■ 65. In § 1313.15, revise the section heading and paragraph (b) to read as follows:

§ 1313.15 Qualification of regular importers.

* * * * *

(b) Each regulated person making application under paragraph (a) of this section shall be considered a ''regular importer'' 30 calendar days after receipt of the application by the Administration, as indicated on the return receipt, unless the regulated person is otherwise notified in writing by the Administration.

* * * * *

■ 67. In § 1313.16, revise the section heading and paragraph (b) to read as follows:

§ 1313.16 Updated notice for change in circumstances.

* * * * *

(b) After a notice under § 1313.12(a) or (d) is submitted to the Administration, if circumstances change and the importer will not be transferring the listed chemical to the transferee identified in the notice, or will be transferring a greater quantity of the chemical than specified in the notice, the importer must update the notice to identify the most recent prospective transferee or the most recent quantity or both (as the case may be) and may not transfer the listed chemical until after the expiration of the 15 calendar day period beginning on the date on which the update is filed with the Administration, or, if the import is being made by a regular importer or intended for transfer to a regular customer, three business days. The preceding sentence applies with respect to changing circumstances regarding a transferee or quantity identified in an update to the same extent and in the same manner as the sentence applies with respect to changing circumstances regarding a transferee or quantity identified in the original notice under § 1313.12(a) or (d). Amended declarations must be submitted to the Administration through the DEA Diversion Control Division secure network application. The amendment must be signed and dated by the importer. Upon receipt and review, the Administration will assign each completed amendment a transaction identification number. Such shipment of listed chemicals may not be imported into the United States until the transaction identification number has been issued.

* * * * *

■ 68. Revise § 1313.17 to read as follows:

§ 1313.17 Return declaration for imports.

(a) *Return information.* Within 30 calendar days after actual receipt of a listed chemical at the importer's registered location or place of business if not required to be registered, the importer must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the listed chemical was released by a customs officer at the port of entry; the date on which the listed chemical arrived at the importer's registered location or place of business; the actual quantity of the listed chemical released; the actual quantity of the listed chemical that arrived at the importer's location; the date of any subsequent transfer; a description of the subsequent transfer, including the actual quantity transferred, chemical, container, and name of transferees; the actual port of entry; and any other information as the Administration may specify. A single report may include the particulars of both the importation and distribution. If the importer has not distributed all chemicals imported by the end of the initial 30 calendar day period, the importer must file supplemental reports not later than 30 calendar days from the date of any further distribution, until the distribution or other disposition of all chemicals imported under the import declaration or any amendment or other update is accounted for. Upon receipt and review, the Administration will assign each completed report a transaction identification number. In determining whether the importer has complied with the requirement to file within 30 calendar days, the report shall be deemed filed on the first date on which a complete report is filed.

(b) If an importation for which a DEA Form 486/486A has been filed fails to take place, the importer must report to the Administration that the importation did not occur through the DEA Diversion Control Division secure network application.

(c) *Denied release at the port of entry.* In the event that a shipment of listed chemicals has been denied release by a customs officer at the port of entry for any reason, the importer who attempted to have the shipment released, within 5 business days of the denial, report to the Administration that the shipment was denied release and the reason for denial. Such report must be transmitted to the Administration through the DEA

Diversion Control Division secure network application. This report must include the following information: The quantity of the listed chemical denied release; the date on which release was denied; and the basis for the denied release. Upon the importer's report of a denied release, the DEA will assign the report a transaction identification number and the import declaration will be void and of no effect. No shipment of listed chemicals denied release for any reason will be allowed entry into the United States without a subsequent refiling of an import declaration. Following such refiling the importer may request release of the listed chemicals immediately after receipt of a transaction identification number without regard to the 15 day advance filing requirement in § 1313.12(b).

■ 69. In § 1313.21, revise the section heading and paragraphs (a), (b), (c) introductory text, (d), and (e) introductory text and add paragraph (h) to read as follows:

§ 1313.21 Notification prior to export.

(a) Each regulated person who seeks to export a listed chemical that meets or exceeds the threshold quantities identified in § 1310.04(f) of this chapter, or is a listed chemical for which no threshold has been established as identified in § 1310.04(g) of this chapter, must notify the Administration of the intended export by filing an export declaration (DEA Form 486) not later than 15 calendar days before the date of release by a customs officer at the port of export. Regulated persons who seek to export a listed chemical below the threshold quantities identified in § 1310.04(f) are not required to file an export declaration in advance of the export.

(b) A complete and accurate declaration (DEA Form 486) must be filed with the Administration through the DEA Diversion Control Division secure network application not later than 15 calendar days prior to the date of release by a customs officer at the port of export. The declaration must be signed and dated by the exporter and must contain the address from which the listed chemicals will be shipped for exportation. Upon receipt and review, the Administration will assign a transaction identification number to each completed declaration. The 15 calendar days shall begin on the date that the regulated person files a completed declaration without regard to the date that the Administration assigns a transaction identification number. Exporters may not request release of a listed chemical until a transaction identification number has been issued.

(c) The 15 calendar day advance notification requirement for listed chemical exports may be waived, in whole or in part, for:

* * * * *

(d) For exports meeting the requirements of paragraph (c)(1) of this section, the declaration (DEA Form 486) must be filed with the Administration through the DEA Diversion Control Division secure network application at least three business days before the date of release by a customs officer. The declaration must be signed and dated by the exporter and must contain the address from which the listed chemicals will be shipped for exportation. Upon receipt and review, the Administration will assign a transaction identification number to each completed declaration. The exporter may only proceed with the export transaction once the transaction identification number has been issued.

(e) For exportations where advance notification is waived pursuant to paragraph (c)(2) of this section no DEA Form 486 is required; however, the regulated person must submit quarterly reports with the Regulatory Section, Diversion Control Division, Drug Enforcement Administration, not later than the 15th day of the month following the end of each quarter. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. Such report shall contain the following information regarding each individual exportation:

* * * * *

(h) Export declarations shall become void and of no effect 180 calendar days after the date the declaration is deemed filed with the Administration.

■ 70. Revise § 1313.22 to read as follows:

§ 1313.22 Export declaration.

(a) Any List I or List II chemical listed in § 1310.02 of this chapter which meets or exceeds the quantitative threshold criteria established in § 1310.04(f) of this chapter or is a listed chemical for which no threshold has been established as identified in § 1310.04(g) of this chapter, may be exported if that chemical is needed for medical, commercial, scientific, or other legitimate uses.

(b) The export declaration (DEA Form 486) must include all the following information:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the chemical exporter; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the export broker, if any;

(2) The name and description of each listed chemical as it appears on the label or container, the name of each listed chemical as it is designated in § 1310.02 of this chapter, the size or weight of container, the number of containers, the net weight of each listed chemical given in kilograms or parts thereof, and the gross weight of the shipment given in kilograms or parts thereof;

(3) The anticipated date of release by a customs officer at the port of export, the port of export, and the foreign port and country of entry; and

(4) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignee in the country where the chemical shipment is destined; the name(s) and address(es) of any intermediate consignee(s); and a copy of the foreign permit, license or registration issued by the competent national authority of the consignee and any intermediate consignees.

(c) Declared exports of listed chemicals which are refused, rejected, or otherwise deemed undeliverable by the foreign competent national authority may be returned to the U.S. chemical exporter of record. The regulated person must provide notification through the DEA Diversion Control Division secure network application (this does not require a DEA Form 486) outlining the circumstances within a reasonable time following the return. Upon receipt and review, the Administration will assign the completed notice a transaction identification number. The notice will not be deemed filed until the Administration issues a transaction identification number. Listed chemicals so returned may not be reexported until the exporter has filed a new DEA Form 486 and the Administration has issued a new transaction identification number. This provision does not apply to shipments that have cleared foreign customs, been delivered, and accepted by the foreign consignee. Returns to third parties in the United States will be regarded as imports.

■ 71. Revise § 1313.23 to read as follows:

§ 1313.23 Disposition of export declaration.

The exporter, or their agent, must submit an official record of the export declaration and/or required data concerning the export transaction to a customs officer at the port of export in compliance with all export control requirements of agencies with export control authorities under the Act or statutory authority other than the Controlled Substances Import and Export Act. An official record of the declaration (available from the DEA Diversion Control Division secure network application after the Administration issues a transaction identification number) must be maintained by the chemical exporter as the official record of the export in accordance with part 1310 of this chapter. Export declarations involving a listed chemical must be retained for two years.

■ 72. In § 1313.26, revise the section heading and paragraph (b) to read as follows:

§ 1313.26 Updated notice for change in circumstances.

* * * * *

(b) After a notice under § 1313.21(a) is submitted to the Administration, if circumstances change and the exporter will not be transferring the listed chemical to the transferee identified in the notice, or will be transferring a greater quantity of the chemical than specified in the notice, the exporter must update the notice to identify the most recent prospective transferee or the most recent quantity or both (as the case may be). The exporter may not transfer the listed chemical until after the expiration of the 15 calendar day period beginning on the date on which the update is filed with the Administration. Except, if the listed chemical is intended for transfer to a regular customer, the exporter may not transfer the listed chemical until after the expiration of three business days. The preceding sentence applies with respect to changing circumstances regarding a transferee or quantity identified in an update to the same extent and in the same manner as the sentence applies with respect to changing circumstances regarding a transferee or quantity identified in the original notice under paragraph (a) of this section. Amended declarations must be submitted to the Administration through the DEA Diversion Control Division secure network application. The amendment must be signed and dated by the exporter. Upon receipt and review, the Administration will assign each completed amendment a transaction identification number. The amendment will not be deemed filed until the Administration issues a transaction identification number.

* * * * *

■ 73. Revise § 1313.27 to read as follows:

§ 1313.27 Return declaration for exports.

(a) *Return information.* Within 30 calendar days after a listed chemical is released by a customs officer at the port of export, the exporter must file a report with the Administration through the DEA Diversion Control Division secure network application specifying the particulars of the transaction. This report must include the following information: The date on which the listed chemical left the registered location or place of business; the date on which the listed chemical was released by a customs officer at the port of export; the actual quantity of listed chemical that left the registered location or place of business; the actual quantity of the listed chemical released by a customs officer at the port of export; chemical; container; name of transferees; and any other information as the Administration may specify. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number. In determining whether the exporter has complied with the requirement to file within 30 calendar days, the report shall be deemed filed on the first date on which a complete report is filed.

(b) If an exportation for which a DEA Form 486 has been filed fails to take place, the exporter must report to the Administration that the exportation did not occur through the DEA Diversion Control Division secure network application.

(c) *Denied release at the port of export.* In the event that a shipment of listed chemicals has been denied release by a customs officer at the port of export for any reason, the exporter who attempted to have the shipment released must, within 5 business days of the denial, report to the Administration that the shipment was denied release and the reason for denial. Such report must be transmitted to the Administration through the DEA Diversion Control Division secure network application. This report must include the following information: The quantity of the listed chemicals denied release; the date on which release was denied; and the basis for the denied release. Upon the exporter's report of a denied release, DEA will assign the report a transaction identification number and the export declaration will be void and of no effect. No shipment of listed chemicals denied release for any reason will be allowed to be released from the United States without a subsequent refiling of a complete and accurate export declaration. Following such refiling, the exporter may request the release of the listed chemicals immediately after receipt of a transaction identification number without regard to the 15 day advance filing required by § 1313.21(b).

■ 74. In § 1313.31, revise paragraphs (b) introductory text and (b)(7), (8), (14), and (15) to read as follows:

§ 1313.31 Advance notice of importation for transshipment or transfer.

* * * * *

(b) Advance notification must be provided to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration, not later than 15 calendar days prior to the proposed date the listed chemical will transship or transfer through the United States. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. A separate notification is required for each shipment of listed chemicals to be transferred or transshipped. The written notification (not a DEA Form 486) must contain the following information:

* * * * *

(7) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) and type of business of the foreign exporter;

(8) The foreign port and country of export;

* * * * *

(14) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) and type of business of the consignee at the foreign port or country of entry;

(15) The shipping route from the U.S. port of export to the foreign port or country of entry at final destination;

* * * * *

■ 75. Revise § 1313.32 to read as follows:

§ 1313.32 Notification of international transactions.

(a) A broker or trader must notify the Administration prior to an international transaction involving a listed chemical which meets or exceeds the threshold quantities identified in § 1310.04(f) of this chapter or is a listed chemical for which no threshold has been established as identified in § 1310.04(g) of this chapter, in which the broker or trader participates. Notification must be made not later than 15 calendar days before the transaction is to take place. In order to facilitate an international transaction involving listed chemicals and implement the purpose of the Act, regulated persons may wish to provide advance notification to the Administration as far in advance of the 15 calendar days as possible.

(b) A completed DEA Form 486 must be submitted to the Administration through the DEA Diversion Control Division secure network application, not later than 15 calendar days prior to the international transaction. The DEA Form 486 must be signed and dated by the broker or trader. Upon receipt and review, the Administration will assign a transaction identification number to each completed notification. A notification is not deemed filed, and therefore is not valid, until the Administration assigns the notification a transaction identification number. An international transaction may not take place until after a transaction identification number has been assigned and the expiration of the 15 calendar day period beginning on the date on which the broker or trader submits a complete notification to the Administration.

(c) No person shall serve as a broker or trader for an international transaction involving a listed chemical knowing or having reasonable cause to believe that the transaction is in violation of the laws of the country to which the chemical is exported or the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported. The Administration will publish a notice of foreign import restrictions for listed chemicals of which DEA has knowledge as provided in § 1313.25.

(d) After a notice under paragraph (a) of this section is submitted to the Administration, if circumstances change and the broker or trader will not be transferring the listed chemical to the transferee identified in the notice, or will be transferring a greater quantity of the chemical than specified in the notice, the broker or trader must amend the notice through the DEA Diversion Control Division secure network application to identify the most recent prospective transferee or the most recent quantity or both (as applicable) and may not transfer the listed chemical until after the expiration of the 15 calendar day period beginning on the date on which the update is submitted to the Administration. The preceding sentence applies with respect to changing circumstances regarding a transferee or quantity identified in an amendment to the same extent and in the same manner as the sentence applies with respect to changing circumstances regarding a transferee or quantity identified in the original notice under paragraph (a) of this section.

(e) For purposes of this section:

(1) The term *transfer*, with respect to a listed chemical, includes the sale of the chemical.

(2) The term *transferee* means a person to whom an exporter transfers a listed chemical.

■ 76. In § 1313.33, revise the paragraphs (b) and (c) to read as follows:

§ 1313.33 Contents of an international transaction declaration.

* * * * *

(b) Any broker or trader who desires to arrange an international transaction, defined in 21 U.S.C. 802(42), involving a listed chemical which meets the threshold criteria set forth in § 1310.04 of this chapter must notify the Administration through the procedures outlined in § 1313.32(b).

(c) The DEA Form 486 must include:

(1) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the chemical exporter; the name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the chemical importer;

(2) The name and description of each listed chemical as it appears on the label or container, the name of each listed chemical as it is designated in § 1310.02 of this chapter, the size or weight of container, the number of containers, the net weight of each listed chemical given in kilograms or parts thereof, and the gross weight of the shipment given in kilograms or parts thereof;

(3) The anticipated date of release at the foreign port of export, the anticipated foreign port and country of export, and the foreign port and country of entry; and

(4) The name/business name, address/business address, and contact information (*e.g.,* telephone number(s), email address(es), etc.) of the consignee in the country where the chemical shipment is destined; the name(s) and address(es) of any intermediate consignee(s).

■ 77. Revise § 1313.34 to read as follows:

§ 1313.34 Disposition of the international transaction declaration.

The broker or trader must retain an official record of the declaration (DEA Form 486) (available from the DEA Diversion Control Division secure network application after the Administration issues a transaction identification number) as the official record of the international transaction. In accordance with part 1310 of this chapter, declarations involving listed chemicals must be retained for two years.

■ 78. Revise § 1313.35 to read as follows:

§ 1313.35 Return declaration or amendment to Form 486 for international transactions.

(a) Within 30 calendar days after an international transaction is completed, the broker or trader must file a report with the Administration through the DEA Diversion Control Division secure network application about the particulars of the transaction. This report must include the following information: The date(s) on which the listed chemical was released by the foreign customs officer(s) at the port(s); the actual quantity of listed chemical that left the country of export; the actual quantity of the listed chemical released by a customs officer at the port of entry; chemical; container; name of transferees; and the transaction identification and any other information as the Administration may specify. Upon receipt and review, the Administration will assign a completed report a transaction identification number. The report will not be deemed filed until the Administration has issued a transaction identification number.

(b) If an international transaction for which a DEA Form 486 has been filed fails to take place, the broker or trader must report to the Administration that the international transaction did not occur utilizing the DEA Diversion Control Division secure network application as soon as the broker or trader becomes aware of the circumstances.

PART 1314—RETAIL SALE OF SCHEDULED LISTED CHEMICAL PRODUCTS

■ 79. The authority citation for part 1314 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 842, 871(b), 875, 877, 886a.

§ 1314.110 [Amended]

■ 80. In § 1314.110, in paragraphs (a)(1) and (2), remove the phrase ''Import/Export Unit,'' and add in its place ''Regulatory Section, Diversion Control Division''.

PART 1315—IMPORTATION AND PRODUCTION QUOTAS FOR EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE

■ 81. The authority citation for part 1315 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 826, 871(b), 952.

■ 82. In part 1315, remove ''Drug & Chemical Evaluation Section, Drug Enforcement Administration'' and ''Drug & Chemical Evaluation Section'' and add in their place ''UN Reporting & Quota Section, Diversion Control Division, Drug Enforcement Administration''.

PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

Subpart D—Administrative Hearings

■ 83. The authority citation for part 1316, subpart D, continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 875, 958(d), 965.

■ 84. In § 1316.47, revise paragraph (a) to read as follows:

§ 1316.47 Request for hearing.

(a) Any person entitled to a hearing and desiring a hearing shall, within the period permitted for filing, file a request for a hearing and/or an answer that complies with the following format (see the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address):

(Date) ___________________________
Drug Enforcement Administration, Attn: Hearing Clerk/OALJ
(Mailing Address) ___________________
Subject: Request for Hearing
Dear Sir:

The undersigned ___________ (Name of the Person) hereby requests a hearing in the matter of: ___________ (Identification of the proceeding).

(A) (State with particularity the interest of the person in the proceeding.)

(B) (State with particularity the objections or issues, if any, concerning which the person desires to be heard.)

(C) (State briefly the position of the person with regard to the particular objections or issues.)

All notices to be sent pursuant to the proceeding should be addressed to:

(Name) ___________________________
(Street Address) ____________________
(City and State) _____________________
Respectfully yours,
(Signature of Person) _______________

* * * * *

■ 85. Revise § 1316.48 to read as follows:

§ 1316.48 Notice of appearance.

Any person entitled to a hearing and desiring to appear in any hearing, shall, if he or she has not filed a request for hearing, file within the time specified in the notice of proposed rulemaking, a written notice of appearance in the following format (see the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address):

(Date) ___________________________
Drug Enforcement Administration, Attn: Hearing Clerk/OALJ
(Mailing Address) ___________________
Subject: Notice of Appearance
Dear Sir:

Please take notice that ___________ (Name of person) will appear in the matter of: ___________ (Identification of the proceeding).

(A) (State with particularity the interest of the person in the proceeding.).

(B) (State with particularity the objections or issues, if any, concerning which the person desires to be heard.).

(C) (State briefly the position of the person with regard to the particular objections or issues.).

All notices to be sent pursuant to this appearance should be addressed to:

(Name) ___________________________
(Street Address) ____________________
(City and State) _____________________

Respectfully yours,
(Signature of Person) _______________

PART 1321—DEA MAILING ADDRESSES

■ 86. The authority citation for part 1321 continues to read:

Authority: 21 U.S.C. 871(b).

■ 87. Revise § 1321.01 to read as follows:

§ 1321.01 DEA mailing addresses.

The following table provides information regarding mailing addresses to be used when sending specified correspondence to the Drug Enforcement Administration.

TABLE OF DEA MAILING ADDRESSES

Code of Federal Regulations Section—Topic	DEA mailing address
DEA Administrator	
1308.43(b)—Petition to initiate proceedings for rulemaking. 1316.23(b)—Petition for grant of confidentiality for research subjects. 1316.24(b)—Petition for exemption from prosecution for researchers.	Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, VA 22152.
DEA Diversion Control Division	
1307.03—Exception request filing. 1307.22—Delivery of surrendered and forfeited controlled substances. 1310.21(b)—Sale by Federal departments or agencies of chemicals which could be used to manufacture controlled substances certification request.[2]	Drug Enforcement Administration, Attn: Diversion Control Division/DC, 8701 Morrissette Drive, Springfield, VA 22152.

TABLE OF DEA MAILING ADDRESSES—Continued

Code of Federal Regulations Section—Topic	DEA mailing address
DEA Regulatory Section	
1301.71(d)—Security system compliance review for controlled substances. 1309.71(c)—Security system compliance review for List I chemicals. 1310.03(c)—Mail-Order reports involving transactions with nonregulated persons or exports.[1] 1310.05(b)(1)—Unusual or excessive loss or disappearance of listed chemicals. 1310.05(b)(2)—Reports of domestic regulated transactions in a tableting machine or an encapsulating machine.[1] 1310.05(c)(1)—Reports of imports and exports of a tableting machine or an encapsulating machine.[1] 1310.05(c)(2)—Report of declared exports of machines refused, rejected, or returned. 1312.12(a)—Application for import permit (DEA Form 357).[1] 1312.18(b)—Import declaration (DEA Form 236) submission.[1] 1312.22(g)(8)—Request for return of unacceptable or undeliverable exported controlled substances.[1] 1312.27(a)—Controlled substances export declaration (DEA Form 236) filing.[1] 1312.31(b)—Controlled substances transshipment permit application. 1312.32(a)—Advanced notice of importation for transshipment or transfer of controlled substances. 1313.12(b)—Authorization to import listed chemicals (DEA Form 486/486A).[1] 1313.12(e)—Quarterly reports of listed chemicals importation. 1313.21(b)—Authorization to export listed chemicals (DEA Form 486).[1] 1313.21(e)—Quarterly reports of listed chemicals exportation. 1313.22(c)—Notice of declared exports of listed chemicals refused, rejected or undeliverable.[1] 1313.31(b)—Advanced notice of importation for transshipment or transfer of listed chemicals. 1313.32(b)(1)—International transaction authorization (DEA Form 486).[1] 1314.110(a)(1)—Reports for mail-order sales. 1314.110(a)(2)—Request to submit mail-order sales reports.	Drug Enforcement Administration, Attn: Regulatory Section/DRG, 8701 Morrissette Drive, Springfield, VA 22152.
DEA Drug & Chemical Evaluation Section	
1308.21(a)—Exclusion of nonnarcotic substance. 1308.23(b)—Exemption for chemical preparations. 1308.24(d)—Exempt narcotic chemical preparations importer/exporter reporting. 1308.24(i)—Exempted chemical preparations listing. 1308.25(a)—Exclusion of veterinary anabolic steroid implant product application. 1308.26(a)—Excluded veterinary anabolic steroid implant products listing. 1308.31(a)—Exemption of a nonnarcotic prescription product application. 1308.32—Exempted prescription products listing. 1308.33(b)—Exemption of certain anabolic steroid products application. 1308.34—Exempted anabolic steroid products listing. 1310.13(b)—Exemption for chemical preparations. 1310.05(d)—Bulk manufacturer of listed chemicals reporting.	Drug Enforcement Administration, Attn: Drug & Chemical Evaluation Section/DRE, 8701 Morrissette Drive, Springfield, VA 22152.
UN Reporting & Quota Section	
1303.12(b)—Application for controlled substances procurement quota (DEA Form 250) filing and request.	Drug Enforcement Administration, Attn: UN Reporting & Quota Section/DRQ, 8701 Morrissette Drive, Springfield, VA 22152.

TABLE OF DEA MAILING ADDRESSES—Continued

Code of Federal Regulations Section—Topic	DEA mailing address
1303.12(d)—Controlled substances quota adjustment request. 1303.22—Application for individual manufacturing quota (DEA Form 189) filing and request for schedule I or II controlled substances. 1304.31(a)—Manufacturers importing narcotic raw material report submission. 1304.32(a)—Manufacturers importing coca leaves report submission. 1315.22—Application for individual manufacturing quota for ephedrine, pseudoephedrine, phenylpropanolamine (DEA Form 189) filing and request. 1315.32(e)—Application for procurement quota for ephedrine, pseudoephedrine, phenylpropanolamine (DEA Form 250) filing and request. 1315.32(g)—Procurement quota adjustment request for ephedrine, pseudoephedrine, and phenylpropanolamine. 1315.34(d)—Application for import quota for ephedrine, pseudoephedrine, phenylpropanolamine (DEA Form 488) request and filing. 1315.36(b)—Request import quota increase for ephedrine, pseudoephedrine, or phenylpropanolamine.	
Pharmaceutical Investigations Section	
1304.04(d)—ARCOS separate central reporting identifier request. 1304.33(a)—Reports to ARCOS.	Drug Enforcement Administration, Attn: ARCOS Unit/DOPT, P.O. Box 2520, Springfield, VA 22152–2520 OR Drug Enforcement Administration, Attn: ARCOS Unit, 8701 Morrissette Drive, Springfield, VA 22152.
DEA Registration Section	
1301.03—Procedures information request (controlled substances registration). 1301.13(e)(2)—Request DEA Forms 224, 225, and 363. 1301.14(a)—Controlled substances registration application submission. 1301.18(c)—Research project controlled substance increase request. 1301.51—Controlled substances registration modification request. 1301.52(b)—Controlled substances registration transfer request. 1301.52(c)—Controlled substances registration discontinuance of business activities notification. 1309.03—List I chemicals registration procedures information request. 1309.32(c)—Request DEA Form 510. 1309.33(a)—List I chemicals registration application submission. 1309.61—List I chemicals registration modification request.	Drug Enforcement Administration, Attn: Registration Section/DRR P.O. Box 2639, Springfield, VA 22152–2639.
DEA Hearing Clerk	
1301.43—Request for hearing or appearance; waiver. 1303.34—Request for hearing or appearance; waiver. 1308.44—Request for hearing or appearance; waiver. 1316.45—Hearings documentation filing. 1316.46(a)—Inspection of record. 1316.47(a)—Request for hearing. 1316.48—Notice of appearance.	Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, VA 22152.
DEA Federal Register Representative	
1301.33(a)—Filing of written comments regarding application for bulk manufacture of Schedule I and II substances.[2] 1301.34(a)—Filing of written comments regarding application for importation of Schedule I and II substances.[2] 1303.11(c)—Filing of written comments regarding notice of an aggregate production quota.[2] 1303.13(c)—Filing of written comments regarding adjustments of aggregate production quotas.[2] 1303.13(c)—Filing of written comments regarding adjustments of aggregate production quotas.[2] 1308.43(g)—Filing of written comments regarding initiation of proceedings for rulemaking.[2]	Drug Enforcement Administration, Attn: Federal Register Representative/DRW, 8701 Morrissette Drive, Springfield, VA 22152. *http://www.regulations.gov/.*

[1] Applications/filings/reports are required to be filed electronically in accordance with this chapter.
[2] Applications/filings/reports may be filed electronically in accordance with this chapter.

Dated: November 28, 2016.

Chuck Rosenberg,

Acting Administrator.

[FR Doc. 2016–28966 Filed 12–29–16; 8:45 am]

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Part V

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2014–0741; FRL–9957–07–OAR]

RIN 2060–AS46

National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills to address the results of the residual risk and technology review (RTR) that the EPA is required to conduct under the Clean Air Act (CAA). These proposed amendments include revisions to the opacity monitoring provisions; addition of electrostatic precipitator (ESP) parameter monitoring provisions; a requirement for 5-year periodic emissions testing; revisions to provisions addressing periods of startup, shutdown, and malfunction (SSM); and technical and editorial changes. The EPA is proposing these amendments to improve the effectiveness of the rule.

DATES: *Comments.* Comments must be received on or before February 28, 2017. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before January 30, 2017.

Public Hearing. A public hearing will be held if requested by January 4, 2017.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2014–0741, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2014–0741. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2014–0741. All documents in the docket are listed in the *Regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing. A public hearing will be held, if requested by January 4, 2017, to accept oral comments on this proposed action. If a hearing is requested, it will be held at the EPA's Washington, DC campus located at 1201 Constitution Avenue NW., Washington, DC. The hearing, if requested, will begin at 9:00 a.m. (local time) and will conclude at 5:00 p.m. (local time) on January 17, 2017. To request a hearing, to register to speak at a hearing, or to inquire if a hearing will be held, please contact Ms. Aimee St. Clair at (919) 541–1063 or by email at *stclair.aimee@epa.gov.* The last day to pre-register to speak at a hearing, if one is held, will be January 12, 2017.

Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, although preferences on speaking times may not be able to be fulfilled. Please note that registration requests received before the hearing will be confirmed by the EPA via email. The EPA will make every effort to accommodate all speakers who arrive and register. Because the hearing will be held at a United States governmental facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building and demonstrations will not be allowed on federal property for security reasons.

Please note that any updates made to any aspect of the hearing, including whether or not a hearing will be held, will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/kraft-soda-sulfite-and-stand-alone-semichemical-pulp-mills-mact-ii.* We ask that you contact Ms. Aimee St. Clair at (919) 541–1063 or by email at *stclair.aimee@epa.gov* or monitor our Web site to determine if a hearing will be held. The EPA does not intend to publish a notice in the **Federal Register** announcing any such updates. Please go to *https://www.epa.gov/stationary-sources-air-pollution/kraft-soda-sulfite-and-stand-alone-semichemical-pulp-mills-mact-ii* for more information on the public hearing.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Dr. Kelley Spence, Sector Policies and Programs Division (Mail Code: E143–03), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3158; fax number: (919) 541–3470; and email address: *spence.kelley@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. James Hirtz, Health and Environmental Impacts Division (Mail Code: C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.* For information about the applicability of the NESHAP to a particular entity, contact Ms. Sara Ayres, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, USEPA Region 5 (Mail Code: E–19J), 77 West Jackson Boulevard, Chicago IL 60604; telephone number: (312) 353–6266; and email address: *ayres.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEGL acute exposure guideline levels
AERMOD air dispersion model used by the HEM–3 model
ANSI American National Standards Institute
ASME American Society of Mechanical Engineers
ASTM American Society for Testing and Materials
ATSDR Agency for Toxic Substances and Disease Registry
BACT best available control technology
BAT best available technology
BLO black liquor oxidation
BLS black liquor solids
CAA Clean Air Act
$CaCO_3$ calcium carbonate
CalEPA California EPA
CBI Confidential Business Information
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
CMS continuous monitoring system
COMS continuous opacity monitoring system
CPMS continuous parameter monitoring system
DCE direct contact evaporator
EJ environmental justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
ERT Electronic Reporting Tool
ESP electrostatic precipitator
FR Federal Register
gr/dscf grains per dry standard cubic foot
HAP hazardous air pollutant
HCCPD hexachlorocyclopentadiene
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.1.0
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
IBR incorporation by reference
ICR Information Collection Request
IRIS Integrated Risk Information System
km kilometer
LAER lowest achievable emission rate
lb/hr pounds per hour
lb/ton pounds per ton
LOAEL lowest-observed-adverse-effect level
MACT maximum achievable control technology
mg/kg-day milligrams per kilogram per day
mg/m^3 milligrams per cubic meter
MIR maximum individual risk
Na_2CO_3 sodium carbonate
Na_2S sodium sulfide
NAAQS National Ambient Air Quality Standards
NAC National Advisory Committee
NAICS North American Industry Classification System
NaOH sodium hydroxide
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NCASI National Council for Air and Stream Improvement
NDCE nondirect contact evaporator
NEI National Emissions Inventory
NESHAP National Emission Standards for Hazardous Air Pollutants
NH_3 ammonia
NOAA National Oceanic and Atmospheric Administration
NOAEL no-observed-adverse-effect level
NRC National Research Council
NRDC Natural Resources Defense Council
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act
O&M operation and maintenance
O_2 oxygen
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PAH polycyclic aromatic hydrocarbons
PB–HAP hazardous air pollutant known to be persistent and bio-accumulative in the environment
PDF portable document format
PEL probable effects level
PM particulate matter
$PM_{2.5}$ fine particles (particulate matter with particles less than 2.5 micrometers in diameter)
POM polycyclic organic matter
ppm parts per million
PRA Paperwork Reduction Act
PTC Performance Test Code
QA quality assurance
RACT reasonably available control technology
RBLC RACT/BACT/LAER Clearinghouse
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RfD reference dose
RTO regenerative thermal oxidizer
RTR residual risk and technology review
SAB Science Advisory Board
SCC source classification code
SDT smelt dissolving tank
SOP standard operating procedure
SSM startup, shutdown, and malfunction
STAPPA/ State and Territorial Air Pollution Program
ALAPCO Administrators/Association of Local Air Pollution Control Officers
TEQ toxic equivalent
THC total hydrocarbon
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
TRS total reduced sulfur
UF uncertainty factor
$\mu g/m^3$ micrograms per cubic meter
UMRA Unfunded Mandates Reform Act
URE unit risk estimate
yr year

Organization of this Document. The information in this preamble is organized as follows:

I. General Information

A. Executive Summary

1. Purpose of the Regulatory Action

Section 112(f)(2) of the CAA requires the EPA to analyze and address the residual risk associated with hazardous air pollutant emissions from source categories subject to maximum achievable control technology (MACT) standards. This review, known as the residual risk review, is a one-time review that the statute provides will be done within 8 years of issuance of the MACT standard. Section 112(d)(6) of the CAA requires the EPA to review and revise CAA section 112 emissions standards, as necessary, taking into account developments in practices, processes, and control technologies. Emission standards promulgated under CAA section 112 are to be reviewed no less often than every 8 years. The EPA issued the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Mills (40 Code of Federal Regulations (CFR) part 63, subpart MM) in 2001. The 2001 emission standards are due for review under CAA sections 112(d)(6) and 112(f)(2). In addition to conducting the RTR for subpart MM, we are evaluating the SSM provisions in the rule in light of the United States Court of Appeals for the District of Columbia Circuit decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008). As explained in section IV of this preamble, in the *Sierra Club* case, the D.C. Circuit vacated the SSM exemption provisions in the General Provisions for nonopacity and opacity standards. Finally, the EPA evaluated the rule to determine if additional amendments were warranted or necessary to ensure continuous compliance with the standard and to promote consistency with other standards.

2. Summary of the Major Proposed Revisions

The EPA is not proposing to make any changes pursuant to 112(f)(2) as a result of its residual risk review. The EPA is proposing to reduce opacity limits as a result of the technology review under CAA section 112(d)(6). In addition, we are proposing the following as part of the technology review: Revising the opacity monitoring provisions, requiring ESP parameter monitoring for processes equipped with ESPs, clarifying the monitoring for combined ESP/wet scrubber controls, and providing alternative monitoring for smelt dissolving tank (SDT) wet scrubbers.

As an additional action, we are proposing to improve the compliance provisions of the subpart by proposing to require periodic air emissions performance testing once every 5 years for facilities subject to the standards for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills. To address the SSM exemptions, we are proposing amendments to subpart MM that will (1) require facilities to meet the standard at all times, including during periods of SSM, and (2) provide alternative monitoring parameters for wet scrubbers and ESPs during these periods. We are also proposing changes to the subpart MM NESHAP and the General Provisions applicability table to eliminate the SSM exemption. To increase the ease and efficiency of data submittal and improve data accessibility, we are proposing to require mills to submit electronic copies of compliance reports, which includes performance test reports.

We are also proposing a number of technical and editorial changes. These changes include the following: Clarifying the location in 40 CFR part 60 of applicable EPA test methods; updating the facility name for Cosmo Specialty Fibers; revising the definitions section in 40 CFR 63.861; corrected misspelling in 40 CFR 63.862(c), revising multiple sections to remove reference to former smelters and former black liquor gasification system at Georgia-Pacific's facility in Big Island, Virginia; revising the monitoring requirements section; revising the performance test requirements section to specify the conditions for conducting performance tests and to revise the ambient O2 concentration in Equations 7 and 8; revising the recordkeeping requirements section in 40 CFR 63.866 to include the requirement to record information on failures to meet the applicable standard; revising the terminology in the delegation of authority section in 40 CFR 63.868 to match the definitions in 40 CFR 63.90; and revising the General Provisions applicability table (Table 1 to subpart MM of part 63) to align with those sections of the General Provisions that have been amended or reserved over time.

3. Costs and Benefits

Table 1 summarizes the costs of this action. See section V of this preamble for further discussion.

TABLE 1—SUMMARY OF THE COSTS OF THIS PROPOSED ACTION

Requirement	Capital cost, $ million	Annual cost, $ million
Change in opacity monitoring provisions for recovery furnaces and lime kilns	42	8.8
ESP parameter monitoring	5.7	1.4

TABLE 1—SUMMARY OF THE COSTS OF THIS PROPOSED ACTION—Continued

Requirement	Capital cost, $ million	Annual cost, $ million
Periodic emissions testing		1.1
Incremental reporting/recordkeeping	0.50	1.9
Total nationwide	48	13

The EPA estimates that the proposed changes to the opacity limits and monitoring allowances will reduce PM emissions by approximately 235 (tons per year) tpy and fine particle ($PM_{2.5}$) emissions by approximately 112 tpy. Periodic testing will tend to reduce emissions by providing incentive for facilities to maintain their control systems and make periodic adjustments to ensure peak performance. Eliminating the SSM exemption will reduce emissions by requiring facilities to meet the applicable standard during SSM periods. See section V of this preamble for further discussion.

B. Does this action apply to me?

Table 2 of this preamble lists the NESHAP and associated regulated industrial source categories that are the subject of this proposal. Table 2 is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action. As defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992), the ''Pulp and Paper Production'' source category is any facility engaged in the production of pulp and/or paper. The EPA developed the NESHAPs for the source category in phases. This NESHAP, 40 CFR part 63, subpart MM, regulates chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills. The NESHAP for non-combustion sources (40 CFR part 63, subpart S) regulates non-combustion processes at mills that (1) chemically pulp wood fiber (using kraft, sulfite, soda, and semichemical methods), (2) mechanically pulp wood fiber (*e.g.,* groundwood, thermomechanical, pressurized), (3) pulp secondary fibers (deinked and non-deinked), (4) pulp non-wood material, and (5) manufacture paper. This proposal only addresses the RTR for subpart MM, and does not propose any amendments to subpart S.

TABLE 2—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [a]
Pulp and Paper Production	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills.	32211, 32212, 32213

[a] North American Industry Classification System.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet through the EPA's Stationary Sources of Air Pollution Web site, a forum for information and technology exchange in various areas of air pollution control. A redline version of the regulatory language that incorporates the proposed changes in this action is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2014–0741). Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at: *https://www.epa.gov/stationary-sources-air-pollution/kraft-soda-sulfite-and-stand-alone-semichemical-pulp-mills-mact-ii.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same Web site. Information on the overall RTR program is available at *http://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

D. What should I consider as I prepare my comments for the EPA?

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI for inclusion in the public docket. If you submit a CD–ROM or disk that does not contain CBI, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2014–0741.

II. Background

A. What is the statutory authority for this action?

Section 112 of the CAA establishes a two-stage regulatory process to address emissions of hazardous air pollutants (HAPs) from stationary sources. In the first stage, after the EPA has identified categories of sources emitting one or more of the HAPs listed in CAA section 112(b), CAA section 112(d) requires the Agency to promulgate technology-based NESHAPs for those sources. ''Major sources'' are those that emit or have the potential to emit 10 tpy or more of a single HAP or 25 tpy or more of any combination of HAPs. For major sources, the technology-based NESHAP must reflect the maximum degree of emission reductions of HAPs achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts) and are commonly referred to as MACT standards.

MACT standards must reflect the maximum degree of emissions reduction achievable through the application of measures, processes, methods, systems, or techniques, including, but not limited to, measures that: (1) Reduce the volume of or eliminate pollutants through process changes, substitution of materials, or other modifications; (2) enclose systems or processes to eliminate emissions; (3) capture or treat pollutants when released from a process, stack, storage, or fugitive emissions point; (4) are design, equipment, work practice, or operational standards (including requirements for operator training or certification); or (5) are a combination of the above. CAA section 112(d)(2)(A)–(E). The MACT standards may take the form of design, equipment, work practice, or operational standards where the EPA first determines either that: (1) A pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA section 112(h)(1)–(2).

The MACT ''floor'' is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emissions control that is achieved in practice by the best-controlled similar source. The MACT floor for existing sources can be less stringent than floors for new sources, but not less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, the EPA must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on considerations of the cost of achieving the emission reductions, any non-air quality health and environmental impacts, and energy requirements.

The EPA is then required to review these technology-based standards and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less frequently than every 8 years. CAA section 112(d)(6). In conducting this review, the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013).

The second stage in standard-setting focuses on reducing any remaining (*i.e.,* ''residual'') risk according to CAA section 112(f). Section 112(f)(1) of the CAA required that the EPA prepare a report to Congress discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, and the EPA's recommendations as to legislation regarding such remaining risk. The EPA prepared and submitted the *Residual Risk Report to Congress,* EPA–453/R–99–001 (*Risk Report*) in March 1999. Section 112(f)(2) of the CAA then provides that if Congress does not act on any recommendation in the Risk Report, the EPA must analyze and address residual risk for each category or subcategory of sources 8 years after promulgation of such standards pursuant to CAA section 112(d).

Section 112(f)(2) of the CAA requires the EPA to determine for source categories subject to MACT standards whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health. Section 112(f)(2)(B) of the CAA expressly preserves the EPA's use of the two-step process for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the *National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the *Risk Report* that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and, in a challenge to the risk review for the Synthetic Organic Chemical Manufacturing source category, the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008) (''[S]ubsection 112(f)(2)(B) expressly incorporates the EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**.''); see also, *A Legislative History of the Clean Air Act Amendments of 1990,* vol. 1, p. 877 (Senate debate on Conference Report).

The first step in the process of evaluating residual risk is the determination of acceptable risk. If risks are unacceptable, the EPA cannot consider cost in identifying the emissions standards necessary to bring risks to an acceptable level. The second step is the determination of whether standards must be further revised in order to provide an ample margin of safety to protect public health. The ample margin of safety is the level at which the standards must be set, unless an even more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

1. Step 1—Determination of Acceptability

The Agency in the Benzene NESHAP concluded that ''the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information'' and that the ''judgment on acceptability cannot be reduced to any single factor.'' Benzene NESHAP at 38046. The determination of what represents an ''acceptable'' risk is based on a judgment of ''what risks are acceptable in the world in which we live'' (*Risk Report* at 178, quoting *NRDC* v. *EPA,* 824 F. 2d 1146, 1165 (D.C. Cir. 1987) (*en banc*) (''Vinyl Chloride''), recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that ''EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately one in 10 thousand, that risk level is considered acceptable.'' 54 FR at 38045, September 14, 1989. We discussed the maximum individual lifetime cancer risk (or maximum individual risk (MIR)) as being ''the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.'' *Id.* We explained that this measure of risk ''is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years.'' *Id.* We acknowledged that maximum individual lifetime cancer risk ''does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded.'' *Id.*

Understanding that there are both benefits and limitations to using the MIR as a metric for determining acceptability, we acknowledged in the Benzene NESHAP that ''consideration of maximum individual risk . . . must take into account the strengths and weaknesses of this measure of risk.'' *Id.* Consequently, the presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination. Further, in the Benzene NESHAP, we noted that:

> ''[p]articular attention will also be accorded to the weight of evidence presented in the risk assessment of potential carcinogenicity or other health effects of a pollutant. While the same numerical risk may be estimated for an exposure to a pollutant judged to be a known human carcinogen, and to a pollutant considered a possible human carcinogen based on limited animal test data, the same weight cannot be accorded to both estimates. In considering the potential public health effects of the two pollutants, the Agency's judgment on acceptability, including the MIR, will be influenced by the greater weight of evidence for the known human carcinogen.''

Id. at 38046. The Agency also explained in the Benzene NESHAP that:

> ''[i]n establishing a presumption for MIR, rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 km exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants.''

Id. at 38045. In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone.

As noted earlier, in *NRDC* v. *EPA,* the court held that CAA section 112(f)(2) ''incorporates the EPA's interpretation of the Clean Air Act from the Benzene Standard.'' The court further held that Congress' incorporation of the Benzene standard applies equally to carcinogens and non-carcinogens. 529 F.3d at 1081–82. Accordingly, we also consider non-cancer risk metrics in our determination of risk acceptability and ample margin of safety.

2. Step 2—Determination of Ample Margin of Safety

Section 112(f)(2) of the CAA requires the EPA to determine, for source categories subject to MACT standards, whether those standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the second step of the inquiry, determining an 'ample margin of safety,' again includes consideration of all of the health factors, and whether to reduce the risks even further . . . . Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by section 112.'' 54 FR at 38046, September 14, 1989.

According to CAA section 112(f)(2)(A), if the MACT standards for HAP ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million,'' the EPA must promulgate residual risk standards for the source category (or subcategory), as necessary to provide an ample margin of safety to protect public health. In doing so, the EPA may adopt standards equal to existing MACT standards if the EPA determines that the existing standards (*i.e.,* the MACT standards) are sufficiently protective. *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008) (''If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the Agency is free to readopt those standards during the residual risk rulemaking.'') The EPA must also adopt more stringent standards, if necessary, to prevent an adverse environmental effect,[1] but must consider cost, energy, safety, and other relevant factors in doing so.

The CAA does not specifically define the terms ''individual most exposed,'' ''acceptable level,'' and ''ample margin of safety.'' In the Benzene NESHAP, 54 FR at 38044–38045, September 14, 1989, the Agency stated as an overall objective:

> In protecting public health with an ample margin of safety under section 112, EPA strives to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million and (2) limiting to no higher than approximately 1-in-10 thousand [*i.e.,* 100-in-1 million] the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The Agency further stated that ''[t]he EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risks to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population.'' *Id.* at 38045.

In the ample margin of safety decision process, the Agency again considers all of the health risks and other health information considered in the first step, including the incremental risk reduction associated with standards more stringent than the MACT standard or a more stringent standard that the EPA has determined is necessary to ensure risk is acceptable. In the ample margin of safety analysis, the Agency considers additional factors, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046, September 14, 1989.

B. What is this source category and how does the current NESHAP regulate its HAP emissions?

The ''Pulp and Paper Production'' source category includes any facility engaged in the production of pulp and/or paper. The EPA developed the NESHAPs for the source category in two phases. The first phase, 40 CFR part 63, subpart S, regulates pulping and paper production processes, and was

[1] ''Adverse environmental effect'' is defined as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life, or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas. CAA section 112(a)(7).

originally promulgated in 1998. The second phase, 40 CFR part 63, subpart MM, regulates chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills, and was originally promulgated in 2001. Another separate NESHAP, 40 CFR part 63, subpart DDDDD, covers other combustion sources located at pulp mills, such as industrial boilers. This proposal focuses exclusively on the RTR for subpart MM. The EPA is not proposing any amendments to Subpart DDDDD or subpart S in this notice.

Subpart MM of 40 CFR part 63 was promulgated on January 12, 2001 (66 FR 3180). As promulgated in 2001, the subpart MM MACT standard applies to major sources of HAP emissions from chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills. The chemical recovery combustion sources include kraft and soda recovery furnaces, SDTs, and lime kilns; kraft black liquor oxidation (BLO) units; sulfite combustion units; and semichemical combustion units. Subpart S was promulgated on April 15, 1998 (63 FR 18504), and underwent a RTR, with final amendments to subpart S promulgated on September 11, 2012 (77 FR 55698).

This proposal includes both a risk assessment and a technology review of the emission sources in 40 CFR part 63, subpart MM, as well as a risk assessment of the whole facility. The whole facility risk assessment includes emissions from all sources of HAP at the facility, including sources covered by other NESHAP (*e.g.,* boilers covered under 40 CFR part 63, subpart DDDDD; pulp and paper production processes covered under 40 CFR part 63, subpart S; paper coating operations covered under 40 CFR part 63, subpart JJJJ).

According to results of the EPA's 2011 pulp and paper information collection request (ICR), and updates based on more recent information, there are a total of 108 major sources in the United States that conduct chemical recovery combustion operations, including 97 kraft pulp mills, 1 soda pulp mill, 3 sulfite pulp mills, and 7 stand-alone semichemical pulp mills.

Subpart MM of 40 CFR part 63 includes numerical emission limits for recovery furnaces, SDTs, lime kilns, and sulfite and semichemical combustion units. The control systems used by most mills to meet the subpart MM emission limits are as follows:

- Recovery furnaces: ESPs, wet scrubbers, and nondirect contact evaporator (NDCE) furnace design with dry-bottom ESP, and dry particulate matter (PM) return system.
- Smelt dissolving tanks: Wet scrubbers, mist eliminators, and venting to recovery furnace.
- Lime kilns: ESPs and wet scrubbers.
- Sulfite combustion units: Wet scrubbers and mist eliminators.
- Semichemical combustion units: Wet scrubbers, ESPs, and regenerative thermal oxidizers (RTOs).

C. What data collection activities were conducted to support this action?

In February 2011, the EPA issued an ICR, pursuant to CAA section 114, to United States pulp and paper manufacturers to gather information needed to conduct the regulatory reviews required under CAA sections 112(d)(6) and (f)(2). The EPA divided the ICR into three parts. Part I requested available information regarding 40 CFR part 63, subpart S process equipment, control devices, pulp and paper production, bleaching, and other aspects of facility operations to support the subpart S technology review and the review of the Kraft Pulp Mills New Source Performance Standards (NSPS) under 40 CFR part 60, subpart BB. Part II requested updated inventory data for all pulp and paper emission sources to support the residual risk assessment for the pulp and paper sector (including 40 CFR part 63, subparts S and MM) and to supplement the National Emissions Inventory (NEI) for the source category for purposes of detailed residual risk modeling. Part III requested available information on subpart MM chemical recovery combustion equipment, control devices, and other pertinent information, to support the subpart MM technology review and the subpart BB NSPS review. The response rate for the ICR was 100 percent.

D. What other relevant background information and data are available?

In addition to ICR responses, the EPA reviewed a number of other information sources to determine if there have been developments in practices, processes, or control technologies by chemical recovery combustion sources. These include:

- Permit limits from permits submitted with ICR responses and collected from state agencies.
- Information on air pollution control options in the pulp and paper industry from the RACT/BACT/LAER Clearinghouse (RBLC).
- Information on best available techniques in the pulp and paper industry from a 2015 European Commission document, titled *Best Available Techniques (BAT) Reference Document for the Production of Pulp, Paper and Board.*
- Information on the most effective ways to control emissions of $PM_{2.5}$ and $PM_{2.5}$ precursors from sources in various industries, including the pulp and paper industry, from a 2006 State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officers (STAPPA/ALAPCO) document, titled *Controlling Fine Particulate Matter under the Clean Air Act: A Menu of Options.*
- Stack test data submitted with ICR responses.
- Emissions factors from technical bulletins prepared by the National Council for Air and Stream Improvement, Inc. (NCASI), a major source of environmental data affecting the pulp and paper industry.

III. Analytical Procedures

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

A. How did we estimate post-MACT risks posed by the source category?

The EPA conducted a risk assessment that provides estimates of the MIR posed by the HAP emissions from each source in the source category, the hazard index (HI) for chronic exposures to HAPs with the potential to cause non-cancer health effects, and the hazard quotient (HQ) for acute exposures to HAPs with the potential to cause non-cancer health effects. The assessment also provides estimates of the distribution of cancer risks within the exposed populations, cancer incidence, and an evaluation of the potential for adverse environmental effects. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule.* The methods used to assess risks (as described in the seven primary steps below) are consistent with those peer-reviewed by a panel of the EPA's Science Advisory Board (SAB) in 2009 and described in their peer review report issued in 2010;[2] they are also consistent with the key

[2] U.S. EPA SAB. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* May 2010.

recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

As discussed in section II.C of this preamble, we used data from Part II of the Pulp and Paper Sector ICR as the basis for the risk assessments for the pulp and paper sector (including 40 CFR part 63, subparts S and MM). Part II of the ICR, which concluded in June 2011, targeted facilities that are major sources of HAP emissions and involved an update of pre-populated NEI data spreadsheets (or creation of new datasets). The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors and HAPs. The NEI database includes estimates of actual annual air pollutant emissions from point and volume sources; emission release characteristic data such as emission release height, temperature, diameter, velocity, and flow rate; and locational latitude/longitude coordinates. We asked pulp and paper mills to refine (or create new) inventories based on their NEI datasets for purposes of detailed residual risk modeling. Refinements included providing additional details for HAP emission sources, providing more specific information on the location and characteristics of emission points (*e.g.,* updating emission release coordinates and parameters), and adding or updating HAP emissions data for each emission release point. We compiled the updated datasets for each individual mill into a pulp and paper Part II emissions database to create the whole facility and MACT source category residual risk modeling files.

The actual annual emissions data in the pulp and paper emissions database include limited data from actual emissions tests and, in most cases, estimates of actual emissions (based on emissions factors) provided by sources surveyed in Part II of the ICR. We received a comprehensive set of emissions test data and emissions estimates that enabled us to conduct risk modeling of detectable HAP emissions for all major source facilities in the MACT source category.

We conducted two substantial quality assurance (QA) efforts on the Part II data in order to create the modeling files needed for the 40 CFR part 63, subpart S residual risk assessment, which included: (1) QA of the updated inventory spreadsheets submitted by each mill prior to import into the compiled database; and (2) QA and standardization of the compiled database.[3] We needed modeling files for both the subpart S category and the whole facility, so our QA efforts focused on data for all emission sources at pulp and paper facilities, including 40 CFR part 63, subpart MM emission sources.

We reviewed the Part II datasets to ensure that the major pulp and paper processes and pollutants were included and properly identified, to ensure that emissions from the various processes were allocated to the correct source category, and to identify emissions and other data anomalies. We also standardized the various codes (*e.g.,* source classification codes (SCCs), pollutant codes), eliminated duplicate records, and checked geographic coordinates. We reviewed emissions release parameters for data gaps and errors, assigned the proper default parameters where necessary, assigned emission process groups to distinguish between processes with related SCCs, and ensured that fugitive release dimensions were specified or given default values where necessary.

We requested comments on the inventory in the preamble to the December 27, 2011, 40 CFR part 63, subpart S proposal. We requested further updates to the mill-specific HAP emissions data used in the risk modeling, if needed. In 2012, we received revisions to inventories for 81 facilities following proposal of the subpart S residual risk review.[4]

While most of the inventory revisions that we received after the proposal made additional refinements to emissions levels and release point details for 40 CFR part 63, subpart S sources, some inventory revisions also made refinements to data for 40 CFR part 63, subpart MM sources. We incorporated revisions to all process types into the inventory to remodel facility-wide risk and perform the complete scope of residual risk modeling for subpart MM emissions sources. We checked the 81 individual revision files to ensure they were incorporated into the main database correctly, and then further reviewed the entire database.

We began compiling an initial draft residual risk modeling input file for use in the 40 CFR part 63, subpart MM residual risk review in September 2014.[5] We made updates to the mill list to account for facilities that recently closed or reopened, and to mill equipment configurations for facilities that recently upgraded equipment. We reviewed the inventory to ensure that each record contained a facility ID, emission unit ID, process ID, and emission release point ID. We cross-walked regulatory codes, SCCs, and emission process groups to identify and correct any inconsistencies that may have been introduced with the inventory updates.

In addition to retaining the emission process groups used in the previous 40 CFR part 63, subpart S modeling effort, we added new emission process groups for 40 CFR part 63, subpart MM sources where necessary. We compared the subpart MM emission process groups with the Part III ICR database to ensure that we included all known recovery furnaces and lime kilns in the inventory for the residual risk modeling. In addition, we reviewed the presence or absence of BLO systems (*i.e.,* because BLO systems are only expected to be present at mills with direct contact evaporator (DCE) recovery furnaces). Finally, we checked the mills to ensure emission process groups included SDTs and sulfite and semichemical recovery equipment, as expected.

We reviewed the pollutant codes in the inventory to ensure the codes and descriptions matched the latest NEI lookup table used by the EPA for risk model input files. We performed extensive QA of the pollutant codes prior to the 40 CFR part 63, subpart S risk modeling, so few updates were required.

We speciated data for a number of HAPs, including chromium, mercury, radionuclides, polycyclic organic matter (POM), and dioxins/furans to facilitate risk modeling. We speciated chromium emissions as hexavalent chromium (chromium VI) and trivalent chromium (chromium III).[6] We speciated mercury emissions as particulate divalent mercury, gaseous divalent mercury, and gaseous elemental mercury. We speciated total POM emissions differently for each emission unit type

[3] These QA efforts are discussed in a November 11, 2011 memorandum in the docket, titled *Inputs to the Pulp and Paper Industry October 2011 Residual Risk Modeling.*

[4] Review of the inventory revisions performed prior to promulgation of 40 CFR part 63, subpart S is documented in a May 8, 2012, memorandum in the subpart S docket (EPA–HQ–OAR–2007–0544), titled *Recommendations Concerning Residual Risk Remodeling for the Pulp and Paper Industry.*

[5] For more information, see the September 30, 2014 memorandum in the docket, titled *Preparation of Residual Risk Modeling Input File for Subpart MM.* The September 2014 memorandum describes the source of the inventory data, discusses quality assurance of the 40 CFR part 63, subpart MM data, provides actual versus allowable and acute risk multipliers for subpart MM sources, and identifies potential outliers and suspect data for further review.

[6] For more information on pollutant speciation, see the September 30, 2014 memorandum in the docket, titled *Preparation of Residual Risk Modeling Input File for Subpart MM.*

based on the most common POM compounds emitted from that unit. We speciated dioxin/furan emissions based on published emissions data in the EPA's dioxin/furan inventory report [7] or, if no speciation profile was available, recalculated the emissions using published emissions factors.[8] Where needed, we added/replaced emissions estimates that were omitted, outdated, out-of-scope, or inconsistent with changes to mill equipment configurations.

We reviewed all records for consistency with respect to the emission release point to ensure each record was characterized by one set of coordinates (latitude and longitude) and one set of stack or fugitive parameters. We checked fugitive parameters to ensure there were no blanks and that the values provided were reasonable and consistent with the required national defaults or other criteria. We reviewed emission points labeled as stacks to ensure no fugitive parameters were identified. We checked exit gas flow rate values against the stack velocity provided to ensure there were no inconsistencies. We mapped the emission point coordinates for each facility to determine if they were properly placed on the mill site. We also added control information from the Part III ICR database or mills' title V permits to the input file for 40 CFR part 63, subpart MM sources.

The emissions inventory for 40 CFR part 63, subpart MM sources identifies emissions of the following HAP known to be persistent and bio-accumulative in the environment (PB–HAPs): Cadmium compounds, lead compounds, mercury compounds, POM, dioxins/furans, and hexachlorobenzene. Risk-based screening levels are available for Tier 1 screening for all of the above PB–HAPs, with the exception of hexachlorobenzene.

Consistent with the EPA's standard practice in conducting risk assessments for source categories, we conducted a two-step process to determine: (1) Whether PB–HAPs are being emitted; and (2) whether they are being released above screening levels. If these releases are significantly above the screening levels and the EPA has detailed information on the releases and the site, a complete multipathway analysis of the site is conducted to estimate pathway risks for the source category.

We considered actual emissions of the ecological HAPs emitted from the 40 CFR part 63, subpart MM source category in the ecological HAP analysis. In addition to the PB–HAPs emitted from the subpart MM source category (except hexachlorobenzene), we considered hydrochloric acid (HCl) and hydrogen fluoride (HF) for ecological HAP modeling. Further information about the multipathway analysis performed for this category follows in section III.B.4 of this preamble.

In 2015, we posted the initial draft risk model input file on our Technology Transfer Network for additional review by interested parties. This review resulted in the submittal of additional mill-specific inventory and receptor revisions. As part of the review, we identified potential outliers and suspect data for 40 CFR part 63, subpart MM sources in the emission inventory and notified facilities to provide an opportunity to review and revise their emissions data, if needed. A total of 40 mills reviewed their emissions data, with 38 of those mills submitting inventory revisions to the EPA.[9]

Inventory revisions primarily included mill name changes; revisions to HAP metal, POM, and dioxin/furan inventory data; and requests for removal of hexachlorocyclopentadiene (HCCPD) data from inventories, particularly for SDTs, since HCCPD is not expected from pulp mill sources. Where necessary, we speciated the revised chromium, mercury, and POM data that the mills provided, using the approaches described above. As part of the review, we identified risk modeling receptors improperly located on mill property for correction in the Human Exposure Model (Community and Sector HEM–3 version 1.1.0) input files before we performed risk modeling for 40 CFR part 63, subpart MM.

After we incorporated the revisions into the input file, we conducted an additional review of the file, which included the following:

- Identified non-40 CFR part 63, subpart MM mills in the inventory and removed them.
- Identified additional mill name changes and incorporated them in the inventory.
- Reviewed fugitive parameters for missing data.
- Identified missing speciated mercury and chromium data and restored the data to the inventory.
- Reviewed location data for mills that submitted inventory revisions and corrected coordinates, as needed.
- Identified records for emissions points with zero emissions for a given pollutant and removed those records from the inventory.
- Conducted emission process group checks, resulting in a revision to an emission process group that reflects a change in SCC, and removal of records with an emission process group no longer applicable (specifically a BLO unit for a mill that no longer operates any DCE recovery furnaces that require a BLO unit).
- Checked mills to ensure they had the expected 40 CFR part 63, subpart MM equipment, comparing the number of recovery furnaces, lime kilns, and SDTs to Part III ICR data to ensure each emission unit was represented in the inventory.
- Reviewed each emission unit for the presence of an emissions value for key expected pollutants (*e.g.,* HAP metals, HCl, methanol, dioxins/furans, POM) and added emissions estimates for those pollutants where needed.[10]
- Replaced obviously errant emissions data (particularly dioxins/furans) with revised estimates calculated based on ICR-reported throughput and emissions factors.
- Rechecked IDs, SCCs, regulatory codes, pollutant codes, duplicate pollutants, and HCCPD deletions.

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAPs emitted during the specified annual time period. In some cases, these ''actual'' emission levels are lower than the emission levels required to comply with the current MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the ''MACT-allowable'' emissions level. We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTRs (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable

[7] U.S. Environmental Protection Agency. *An Inventory of Sources and Environmental Releases of Dioxin-Like Compounds in the United States for the Years 1987, 1995, and 2000.* Publication No. EPA/600/P–03/002F. Available at: *http://www.epa.gov/ncea/pdfs/dioxin/2006/dioxin.pdf.* November 2006. Tables 4–14, 4–25, and 5–13.

[8] National Council for Air and Stream Improvement (NCASI). *Compilation of 'Air Toxic' and Total Hydrocarbon Emissions Data for Pulp and Paper Mill Sources—A Second Update.* Technical Bulletin No. 973. February 2010. Table 9.9.

[9] For further information, see the October 16, 2015 memorandum in the docket, titled *Review of Pulp Mill Inventory Revisions Received in 2015.*

[10] For further information, see the February 16, 2016 memorandum in the docket, titled *Approach for Populating Missing and Erroneous Emissions Estimates for Key HAP in the Subpart MM Residual Risk Modeling Inventory.*

since these risks reflect the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044, September 14, 1989.) It is reasonable to consider actual emissions because sources typically seek to perform better than required by emissions standards to provide an operational margin to accommodate the variability in manufacturing processes and control device performance. Facilities' actual emissions may also be significantly lower than MACT-allowable emissions for other reasons such as state requirements, better performance of control devices than required by the MACT standards, or reduced production.

We estimated actual emissions based on the Part II emissions inventory and subsequent site-specific inventory revisions provided by mills. To estimate emissions at the MACT-allowable level, we developed a ratio of MACT-allowable emissions to actual emissions for each source type for the facilities in the 40 CFR part 63, subpart MM source category. We developed this ratio based on the level of control required by the subpart MM MACT standards compared to the level of reported actual emissions from stack test reports provided with Part III survey responses. For example, stack test data indicated that SDTs achieve PM levels of 0.108 pounds per ton (lb/ton) black liquor solids (BLS), on average, while the PM emission limit for existing SDTs is 0.20 lb/ton BLS, so we estimated that MACT-allowable emissions of HAP metals from SDTs (where PM is used as a surrogate) could be as much as 1.8 times higher, and the ratio of MACT-allowable to actual emissions used was 1.8:1 for SDTs.[11]

After developing these ratios for each emission point type in this source category, we next applied these ratios on an emission unit basis to the Part II actual emissions data to obtain risk estimates based on MACT-allowable emissions.

3. How did we conduct dispersion modeling, determine inhalation exposures and estimate individual and population inhalation risks?

Both long-term and short-term inhalation exposure concentrations and health risks from the source category addressed in this proposal were estimated using HEM–3. The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAPs in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources,[12] and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The air dispersion model used by the HEM–3 model (AERMOD) is one of the EPA's preferred models for assessing pollutant concentrations from industrial facilities.[13] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2014) of hourly surface and upper air observations for more than 800 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[14] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by the EPA for HAPs and other toxic air pollutants. These values are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentrations of each HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of inhabited census blocks. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use URE values from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) URE values, where available. In cases where new, scientifically credible dose response values have been developed in a manner consistent with the EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

The EPA estimated incremental individual lifetime cancer risks associated with emissions from the facilities in the source category as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans, and suggestive evidence of carcinogenic potential[15]) emitted by the modeled sources. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of the

[11] For more information, see the September 30, 2014 memorandum in the docket, titled *Preparation of Residual Risk Modeling Input File for Subpart MM.*

[12] This metric comes from the Benzene NESHAP. See 54 FR 38046.

[13] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[14] A census block is the smallest geographic area for which census statistics are tabulated.

[15] These classifications also coincide with the terms "known carcinogen, probable carcinogen, and possible carcinogen," respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002) was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *http://yosemite.epa.gov/ sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/ $File/ecadv02001.pdf.*

sources were also estimated for the source category as part of this assessment by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044, September 14, 1989) and the limitations of Gaussian dispersion models, including AERMOD.

To assess the risk of non-cancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ is the estimated exposure divided by the chronic reference value, which is a value selected from one of several sources. First, the chronic reference level can be the EPA reference concentration (RfC) (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*), defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime.'' Alternatively, in cases where an RfC from the EPA's IRIS database is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic reference level can be a value from the following prioritized sources: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*http://www.atsdr.cdc.gov/mrls/index.asp*), which is defined as ''an estimate of daily human exposure to a hazardous substance that is likely to be without an appreciable risk of adverse non-cancer health effects (other than cancer) over a specified duration of exposure''; (2) the CalEPA Chronic Reference Exposure Level (REL) (*http://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*), which is defined as ''the concentration level (that is expressed in units of micrograms per cubic meter (μg/m^3) for inhalation exposure and in a dose expressed in units of milligram per kilogram-day (mg/kg-day) for oral exposures), at or below which no adverse health effects are anticipated for a specified exposure duration''; or (3), as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA, in place of or in concert with other values.

As mentioned above, in order to characterize non-cancer chronic effects, and in response to key recommendations from the SAB, the EPA selects dose-response values that reflect the best available science for all HAPs included in RTR risk assessments.[16] More specifically, for a given HAP, the EPA examines the availability of inhalation reference values from the sources included in our tiered approach (*e.g.,* IRIS first, ATSDR second, CalEPA third) and determines which inhalation reference value represents the best available science. Thus, as new inhalation reference values become available, the EPA will typically evaluate them and determine whether they should be given preference over those currently being used in RTR risk assessments.

The EPA also evaluated screening estimates of acute exposures and risks for each of the HAP (for which appropriate acute dose-response values are available) at the point of highest potential off-site exposure for each facility. To do this, the EPA estimated the risks when both the peak (hourly) emissions rate and worst-case dispersion conditions occur. We also assume that a person is located at the point of highest impact during that same time. In accordance with our mandate in section 112 of the CAA, we use the point of highest off-site exposure to assess the potential risk to the maximally exposed individual. The acute HQ is the estimated acute exposure divided by the acute dose-response value. In each case, the EPA calculated acute HQ values using best available, short-term dose-response values. These acute dose-response values, which are described below, include the acute REL, acute exposure guideline levels (AEGL) and emergency response planning guidelines (ERPG) for 1-hour exposure durations. As discussed below, we used conservative assumptions for emissions rates, meteorology, and exposure location.

As described in the CalEPA's *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary*) is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' *Id.* at page 2. Acute REL values are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. Acute REL values are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.

Acute exposure guideline level values were derived in response to recommendations from the National Research Council (NRC). The National Advisory Committee (NAC) for the Development of Acute Exposure Guideline Levels for Hazardous Substances—usually referred to as the AEGL Committee or the NAC/AEGL committee developed AEGL values for at least 273 of the 329 chemicals on the AEGL priority chemical list. The last meeting of the NAC/AEGL Committee was in April 2010, and its charter expired in October 2011. The NAC/AEGL Committee ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

As described in *Standing Operating Procedures (SOP) for Developing Acute Exposure Guideline Levels for Hazardous Substances,* ''The NRC's previous name for acute exposure levels—community emergency exposure levels—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites'' (*https://www.epa.gov/aegl/process-developing-acute-exposure-guideline-levels-aegls*) *Id.* at 2.[17] The AEGL values represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours. ''The primary purpose of the AEGL program is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. ''More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time

[16] The SAB peer review of RTR Risk Assessment Methodologies is available at *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

[17] National Academy of Sciences (NAS), 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2.

emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers.'' *Id.* at 31.

The AEGL–1 value is then specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or mg/m3 (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' *Id.* at 3. The document also notes that, ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* Similarly, the document defines AEGL–2 values as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

Emergency response planning guideline values are derived for use in emergency response, as described in the American Industrial Hygiene Association's Emergency Response Planning (ERP) Committee document titled, *ERPGS Procedures and Responsibilities* (*https://www.aiha.org/get-involved/AIHAGuideline Foundation/EmergencyResponse PlanningGuidelines/Documents/ERPG%20Committee%20Standard%20 Operating%20Procedures%20%20-%20 March%202014%20Revision%20%28 Updated%2010-2-2014%29.pdf*), which states that, ''Emergency Response Planning Guidelines were developed for emergency planning and are intended as health based guideline concentrations for single exposures to chemicals.''[18] *Id.* at 1. The ERPG–1 value is defined as ''the maximum airborne concentration below which nearly all individuals could be exposed for up to 1 hour without experiencing more than mild, transient health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 value is defined as ''the maximum airborne concentration below which nearly all individuals could be exposed for up to 1 hour without experiencing or developing irreversible or other serious adverse health effects or symptoms that could impair an individual's ability to take protective action.'' *Id.* at 1.

As can be seen from the definitions above, the AEGL and ERPG values include the similarly-defined severity levels 1 and 2. For many chemicals, a severity level 1 value AEGL or ERPG has not been developed because the types of effects for these chemicals are not consistent with the AEGL–1/ERPG–1 definitions; in these instances, we compare higher severity level AEGL–2 or ERPG–2 values to our modeled exposure levels to screen for potential acute concerns. When AEGL–1/ERPG–1 values are available, they are used in our acute risk assessments.

Acute REL values for 1-hour exposure durations are typically lower than their corresponding AEGL–1 and ERPG–1 values. Even though their definitions are slightly different, AEGL–1 values are often the same as the corresponding ERPG–1 values, and AEGL–2 values are often equal to ERPG–2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1 value).

To develop screening estimates of acute exposures in the absence of hourly emissions data, generally we first develop estimates of maximum hourly emissions rates by multiplying the average actual annual hourly emissions rates by a default factor to cover routinely variable emissions. We choose the factor to use partially based on process knowledge and engineering judgment. The factor chosen also reflects a Texas study of short-term volatile organic compound (VOC) emissions variability, which showed that most peak emission events in a heavily-industrialized four-county area (Harris, Galveston, Chambers, and Brazoria Counties, Texas) were less than twice the annual average hourly emissions rate. The highest peak emissions event was 74 times the annual average hourly emissions rate, and the 99th percentile ratio of peak hourly emissions rate to the annual average hourly emissions rate was 9.[19] Considering this analysis, to account for more than 99 percent of the peak hourly emissions, we apply a conservative screening multiplication factor of 10 to the average annual hourly emissions rate in our acute exposure screening assessments as our default approach. However, we use a factor other than 10 if we have information that indicates that a different factor is appropriate for a particular source category. For this source category, median peak-to-mean multipliers ranging from 1.1 to 4.7 were developed for 40 CFR part 63, subpart MM emission process groups based on the routine annual emissions data and peak hourly emissions data obtained from Part II survey data. A further discussion of why these factors were chosen can be found in the memorandum, *Preparation of Residual Risk Modeling Input File for Subpart MM,* available in the docket for this rulemaking.

As part of our acute risk assessment process, for cases where acute HQ values from the screening step were less than or equal to 1 (even under the conservative assumptions of the screening analysis), acute impacts were deemed negligible and no further analysis was performed for these HAPs. See the *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule* for more details. Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emissions rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. Recognizing that this level of data is rarely available, we instead rely on the multiplier approach.

To better characterize the potential health risks associated with estimated acute exposures to HAPs, and in response to a key recommendation from the SAB's peer review of the EPA's RTR risk assessment methodologies,[20] we generally examine a wider range of available acute health metrics (*e.g.,* RELs, AEGL) than we do for our chronic risk assessments. This is in response to

[18] *ERP Committee Procedures and Responsibilities.* November 1, 2006. American Industrial Hygiene Association.

[19] Allen, et al., 2004. Variable Industrial VOC Emissions and their impact on ozone formation in the Houston Galveston Area. Texas Environmental Research Consortium. *https://www.researchgate.net/publication/237593060_Variable_Industrial_VOC_Emissions_and_their_Impact_on_Ozone_Formation_in_the_Houston_Galveston_Area.*

[20] The SAB peer review of *RTR Risk Assessment Methodologies* is available at *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

the SAB's acknowledgement that there are generally more data gaps and inconsistencies in acute reference values than there are in chronic reference values. In some cases, when Reference Value Arrays [21] for HAPs have been developed, we consider additional acute values (*i.e.,* occupational and international values) to provide a more complete risk characterization.

4. How did we conduct the multipathway exposure and risk screening?

The EPA conducted a screening analysis examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determined whether any sources in the source category emitted PB–HAP. The PB–HAP compounds or compound classes are identified for the screening from the EPA's Air Toxics Risk Assessment Library (available at *http://www2.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the 40 CFR part 63, subpart MM source category, we identified emissions of cadmium compounds, lead compounds, mercury compounds, POM, dioxins/furans, and hexachlorobenzene. Because one or more of these PB–HAPs are emitted by at least one facility in the subpart MM source category, we proceeded to the next step of the evaluation. In this step, we determined whether the facility-specific emissions rates of the emitted PB–HAP were large enough to create the potential for significant non-inhalation human health risks under reasonable worst-case conditions. To facilitate this step, we have developed emissions rate screening levels for several PB–HAPs using a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAPs with emissions rate screening levels are: Lead, cadmium, dioxins/furans, mercury compounds, and POM. We conducted a sensitivity analysis on the screening scenario to ensure that its key design parameters would represent the upper end of the range of possible values, such that it would represent a conservative, but not impossible, scenario. The facility-specific emissions for each PB–HAP were compared to the emission rate screening levels for these PB–HAPs to assess the potential for significant human health risks via non-inhalation pathways. We call this application of the TRIM.FaTE model the Tier 1 TRIM-screen or Tier 1 screen.

For the purpose of developing emission rate screening values for our Tier 1 TRIM-screen, we derived emission levels for these PB–HAPs (other than lead compounds) at which the maximum excess lifetime cancer risk would be 1-in-1 million (*i.e.,* for dioxins/furans and POM) or, for HAPs that cause non-cancer health effects (*i.e.,* cadmium compounds and mercury compounds), the maximum HQ would be 1. If the emissions rate of any PB–HAP included in the Tier 1 screen exceeds the Tier 1 screening emissions level for any facility, we conduct a second screen, which we call the Tier 2 TRIM-screen or Tier 2 screen.

In the Tier 2 screen, the location of each facility that exceeded the Tier 1 emission level is used to refine the assumptions associated with the environmental scenario while maintaining the exposure scenario assumptions. A key assumption that is part of the Tier 1 screen is that a lake is located near the facility; we confirm the existence of lakes near the facility as part of the Tier 2 screen. We then adjust the risk-based Tier 1 screening value for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with meteorology and environmental assumptions. PB–HAP emissions that do not exceed these new Tier 2 screening levels are considered to pose no unacceptable risks. If the PB–HAP emissions for a facility exceed the Tier 2 screening levels and data are available, we may decide to conduct a more refined Tier 3 multipathway assessment. There are several analyses that can be included in a Tier 3 screen depending upon the extent of refinement warranted, including validating that the lake is fishable and considering plume-rise to estimate emissions lost above the mixing layer. If the Tier 3 screen is exceeded, the EPA may further refine the assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening emissions rate for them, we compared maximum estimated chronic inhalation exposures with the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[22] Values below the level of the primary (health-based) lead NAAQS were considered to have a low potential for multipathway risk.

For further information on the multipathway analysis approach, see the document titled *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule*, which is available in the docket for this action.

5. How did we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect

The EPA conducts a screening assessment to examine the potential for adverse environmental effects as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

b. Environmental HAPs

The EPA focuses on seven HAPs, which we refer to as ''environmental HAPs,'' in its screening analysis: Five PB–HAPs and two acid gases. The five PB–HAPs are cadmium, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury) and lead compounds. The two acid gases are HCl and HF. The rationale for including these seven HAPs in the environmental risk screening analysis is presented below.

The HAPs that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The PB–HAPs are taken up, through sediment, soil, water, and/or

[21] U.S. EPA. (2009) Chapter 2.9, *Chemical Specific Reference Values for Formaldehyde in Graphical Arrays of Chemical-Specific Health Effect Reference Values for Inhalation Exposures (Final Report).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/061, 2009, and available online at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=211003.*

[22] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring among other things that the standard provide an ''ample margin of safety''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

ingestion of other organisms, by plants or animals (*e.g.,* small fish) at the bottom of the food chain. As larger and larger predators consume these organisms, concentrations of the PB–HAPs in the animal tissues increases as does the potential for adverse effects. The five PB–HAPs we evaluate as part of our screening analysis account for 99.8 percent of all PB–HAP emissions nationally from stationary sources (on a mass basis from the 2005 EPA NEI).

In addition to accounting for almost all of the mass of PB–HAPs emitted, we note that the TRIM.FaTE model that we use to evaluate multipathway risk allows us to estimate concentrations of cadmium compounds, dioxins/furans, POM, and mercury in soil, sediment and water. For lead compounds, we currently do not have the ability to calculate these concentrations using the TRIM.FaTE model. Therefore, to evaluate the potential for adverse environmental effects from lead compounds, we compare the estimated exposures from the source category emissions of lead with the level of the secondary NAAQS for lead.[23] We consider values below the level of the secondary lead NAAQS to be unlikely to cause adverse environmental effects.

Due to their well-documented potential to cause direct damage to terrestrial plants, we include two acid gases, HCl and HF, in the environmental screening analysis. According to the 2005 NEI, HCl and HF account for about 99 percent (on a mass basis) of the total acid gas HAPs emitted by stationary sources in the United States. In addition to the potential to cause direct damage to plants, high concentrations of HF in the air have been linked to fluorosis in livestock. Air concentrations of these HAPs are already calculated as part of the human multipathway exposure and risk screening analysis using the HEM3–AERMOD air dispersion model, and we are able to use the air dispersion modeling results to estimate the potential for an adverse environmental effect.

The EPA acknowledges that other HAPs beyond the seven HAPs discussed above may have the potential to cause adverse environmental effects. Therefore, the EPA may include other relevant HAPs in its environmental risk screening in the future, as modeling science and resources allow. The EPA invites comment on the extent to which other HAPs emitted by the source category may cause adverse environmental effects. Such information should include references to peer-reviewed ecological effects benchmarks that are of sufficient quality for making regulatory decisions, as well as information on the presence of organisms located near facilities within the source category that such benchmarks indicate could be adversely affected.

[23] The Secondary Lead NAAQS is a reasonable measure of determining whether there is an adverse environmental effect since it was established considering ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

c. Ecological Assessment Endpoints and Benchmarks for PB–HAP

An important consideration in the development of the EPA's screening methodology is the selection of ecological assessment endpoints and benchmarks. Ecological assessment endpoints are defined by the ecological entity (*e.g.,* aquatic communities including fish and plankton) and its attributes (*e.g.,* frequency of mortality). Ecological assessment endpoints can be established for organisms, populations, communities or assemblages, and ecosystems.

For PB–HAPs (other than lead compounds), we evaluated the following community-level ecological assessment endpoints to screen for organisms directly exposed to HAPs in soils, sediment, and water:

- Local terrestrial communities (i.e., soil invertebrates, plants) and populations of small birds and mammals that consume soil invertebrates exposed to PB–HAPs in the surface soil;
- Local benthic (i.e., bottom sediment dwelling insects, amphipods, isopods, and crayfish) communities exposed to PB–HAPs in sediment in nearby water bodies; and
- Local aquatic (water-column) communities (including fish and plankton) exposed to PB–HAP in nearby surface waters.

For PB–HAPs (other than lead compounds), we also evaluated the following population-level ecological assessment endpoint to screen for indirect HAP exposures of top consumers via the bioaccumulation of HAPs in food chains:

- Piscivorous (*i.e.,* fish-eating) wildlife consuming PB–HAP-contaminated fish from nearby water bodies.

For cadmium compounds, dioxins/furans, POM, and mercury, we identified the available ecological benchmarks for each assessment endpoint. An ecological benchmark represents a concentration of HAPs (*e.g.,* 0.77 µg of HAP per liter of water) that has been linked to a particular environmental effect level through scientific study. For PB–HAPs we identified, where possible, ecological benchmarks at the following effect levels:

- Probable effect levels (PEL): Level above which adverse effects are expected to occur frequently;
- Lowest-observed-adverse-effect level (LOAEL): The lowest exposure level tested at which there are biologically significant increases in frequency or severity of adverse effects; and
- No-observed-adverse-effect levels (NOAEL): The highest exposure level tested at which there are no biologically significant increases in the frequency or severity of adverse effect.

We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, the EPA sources that are used at a programmatic level (*e.g.,* Office of Water, Superfund Program) were used in the analysis, if available. If unavailable, the EPA benchmarks used in regional programs (*e.g.,* Superfund) were used. If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other federal agencies (*e.g.,* National Oceanic and Atmospheric Administration (NOAA)) or state agencies.

Benchmarks for all effect levels are not available for all PB–HAPs and assessment endpoints. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

d. Ecological Assessment Endpoints and Benchmarks for Acid Gases

The environmental screening analysis also evaluated potential damage and reduced productivity of plants due to direct exposure to acid gases in the air. For acid gases, we evaluated the following ecological assessment endpoint:

- Local terrestrial plant communities with foliage exposed to acidic gaseous HAPs in the air.

The selection of ecological benchmarks for the effects of acid gases on plants followed the same approach as for PB–HAPs (*i.e.,* we examine all of the available chronic benchmarks). For HCl, the EPA identified chronic benchmark concentrations. We note that the benchmark for chronic HCl exposure to plants is greater than the reference concentration for chronic inhalation exposure for human health. This means that where the EPA includes regulatory requirements to prevent an exceedance of the reference concentration for human health, additional analyses for adverse environmental effects of HCl would not be necessary.

For HF, the EPA identified chronic benchmark concentrations for plants and evaluated chronic exposures to plants in the screening analysis. High concentrations of HF in the air have also been linked to fluorosis in livestock. However, the HF concentrations at which fluorosis in livestock occur are higher than those at which plant damage begins. Therefore, the benchmarks for plants are protective of both plants and livestock.

e. Screening Methodology

For the environmental risk screening analysis, the EPA first looked at whether any facilities in the 40 CFR part 63, subpart MM source category emitted any of the seven environmental HAPs. Because we found that one or more of the seven environmental HAPs evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

f. PB–HAP Methodology

For cadmium, mercury, POM, and dioxins/furans, the environmental screening analysis consists of two tiers, while lead compounds are analyzed differently as discussed earlier. In the first tier, we determined whether the maximum facility-specific emission rates of each of the emitted environmental HAPs were large enough to create the potential for adverse environmental effects under reasonable worst-case environmental conditions. These are the same environmental conditions used in the human multipathway exposure and risk screening analysis.

To facilitate this step, TRIM.FaTE was run for each PB–HAP under hypothetical environmental conditions designed to provide conservatively high HAP concentrations. The model was set to maximize runoff from terrestrial parcels into the modeled lake, which in turn, maximized the chemical concentrations in the water, the sediments, and the fish. The resulting media concentrations were then used to back-calculate a screening level emission rate that corresponded to the relevant exposure benchmark concentration value for each assessment endpoint. To assess emissions from a facility, the reported emission rate for each PB–HAP was compared to the screening level emission rate for that PB–HAP for each assessment endpoint. If emissions from a facility do not exceed the Tier 1 screening level, the facility ‘‘passes’’ the screen, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening level, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening analysis, the emission rate screening levels are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screen. The modeling domain for each facility in the Tier 2 analysis consists of 8 octants. Each octant contains 5 modeled soil concentrations at various distances from the facility (5 soil concentrations × 8 octants = total of 40 soil concentrations per facility) and 1 lake with modeled concentrations for water, sediment and fish tissue. In the Tier 2 environmental risk screening analysis, the 40 soil concentration points are averaged to obtain an average soil concentration for each facility for each PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening level, the facility passes the screen, and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening level, the facility does not pass the screen and, therefore, may have the potential to cause adverse environmental effects. Such facilities are evaluated further to investigate factors such as the magnitude and characteristics of the area of exceedance.

g. Acid Gas Methodology

The environmental screening analysis evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to acid gases. The environmental risk screening methodology for acid gases is a single-tier screen that compares the average off-site ambient air concentration over the modeling domain to ecological benchmarks for each of the acid gases. Because air concentrations are compared directly to the ecological benchmarks, emission-based screening levels are not calculated for acid gases as they are in the ecological risk screening methodology for PB–HAPs.

For purposes of ecological risk screening, the EPA identifies a potential for adverse environmental effects to plant communities from exposure to acid gases when the average concentration of the HAP around a facility exceeds the LOAEL ecological benchmark. In such cases, we further investigate factors such as the magnitude and characteristics of the area of exceedance (*e.g.,* land use of exceedance area, size of exceedance area) to determine if there is an adverse environmental effect. For further information on the environmental screening analysis approach, see the *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule*, which is available in the docket for this action.

6. How did we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ‘‘facility,’’ where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAPs from all other emission sources at the facility for which we have data. There are currently 108 major sources subject to the 40 CFR part 63, subpart MM source category which includes chemical recovery combustion sources (*e.g.,* recovery furnace, SDT, lime kiln). Nearly all major sources also have boilers on site. These facilities engage in chemical or mechanical pulping, papermaking, paper coating, landfills, petroleum storage and transfer, and other operations. Therefore, where data were available, we performed a facility-wide risk assessment for these major sources as part of this action. For this source category, we conducted the facility-wide assessment using the data from Part II of the Pulp and Paper Sector ICR.

We analyzed risks due to the inhalation of HAPs that are emitted ‘‘facility-wide’’ for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of facility-wide risks that could be attributed to the source category addressed in this proposal. We specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The document titled *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review*

Proposed Rule, available in the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How did we consider uncertainties in risk assessment?

In the Benzene NESHAP, the Agency concluded that risk estimation uncertainty should be considered in our decision-making under the ample margin of safety framework. Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health-protective and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties. A more thorough discussion of these uncertainties is included in the document titled *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, various uncertainties exist. Thus, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The EPA did not include the effects of human mobility on exposures in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.[24] The approach of not considering short or long-term population mobility does not bias the estimate of the theoretical MIR (by definition), nor does it affect the estimate of cancer incidence because the total population number remains the same. It does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby increasing the estimated number of people at specific high risk levels (*e.g.,* 1-in-10 thousand or 100-in-1 million).

In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live farther from the facility and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact, but is an unbiased estimate of average risk and incidence. We reduce this uncertainty by analyzing large census blocks near facilities using aerial imagery and adjusting the location of the block centroid to better represent the population in the block, as well as adding additional receptor locations where the block population is not well represented by a single location.

The assessment evaluates the cancer inhalation risks associated with pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emission sources at facilities actually operate (*i.e.,* more or less than 70 years) and the domestic growth or decline of the modeled industry (*i.e.,* the increase or decrease in the number or size of domestic facilities) will influence the future risks posed by a given source or source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in the unlikely scenario where a facility maintains, or even increases, its emissions levels over a period of more than 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the cancer inhalation risks could potentially be underestimated. However, annual cancer incidence estimates from exposures to emissions from these sources would not be affected by the length of time an emissions source operates.

The exposure estimates used in these analyses assume chronic exposures to ambient (outdoor) levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAPs, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, indoor levels are typically lower. This factor has the potential to result in an overestimate of 25 to 30 percent of exposures.[25]

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure

[24] Short-term mobility is movement from one micro-environment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

[25] U.S. EPA. *National-Scale Air Toxics Assessment for 1996.* (EPA 453/R–01–003; January 2001; page 85.)

assessment that the EPA conducts as part of the risk review under section 112 of the CAA that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the present of humans at the location of the maximum concentration. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and worst-case meteorological conditions co-occur, thus, resulting in maximum ambient concentrations. These two events are unlikely to occur at the same time, making these assumptions conservative. We then include the additional assumption that a person is located at this point during this same time period. For this source category, these assumptions would tend to be worst-case actual exposures, as it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and worst-case meteorological conditions occur simultaneously.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and non-cancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in the EPA's *2005 Cancer Guidelines;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (*EPA's 2005 Cancer Guidelines,* pages 1–7). This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule,* which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit).[26] In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[27] When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health protection, the EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for other uses (*e.g.,* priority-setting or expected benefits analysis).

Chronic non-cancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure (*i.e.,* the RfC) or a daily oral exposure (*i.e.,* the RfD) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach (U.S. EPA, 1993 and 1994) which considers uncertainty, variability and gaps in the available data. The UFs are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UFs are commonly default values,[28] *e.g.,* factors of 10 or 3, used in the absence of compound-specific data; where data are available, UFs may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UFs are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (*i.e.,* less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated.

While collectively termed ''UF,'' these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UFs are intended to account for: (1) variation in susceptibility among the members of the human population (*i.e.,* inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (i.e., interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (i.e., extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies.

Many of the UFs used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. The UFs are applied based on chemical-specific or health effect-specific information (*e.g.,* simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UFs applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in

[26] IRIS glossary (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*).

[27] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[28] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) ''[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain.'' The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process,* defined default option as ''the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary'' (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the Agency; rather, the Agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with the EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See U.S. EPA, *An Examination of EPA Risk Assessment Principles and Practices*, EPA/100/B–04/001, 2004 available at: *https://training.fws.gov/resources/course-resources/pesticides/Risk%20Assessment/Risk%20Assessment%20Principles%20and%20Practices.pdf.*

extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute reference value at another exposure duration (*e.g.,* 1 hour).

Not all acute reference values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective reference value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified reference value, we also apply the most protective reference value from the other compounds in the group to estimate risk.

e. Uncertainties in the Multipathway Assessment

For each source category, we generally rely on site-specific levels of PB–HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary. This determination is based on the results of a three-tiered screening analysis that relies on the outputs from models that estimate environmental pollutant concentrations and human exposures for four PB–HAPs. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[29]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the actual processes that might occur for that situation. An example of model uncertainty is the question of whether the model adequately describes the movement of a pollutant through the soil. This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screen are appropriate and state-of-the-art for the multipathway risk assessments conducted in support of RTR.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway screen, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water and soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway assessment, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for Tier 1 and Tier 2.

For both Tiers 1 and 2 of the multipathway assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do screen out, we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do not screen out, it does not mean that multipathway impacts are significant, only that we cannot rule out that possibility and that a refined multipathway analysis for the site might be necessary to obtain a more accurate risk characterization for the source category.

For further information on uncertainties and the Tier 1 and 2 screening methods, refer to the risk document, Appendix 6, *Technical Support Document for TRIM-Based Multipathway Tiered Screening Methodology for RTR.*

f. Uncertainties in the Environmental Risk Screening Assessment

For each source category, we generally rely on site-specific levels of environmental HAP emissions to perform an environmental screening assessment. The environmental screening assessment is based on the outputs from models that estimate environmental HAP concentrations. The same models, specifically the TRIM.FaTE multipathway model and the AERMOD air dispersion model, are used to estimate environmental HAP concentrations for both the human multipathway screening analysis and for the environmental screening analysis. Therefore, both screening assessments have similar modeling uncertainties.

Two important types of uncertainty associated with the use of these models in RTR environmental screening assessments (and inherent to any assessment that relies on environmental modeling) are model uncertainty and input uncertainty.[30]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the movement and accumulation of environmental HAP emissions in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screen are appropriate and state-of-the-art for the environmental risk assessments conducted in support of our RTR analyses.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the environmental screen for PB–HAPs, we configured the models to avoid underestimating exposure and risk to reduce the likelihood that the results

[29] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both variability in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as uncertainty in being able to accurately estimate the true result.

[30] In the context of this discussion, the term ''uncertainty,'' as it pertains to exposure and risk assessment, encompasses both variability in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as uncertainty in being able to accurately estimate the true result.

indicate the risks are lower than they actually are. This was accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, the location and size of any bodies of water, meteorology, surface water and soil characteristics, and structure of the aquatic food web. In Tier 1, we used the maximum facility-specific emissions for the PB–HAPs (other than lead compounds, which were evaluated by comparison to the Secondary Lead NAAQS) that were included in the environmental screening assessment and each of the media when comparing to ecological benchmarks. This is consistent with the conservative design of Tier 1 of the screen. In Tier 2 of the environmental screening analysis for PB–HAPs, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the locations of water bodies near the facility location. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. To better represent widespread impacts, the modeled soil concentrations are averaged in Tier 2 to obtain one average soil concentration value for each facility and for each PB–HAP. For PB–HAP concentrations in water, sediment, and fish tissue, the highest value for each facility for each pollutant is used.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For both Tiers 1 and 2 of the environmental screening assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying potential risks for adverse environmental impacts.

Uncertainty also exists in the ecological benchmarks for the environmental risk screening analysis. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, EPA benchmarks used at a programmatic level (*e.g.,* Office of Water, Superfund Program) were used if available. If unavailable, we used EPA benchmarks used in regional programs (*e.g.,* Superfund Program). If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other agencies (*e.g.,* NOAA) or by state agencies.

In all cases (except for lead compounds, which were evaluated through a comparison to the NAAQS), we searched for benchmarks at the following three effect levels, as described in section III.A.5 of this preamble:

1. A no-effect level (*i.e.*, NOAEL).
2. Threshold-effect level (*i.e.*, LOAEL).
3. Probable effect level (*i.e.*, PEL).

For some ecological assessment endpoint/environmental HAP combinations, we could identify benchmarks for all three effect levels, but for most, we could not. In one case, where different agencies derived significantly different numbers to represent a threshold for effect, we included both. In several cases, only a single benchmark was available. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we used all of the available effect levels to help us to determine whether risk exists and if the risks could be considered significant and widespread.

The EPA evaluates the following seven HAPs in the environmental risk screening assessment: cadmium, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), lead compounds, HCl, and HF, where applicable. These seven HAPs represent pollutants that can cause adverse impacts for plants and animals either through direct exposure to HAPs in the air or through exposure to HAPs that is deposited from the air onto soils and surface waters. These seven HAPs also represent those HAPs for which we can conduct a meaningful environmental risk screening assessment. For other HAPs not included in our screening assessment, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAPs beyond the seven HAPs that we are evaluating may have the potential to cause adverse environmental effects and, therefore, the EPA may evaluate other relevant HAPs in the future, as modeling science and resources allow.

Further information on uncertainties and the Tier 1 and 2 environmental screening methods is provided in Appendix 6 of the document, *Technical Support Document for TRIM-Based Multipathway Tiered Screening Methodology for RTR. Also, see the document titled Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule,* available in the docket for this action.

B. How did we consider the risk results in making decisions for this proposal?

As discussed in section II.A of this preamble, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step process to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination ‘‘considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [31] of approximately [1-in-10 thousand] [*i.e.*, 100-in-1 million].’’ 54 FR 38045, September 14, 1989. If risks are unacceptable, the EPA must determine the emissions standards necessary to bring risks to an acceptable level without considering costs. In the second step of the process, the EPA considers whether the emissions standards provide an ample margin of safety ‘‘in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.’’ *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration, costs, energy, safety, and other relevant factors, an adverse environmental effect.

In past residual risk actions, the EPA considered a number of human health risk metrics associated with emissions from the categories under review, including the MIR, the number of persons in various risk ranges, cancer incidence, the maximum non-cancer HI and the maximum acute non-cancer hazard. See, *e.g.*, 72 FR 25138, May 3,

[31] Although defined as ‘‘maximum individual risk,’’ MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level ofa pollutant for a lifetime.

2007; and 71 FR 42724, July 27, 2006. The EPA considered this health information for both actual and allowable emissions. See, *e.g.*, 75 FR 65068, October 21, 2010; 75 FR 80220, December 21, 2010; 76 FR 29032, May 19, 2011. The EPA also discussed risk estimation uncertainties and considered the uncertainties in the determination of acceptable risk and ample margin of safety in these past actions. The EPA considered this same type of information in support of this action.

The Agency is considering these various measures of health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under [previous] section 112 is best judged on the basis of a broad set of health risk measures and information.'' 54 FR 38046, September 14, 1989. Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' Id.

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that:

> ''[t]he policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health'.''

See 54 FR at 38057, September 14, 1989. Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify those HAP risks that may be associated with emissions from other facilities that do not include the source categories in question, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in these categories.

The Agency understands the potential importance of considering an individual's total exposure to HAPs in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing non-cancer risks, where pollutant-specific exposure health reference levels (e.g., RfCs) are based on the assumption that thresholds exist for adverse health effects. For example, the Agency recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (e.g., other facilities) to which an individual is exposed may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the SAB advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.'' [32]

In response to the SAB recommendations, the EPA is incorporating cumulative risk analyses into its RTR risk assessments, including those reflected in this proposal. The Agency is: (1) Conducting facility-wide assessments, which include source category emission points as well as other emission points within the facilities; (2) considering sources in the same category whose emissions result in exposures to the same individuals; and (3) for some persistent and bioaccumlative pollutants, analyzing the ingestion route of exposure. In addition, the RTR risk assessments have always considered aggregate cancer risk from all carcinogens and aggregate non-cancer HI from all non-carcinogens affecting the same target organ system.

Although we are interested in placing source category and facility-wide HAP risks in the context of *total* HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Because of the contribution to total HAP risk from emission sources other than those that we have studied in depth during this RTR review, such estimates of total HAP risks would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

C. How did we perform the technology review?

Our technology review focused on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identified such developments, in order to inform

[32] The EPA's responses to this and all other key recomendations of the SAB's advisory on RTR risk assessment methodologies (which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf*) are outlined in a memorandum to this rulemaking docket from David Guinnup titled, *EPA's Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies*.

our decision of whether it is "necessary" to revise the emissions standards, we analyzed the technical feasibility of applying these developments and the estimated costs, energy implications, non-air environmental impacts, as well as considering the emission reductions. We also considered the appropriateness of applying controls to new sources versus retrofitting existing sources.

Based on our analyses of the available data and information, we identified potential developments in practices, processes, and control technologies. For this exercise, a "development" was considered to be any of the following that was not considered during the development of the promulgated subpart MM standards that could result in significant additional reductions of regulated HAP emissions:

- Add-on control technology or other equipment not previously identified;
- Improvements in add-on control technology or other equipment;
- Work practices or operational procedures that were not previously identified;
- Process change or pollution prevention alternative that could be broadly applied to further reduce HAP emissions; and
- Improvements in work practices, operational procedures, process changes, or pollution prevention alternatives.

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP, we reviewed a variety of data sources in our investigation of potential practices, processes, or controls to consider. Among the sources we reviewed were the practices, processes and control technologies considered in the NESHAP for various industries that were promulgated since the MACT standards being reviewed in this action. We requested information from facilities regarding developments in practices, processes or control technology through Part III of the Pulp and Paper Sector ICR. The ICR data provided information on the process and emission controls currently in use on chemical recovery combustion sources, and provided emissions data to assess the performance of current emissions controls. We reviewed continuous opacity monitoring data for ESP-controlled recovery furnaces and lime kilns. We also consulted the EPA's RBLC to determine whether it contained any practices, processes or control technologies for the types of processes covered by the 40 CFR part 63, subpart MM source category.[33] We conducted a general search of the Internet for information on control technologies applicable to pulp mill combustion sources. We also reviewed information from other sources, such as state and/or local permitting agency databases.

Each of the evaluations listed above considered and reviewed the technologies suitable to demonstrate compliance with the requirements listed in 40 CFR 63.860 through 63.868 (subpart MM).[34]

IV. Analytical Results and Proposed Decisions

A. What are the results of the risk assessment and analyses?

1. Inhalation Risk Assessment Results

The inhalation risk modeling performed to estimate risks based on actual and allowable emissions relied primarily on emissions data from the ICR. The results of the chronic baseline inhalation cancer risk assessment indicate that, based on estimates of current actual and allowable emissions under 40 CFR part 63, subpart MM, the MIR posed by the MACT source category was 4-in-1 million. The total estimated cancer incidence from the MACT source category based on actual emission levels is 0.01 excess cancer cases per year, or 1 case every 100 years, while the cancer incidence for allowable emissions is 0.02 excess cancer cases per year, or 1 case every 50 years. Air emissions of chromium VI, formaldehyde, and naphthalene contributed 31 percent, 18 percent, and 13 percent, respectively, to this cancer incidence. We estimated approximately 7,600 people to have cancer risks greater than or equal to 1-in-1 million considering actual and allowable emissions from subpart MM sources, refer to Table 3.

TABLE 3—INHALATION RISK ASSESSMENT SUMMARY FOR PULP MILL COMBUSTION SOURCES SOURCE CATEGORY—(SUBPART MM)

	Cancer MIR (in-1 million)		Cancer incidence (cases per year)	Population with risk of 1-in-1 million or more	Population with risk of 10-in-1 million or more	Max chronic noncancer HI (actuals)	Max chronic noncancer HI (allowables)
	Based on actual emissions	Based on allowable emissions					
Source Category	4 (naphthalene, acetaldehyde).	4 (naphthalene, acetaldehyde).	0.01	7,600	0	HI < 1	HI < 1
Whole Facility	20 (arsenic, chromium VI).	....	0.05	440,000	280	HI = 1	HI = 1

We estimated the maximum modeled chronic non-cancer HI (TOSHI) value for the source category based on actual and allowable emissions to be 0.3, with acrolein emissions from lime kilns accounting for 92 percent of the HI.

2. Acute Risk Results

Our screening analysis for worst-case acute impacts based on actual emissions did not identify impacts associated with any pollutants that exceeded an HQ value of 1 based upon the REL. For the acute risk screening analysis, we calculated acute hourly multipliers based on the median of peak-to-mean ratio for 14 emission process groups ranging from 1.3 to 4.7, with emissions from the semichemical recovery process having the highest hourly peak emissions with a multiplier of 4.7. For more information on how we calculated the acute hourly multipliers, refer to the

[33] See the memorandum in the docket titled, *Summary of RBLC and Other Findings to Suppport the Residual Risk and Technology Review of Chemical Recovery Combustion Sources NESHAP.*

[34] See the memorandum in the docket titled, *Section 112(d)(6) Technology Review fo the NESHAP for Chemical Recovery Combustion Sourcces at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills.*

risk document, Appendix 1, *Preparation of Residual Risk Modeling Input File for Subpart MM* dated September 30, 2014.

3. Multipathway Risk Screening Results

Results of the worst-case Tier 1 screening analysis identified emissions (based on estimates of actual emissions) exceeding the PB–HAP emission cancer screening rates for dioxin/furans and polycyclic aromatic hydrocarbons (PAH) and the non-cancer screening threshold for mercury. For the compounds and facilities that did not screen out at Tier 1, we conducted a Tier 2 screen. The Tier 2 screen replaces some of the assumptions used in Tier 1 with site-specific data, including the location of fishable lakes and local precipitation, wind direction and speed. The Tier 2 screen continues to rely on high-end assumptions about consumption of local fish and locally grown or raised foods (adult female angler at 99th percentile consumption for fish for the subsistence fisherman scenario and 90th percentile consumption for locally grown or raised foods for the farmer scenario). For facilities for which the Tier 2 screening value(s) indicate a potential health risk to the public, we can conduct a Tier 3 multipathway screen. Tier 3 has three individual stages: (1) Lake assessment to assess fishability and accessibility; (2) plume-rise calculations to estimate the emissions exiting the mixing layer and resulting in no ground-level exposures; (3) TRIMFaTE hourly screening runs using the layout for the farm and/or fish location that best characterizes the facility being modeled. We progress through Tier 3 stages until the facility's screening values indicate that emissions are unlikely to pose health risks to the public, or until all three stages are complete. A Tier 3 screen was required for one facility that exceeded the Tier 2 screen for mercury. It is important to note that, even with the inclusion of some site-specific information in the Tier 2 and 3 analysis, the multipathway screening analysis is still a very conservative, health-protective assessment (i.e., upper-bound consumption of local fish and locally grown and/or raised foods) and in all likelihood yields results that serve as an upper-bound multipathway risk associated with a facility.

While the screening analysis is not designed to produce a quantitative risk result, the factor by which the emissions exceed the threshold serves as a rough gauge of the ''upper-limit'' risks we would expect from a facility. Thus, for example, if a facility emitted a PB–HAP carcinogen at a level 2 times the screening threshold, we can say with a high degree of confidence that the actual maximum cancer risks will be less than 2-in-1 million. Likewise, if a facility emitted a noncancer PB–HAP at a level 2 times the screening threshold, the maximum noncancer hazard would represent an HQ less than 2. The high degree of confidence comes from the fact that the screens are developed using the very conservative (health-protective) assumptions that we describe above.

a. Cancer Risk Screening

Results of the worst-case Tier 1 screening analysis indicate that 85 of the 108 facilities with pulp mill combustion sources exceeded the PB–HAP emission cancer screening rates (based on estimates of actual emissions) for dioxin/furans and PAH. The EPA conducted a Tier 2 cancer screening analysis of the 85 facilities that were found to exceed the Tier 1 screening value. Nineteen of these facilities with subpart MM MACT source category sources emitted dioxin/furans and PAH above a cancer screening value of 1 for the subsistence fisher and farmer scenarios. In the Tier 2 analysis, the individual dioxin/furan congener emissions are all scaled based on their toxicity relative to 2,3,7,8-tetrachlorodibenzo-p-dioxin and are reported as toxic equivalents (TEQs), and all PAH congener emissions are scaled based on their toxicity relative to benzo(a)pyrene and are reported as TEQs. The maximum Tier 2 cancer screening value for the subsistence fisher scenario and the farmer scenario for this source category was equal to 10, which represents a maximum cancer risks that would be less than 10-in-1 million. The EPA did not conduct further cancer screening for this source category and considered this result along with all the risk results as part of determining whether the risks are acceptable (as discussed in section B).

b. Non-Cancer Risk Screening

Results of the worst-case Tier 1 screening analysis indicate that 59 of the 108 plants sources exceeded the Tier 1 non-cancer screen value for mercury. The EPA conducted a Tier 2 chronic non-cancer screening analysis of the 59 facilities, resulting in 9 facilities emitting divalent mercury above the non-cancer screening value of 1 for the subsistence fisher scenario. The highest exceedance of the Tier 2 non-cancer mercury screen value for pulp mill combustion sources under 40 CFR part 63, subpart MM was equal to 5. The risk associated with divalent mercury is based on its ability to transform into the most toxic form of mercury as methyl mercury.

The Tier 2 non-cancer screening analysis for the 9 facilities indicated potential risks greater than or equal to 2 but less than 5 times the non-cancer screening level for the subsistence fisher scenario. More refined screening using Tier 3 was conducted for the 9 facilities flagged in Tier 2. The Tier 3 screen examined the set of lakes from which the fisher might ingest fish (Stage 1). Any lakes that appeared to not be fishable or not publicly accessible were removed from the assessment, and the screening assessment was repeated. After we made the determination that the critical lakes were fishable, we analyzed plume rise data for each of the sites (Stage 2). The results of the Tier 3 screen (Stage 2) showed one facility with a non-cancer screen value of 2.

We conducted the final screening stage of Tier 3 for this single facility utilizing a time-series assessment (Stage 3). In this stage, we conducted a new mercury run using TRIM.FaTE for each relevant lake that represents a risk concern based upon the Tier 3 plume-rise assessment. For these model runs, we started with the screening configuration corresponding to the lake location, but instead of the static meteorology and stack parameters used in previous screening tiers and stages, we used site-specific hourly meteorology and the hourly plume-rise values calculated in the Tier 3 plume-rise assessment. Allowing TRIM.FaTE to model chemical fate and transport with hour-by-hour changes in meteorology and plume rise produces a more accurate estimate of chemical concentrations in media of interest, as compared to the static values used in Tier 2 and the post-processing adjustments made in the Tier 3 plume-rise assessment. If the potential risk (estimated using this Tier 3 time-series approach) associated with a facility's PB–HAP emissions are lower than the screening value, we consider the emissions to pose no significant risk. This Tier 3 screen resulted in lowering the maximum exceedance of the screen value for the highest site from 2 to 1. Further details on the refined multipathway screening analysis are in Appendix 10, Attachment 1 of the risk report, ''Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule''.

4. Environmental Risk Screening Results

As described in section III.A of this document, we conducted an environmental risk screening assessment for the 40 CFR part 63, subpart MM source category for the following seven HAPs: PAH, mercury (methyl mercury and mercuric chloride), cadmium, lead, dioxin/furans, HCl, and HF.

In the Tier 1 screening analysis for PB–HAPs (other than lead, which we evaluated differently), one modeled soil parcel for one facility in the source category exceeded a surface soil—threshold level benchmark (invertebrates) for mercuric chloride by 2. There were no Tier 1 exceedances of any benchmarks for the other pollutants; PAH, cadmium and dioxins/furans. Therefore, we conducted a Tier 2 screen for mercuric chloride only. In the Tier 2 screen for mercuric chloride, none of the individual modeled concentrations for any facility in the source category exceeded any of the ecological benchmarks.

For lead, we did not estimate any exceedances of the secondary lead NAAQS. For HCl and HF, the average modeled concentration around each facility (i.e., the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl and HF (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for all facilities.

5. Facility-Wide Risk Results

Considering facility-wide emissions at the 108 plants, we estimated the MIR to be 20-in-1 million driven by arsenic and chromium VI emissions, and calculated the chronic non-cancer TOSHI value to be 1 driven by emissions of acrolein (refer to Table 3). The above cancer and non-cancer risks are driven by emissions from the industrial boilers.

We estimated approximately 440,000 people to have cancer risks greater than or equal to 1-in-1 million considering whole facility emissions from 81 of the 108 facilities modeled from the pulp and paper production industry (refer to Table 3). From these 81, 2 facilities have cancer risks greater than or equal to 10-in-1 million (but less than 20-in-1 million) with approximately 300 being exposed at these levels.

6. What demographic groups might benefit from this regulation?

To determine whether or not to conduct a demographics analysis, which is an assessment of risks to individual demographic groups, we look at a combination of factors, including the MIR, non-cancer TOSHI, population around the facilities in the source category, and other relevant factors. For the 40 CFR part 63, subpart MM source category, we examined the potential for any environmental justice (EJ) issues that might be associated with the source category, by performing a demographic analysis of the population close to the facilities. In this analysis, we evaluated the distribution of HAP-related cancer and non-cancer risks from the subpart MM source category across different social, demographic, and economic groups within the populations living near facilities identified as having the highest risks. The methodology and the results of the demographic analyses are included in a technical report, *Risk and Technology Review—Analysis of Socio-Economic Factors For Populations Living Near Pulp Mill Combustion Sources*, available in the docket for this action.

The results of the demographic analysis are summarized in Table 4 below. These results, for various demographic groups, are based on the estimated risks from actual emissions levels for the population living within 50 km of the facilities.

TABLE 4—SUBPART MM SOURCE CATEGORY DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk at or above 1-in-1 million	Population with chronic hazard index above 1
Total Population	312,861,265	7,600	0
Race by Percent			
White	72	67	0
All Other Races	28	33	0
Race by Percent			
White	72	67	0
African American	13	28	0
Native American	1.1	0.4	0
Other and Multiracial	14	5	0
Ethnicity by Percent			
Hispanic	17	3	0
Non-Hispanic	83	97	0
Income by Percent			
Below Poverty Level	14	16	0
Above Poverty Level	86	84	0
Education by Percent			
Over age 25 and without High School Diploma	15	18	0
Over age 25 and with a High School Diploma	85	82	0

The results of the 40 CFR part 63, subpart MM source category demographic analysis indicate that emissions from the source category expose approximately 7,600 people to a cancer risk at or above 1-in-1 million and no one exposed to a chronic non-cancer TOSHI greater than 1. The specific demographic results indicate that the percentage of the population potentially impacted by emissions is greater than its corresponding national percentage for the minority population (33 percent for the source category compared to 28 percent nationwide), the African American population (28 percent for the source category compared to 13 percent nationwide) and for the population over age 25 without a high school diploma (18 percent for the source category compared to 15 percent nationwide). The proximity results (irrespective of risk) indicate that the population percentages for certain demographic categories within 5 km of source category emissions are greater than the corresponding national percentage for those same demographics. The following demographic percentages for populations residing within close proximity to facilities with chemical recovery combustion sources are higher than the corresponding nationwide percentage: African American, ages 65 and up, over age 25 without a high school diploma, and below the poverty level.

The risks due to HAP emissions from this source category are low for all populations (*e.g.*, inhalation cancer risks are less than 4-in-1 million for all populations and non-cancer hazard indices are less than 1). Furthermore, we do not expect this proposal to achieve significant reductions in HAP emissions. Section IV.C of this preamble addresses opportunities as part of the technology review to further reduce HAP emissions. These technologies were found not to be cost-effective. Therefore, we conclude that this proposal will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. However, this proposal, if finalized, will provide additional benefits to these demographic groups by improving the compliance, monitoring, and implementation of the NESHAP.

B. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effects?

1. Risk Acceptability

As noted in section II.A of this preamble, the EPA sets standards under CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1-in-10 thousand.'' (54 FR 38045, September 14, 1989).

In this proposal, the EPA estimated risks based on both actual and allowable emissions from pulp mill combustion sources. As discussed above, in determining acceptability, we considered risks based on both actual and allowable emissions. Based on the risk assessment results described above, the EPA is proposing that the risks are acceptable.

The baseline inhalation cancer risk from the source category was 4-in-1-million for the most exposed individual based on actual and allowable emissions. The total estimated incidence of cancer for this source category due to inhalation exposures is 0.02 excess cancer cases per year, or 1 case in 50 years. The Agency estimates that the maximum chronic non-cancer TOSHI from inhalation exposure for this source category has an HI equal to 0.3 based upon both actual and allowable emissions. Lime kilns account for a large portion (92 percent) of the HI.

The multipathway screening analysis, based upon actual emissions, indicates the excess cancer risk from this source category is less than 10-in-1 million based on dioxins/furans and PAH emissions, with PAH emissions accounting for 99 percent of these potential risks from the fisher and the farmer scenarios. There were no facilities within this source category with a multipathway non-cancer screen value greater than 1 for cadmium or mercury. In evaluating the potential for multipathway effects from emissions of lead, we compared modeled maximum annual lead concentrations to the secondary NAAQS for lead (0.15 µg/m3). Results of this analysis estimate that the NAAQS for lead would not be exceeded at any off-site locations.

To put the risks from the source category in context, we also evaluated facility-wide risk. Our facility-wide assessment, based on actual emissions, estimated the MIR to be 20-in-1 million driven by arsenic and chromium VI emissions, and estimated the chronic non-cancer TOSHI value to be 1 driven by emissions of acrolein. We estimated approximately 440,000 people to have cancer risks greater than or equal to 1-in-1 million considering facility-wide emissions from the pulp and paper production industry (see Table 3). The above cancer and non-cancer risks are driven by emissions from industrial boilers, representing 62 percent of the cancer risks and 95 percent of the non-cancer risks. Emissions from the 40 CFR part 63, subpart MM sources represent only 6 percent of the total facility-wide cancer risk of 20-in-1 million.

The screening assessment of worst-case acute inhalation impacts indicates no pollutants exceeding an HQ value of 1 based on the REL, with an estimated worst-case maximum acute HQ of 0.3 for acrolein based on the 1-hour REL.

A review of the uncertainties in the risk assessment identified one additional key consideration, and that is the quality of data associated with the whole-facility emissions. The data provided from the power boilers were collected in 2009 and represent pre-MACT emissions before any controls. The uncertainty introduced by using pre-MACT boiler emissions data may result in an overestimated risk estimate for the whole-facility analysis for both cancer and non-cancer impacts.

Considering all of the available health risk information, we propose that risks from the source category are acceptable.

2. Ample Margin of Safety Analysis

As directed by section 112(f)(2), we conducted an additional analysis to determine whether additional standards are needed to provide an ample margin of safety to protect public health. Under this ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies and other measures that could be applied in this source category to further reduce the risks (or potential risks) due to emissions of HAPs identified in our risk assessment, along with all of the health risks and other health information considered in our determination of risk acceptability.

Although we are proposing that the risks from the subpart MM source category are acceptable, inhalation risk estimates are above 1-in-1 million at the actual and MACT-allowable emission levels for approximately 7,600 individuals in the exposed population. The HAP risk drivers contributing to the inhalation risks in excess of 1-in-1 million include primarily the gaseous organic HAPs acetaldehyde and naphthalene. Additional gaseous organic HAPs contributing to the risk includes benzene, chloroprene, formaldehyde, 2-methylnaphthalene, 7,12-dimethylbenz[a]anthracene, acenaphthene, acenaphthylene, and fluoranthene. More than 80-percent of the mass emissions of these compounds originate from NDCE recovery furnaces, and DCE recovery furnaces (including BLO systems). We considered options for further reducing gaseous organic HAP emissions from NDCE and DCE recovery furnaces. The greatest reduction in gaseous organic HAP emissions that could be achieved for DCE recovery furnaces would result from DCE-to-NDCE furnace conversions or replacements of DCE furnaces with NDCE systems. We estimated furnace emissions to be reduced when a DCE furnace is converted (or replaced with NDCE design). Conversion or replacement of a DCE system with an NDCE system results in removal of the BLO system and elimination of 100 percent of the BLO emissions. For NDCE recovery furnaces with wet ESP systems, conversion of the wet ESP system to a dry system can further reduce gaseous organic HAPs. Section IV.C.1 of this preamble discusses the costs and impacts associated with DCE conversions (or replacements) and wet-to-dry ESP conversions for NDCE recovery furnaces. The overall cost of these options is an estimated $1.4 billion to $3.7 billion in capital cost and $120 million to $440 million in annualized cost. Application of this option would achieve an estimated emission reduction of 2,920 tpy of gaseous organic HAPs (including risk drivers and other gaseous organic HAPs), and the corresponding cost-effectiveness ranges from $45,000 to $153,000 per ton of emissions reduced. The non-air environmental impacts, energy impacts, and secondary air emissions associated with the options described above are discussed in a memorandum in the docket. Due to the low level of current risk and the substantial costs associated with these options, we are proposing that additional emission reductions from the source category are not necessary to provide an ample margin of safety.

3. Adverse Environmental Effects

Based on the results of our environmental risk screening assessment, we propose to conclude that there is not an adverse environmental effect as a result of HAP emissions from the 40 CFR part 63, subpart MM source category.[35] Thus, we are proposing that it is not necessary to set a more stringent standard to prevent an adverse environmental effect.

[35] The environmental screening analysis is documented in *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule*, in the docket for this action.

C. What are the results and proposed decisions based on our technology review?

1. Kraft and Soda Recovery Furnaces

The ability to recover pulping chemicals is imperative to the kraft and soda process, and is achieved by burning spent pulping liquor (*i.e.*, black liquor) in a recovery furnace. The recovery furnace is easily identified at a pulp mill because it is typically the tallest equipment on site. The purpose of the recovery furnace is to: (1) Recover inorganic pulping chemicals (e.g., sodium sulfide (Na_2S) and sodium hydroxide (NaOH) in kraft mills and NaOH in soda mills); and (2) produce steam. The recovered inorganic pulping chemicals are reused in the process, and the steam is used to generate electricity and for process heating. Prior to being fired in the recovery furnace, black liquor recovered from pulp washing is concentrated using an NDCE or DCE. The NDCE is an indirect, steam-heated black liquor concentrator. The DCE uses the hot combustion gases exiting the furnace to increase the solids content of the black liquor. A BLO system precedes the DCE to reduce malodorous total reduced sulfur (TRS) emissions that can be stripped in the DCE when hot flue gases from the recovery furnace come in contact with the black liquor. The BLO system uses molecular oxygen (O_2) or air to oxidize Na_2S to nonvolatile sodium thiosulfate ($Na_2S_2O_3$) to reduce the potential for stripping. Outputs from recovery furnaces include molten smelt (primarily Na_2S and sodium carbonate (Na_2CO_3)), flue gases, and steam. The smelt exits from the bottom of the furnace into an SDT, where the recovery of kraft pulping chemicals continues. Particulate matter (primarily sodium sulfate (Na_2SO_4) [salt cake] and Na_2CO_3) entrained in the flue gases is also recovered using an ESP, which deposits the collected material into a chemical ash tank or salt cake mix tank for subsequent addition into the concentrated black liquor.

We reviewed ICR data on recovery furnace design and emissions controls for purposes of the technology review. There are currently 148 kraft and soda recovery furnaces in the United States, including 36 existing DCE furnaces, 108 existing NDCE furnaces, and 4 recovery furnaces subject to the new source limits under 40 CFR part 63, subpart MM. The vast majority (96 percent) of recovery furnaces have ESP control, including the 4 NDCE recovery furnaces subject to the new source limits under subpart MM. Three of the DCE furnaces and one of the NDCE furnaces have an ESP followed by a wet scrubber. Two NDCE furnaces have a wet scrubber alone. The one remaining soda recovery furnace is a subpart MM new source with ESP control. As we noted in 2001, when subpart MM was promulgated, we project no new DCE recovery furnaces to be installed in the future, because more energy-efficient NDCE technology is now prevalent.

Recovery furnace ESPs can be further characterized as wet- or dry-bottom ESPs having either a wet or dry PM return system. A wet-bottom ESP uses either oxidized or unoxidized black liquor to collect the PM and carry it to the salt cake mix tank via a wet PM return system. A dry-bottom ESP routes the captured PM to the mix tank via a screw conveyor or drag chain without the use of liquid, typically with a dry PM return system. However, there are some dry-bottom ESPs with a wet PM return system that use black liquor or other process liquids to transport the dry collected PM to the mix tank. Approximately 60 percent of recovery furnaces in the United States (or 90 recovery furnaces) have a dry-bottom ESP with a dry PM return system (including two furnaces with a dry-bottom ESP followed by a scrubber).

Recovery furnace gaseous organic HAP. Subpart MM of 40 CFR part 63 contains a gaseous organic HAP limit of 0.025 lb/ton BLS (measured as methanol) for new recovery furnaces based on use of an NDCE recovery furnace with a dry-bottom ESP and a dry PM return system. Recovery furnace system design impacts gaseous organic HAP emissions. Non-direct contact evaporator recovery furnaces emit less gaseous organic HAPs because there is no contact between the incoming black liquor and hot flue gases in the evaporator and there is no BLO system. Replacement of DCE recovery furnace systems with a new NDCE recovery furnace or conversion of an existing DCE furnace to an NDCE design (referred to as a ''low-odor conversion''), along with removal of the associated BLO system, provides the greatest reduction in gaseous organic HAP emissions. Use of a dry-bottom ESP system with a dry PM return also reduces gaseous organic HAP emissions.

Analysis of ICR data for our technology review revealed that the number of DCE recovery furnaces in the United States continues to decrease as facilities with older DCE furnaces either close or, where feasible, replace aging DCE furnaces or convert them to NDCE systems. When subpart MM was proposed in 1998, 39 percent of recovery furnaces (82 units) were DCE systems. Today, only 36 DCE recovery furnaces remain, which is 24 percent of the recovery furnace population (including 2 DCE recovery furnaces that are only used as backup systems for times when other NDCE furnaces onsite are not operating).

We analyzed the costs and environmental impacts of replacement or conversion of the remaining DCE recovery furnaces as part of our technology review. High capital costs of an estimated $1.3 to $3.7 billion and annualized costs of an estimated $120 to $440 million are associated with recovery furnace installation (or conversion) projects due to the integral nature of the recovery furnace within the pulp mill and the number of upstream and downstream equipment components that must be removed, replaced, or reengineered along with the recovery furnace itself. These costs would be borne by 21 facilities that continue to operate DCE recovery furnaces and are not already projected to replace these systems in the absence of any regulatory action. The cost effectiveness of recovery furnace conversions or replacements is also high, at an estimated $44,000 to $159,000 per ton of gaseous organic HAPs reduced. We estimated a range of costs based on multiple information sources.

We also considered the costs and impacts associated with converting the remaining NDCE recovery furnace wet-bottom ESPs in the industry to dry-bottom ESPs. Capital costs are an estimated $56.1 million for wet-to-dry bottom ESP conversions at 11 mills with NDCE recovery furnaces, with cost effectiveness of $54,000 per ton of gaseous organic HAPs removed.

The total costs of the gaseous organic HAP options we considered are an estimated $1.4 to $3.7 billion in capital cost borne by 32 facilities, to achieve an estimated emission reduction of 2,920 tpy of gaseous organic HAP at a cost effectiveness of $45,000 to $153,000 per ton of gaseous organic HAPs removed. Collateral TRS emission reductions are an estimated 1,250 tpy at a cost effectiveness of $104,000 to $357,000 per ton of TRS reduced. Given the high capital costs and high cost per ton of emissions reduced, we are not proposing additional regulation of recovery furnace gaseous organic HAP emissions as a result of the technology review.

Recovery furnace PM. Under the current 40 CFR part 63, subpart MM, PM is a surrogate for HAP metal emissions. Subpart MM requires existing recovery furnaces to meet a PM emission limit of 0.044 grains per dry standard cubic foot (gr/dscf) at 8 percent O_2 and requires new recovery furnaces to meet a PM limit of 0.015 gr/dscf at 8-percent O_2. We recently analyzed PM emissions test data collected with the 2011 Pulp and Paper Sector ICR for purposes of the Kraft Pulp Mill NSPS review promulgated on April 4, 2014 (79 FR 18952). We reviewed the PM data tabulated for the NSPS review in the context of the existing and new source PM limits for the subpart MM NESHAP technology review. The dataset included more than 200 filterable PM stack tests, including some repeat tests, on nearly all of the recovery furnaces in the United States using a variety of PM emission controls (ESP, ESP and wet scrubber combinations, and wet scrubbers). The PM stack test data revealed little or no distinction between DCE and NDCE recovery furnaces for PM emissions. Nearly all of the recovery furnaces tested met the current existing source limit (0.044 gr/dscf),[36] and several met the new source limit (0.015 gr/dscf), though there was a considerable scatter of emission test results between 0.015 and 0.044 gr/dscf, including variability in test results for the same units tested multiple times. There was also variability in the performance of the different types of ESP or ESP and scrubber systems such that no one type of control system seemed to perform better than another. Based on the data, wet scrubbing of recovery furnace exhaust gases (either alone or in conjunction with an ESP) does not necessarily improve filterable PM removal. After reviewing the recovery furnace PM emissions data, we concluded that the current subpart MM emission limits of 0.044 gr/dscf and 0.015 gr/dscf continue to represent the performance of existing and new recovery furnaces, respectively. The technology review did not reveal any developments in practices, processes, and control technologies for reducing PM emissions from recovery furnaces that have occurred since promulgation of subpart MM. Therefore, we are not proposing any changes to the PM emission limits for purposes of the technology review. As discussed below, we estimated incidental incremental improvements in PM emissions as part of our analysis of the opacity monitoring limit for recovery furnaces.

2. Kraft and Soda Lime Kilns

In kraft and soda pulp mills, the lime kiln is part of the causticizing process in which green liquor from the SDT is converted to white liquor. The function of the lime kiln is to oxidize lime mud (calcium carbonate, $CaCO_3$) to reburned lime (calcium oxide, CaO) in a process known as calcining. Lime kiln air pollution control devices include wet scrubbers, ESPs, or a combination system including an ESP followed by a wet scrubber. The 2011 ICR data indicate that, of 130 lime kilns in the United States, 89 kilns have wet scrubbers, 30 kilns have ESPs, and 11 kilns have ESP-wet scrubber combinations.

Subpart MM, 40 CFR part 63, includes a PM limit of 0.064 gr/dscf at 10-percent O_2 (which is a surrogate limit for HAP metals) for existing lime kilns. For new or reconstructed lime kilns, the subpart MM limit is 0.010 gr/dscf at 10-percent O_2 based on use of a high-efficiency ESP. Subpart MM does not distinguish between fuel types. Lime kilns typically burn natural gas, fuel oil, petroleum coke, or a combination of these fuels. They may also burn noncondensable gases (NCGs) or pulp mill byproducts such as tall oil.

The EPA recently reviewed PM stack test data from more than 250 filterable PM stack tests (including several repeat tests) on 110 lime kilns in the United States for purposes of the Kraft Pulp Mill NSPS review. The EPA interpreted this same dataset in the context of conducting the technology review of the subpart MM PM limits for lime kilns. The tests included lime kilns with scrubbers, ESPs and ESP-wet scrubber combination controls. Most of the scrubber-controlled kilns achieved the subpart MM existing source limit (0.064 gr/dscf at 10-percent O_2) with the exception of kilns that participate in the PM bubble compliance alternative. The data suggested that scrubber-controlled kilns would not be expected to meet the subpart MM new source limit of 0.010 gr/dscf at 10-percent O_2. The EPA found that ESP and ESP-wet scrubber controls typically reduce PM to lower levels than wet scrubbers alone. The ESP-wet scrubber systems did not necessarily perform better on filterable PM than the ESPs alone. Several existing ESP and ESP-wet scrubber controlled kilns consistently met the 0.064 gr/dscf existing source limit, and often met the new source limit of 0.010 gr/dscf at 10-percent O_2. The EPA observed test results between the existing and new source limit for existing sources with ESP and ESP-wet scrubber systems. Our review of the PM emissions test data for lime kilns suggests that the subpart MM limits for lime kilns are appropriate. For purposes of the subpart MM technology review, the EPA has identified no practices, processes, or controls for PM emissions from lime kilns beyond those

[36] Exceptions included a few stack tests that were repeated, or recovery furnaces that participate in the PM bubble compliance option under 40 CFR part 63, subpart MM.

identified when subpart MM was developed. Therefore, the EPA is not proposing any changes to the existing PM limits of 0.064 gr/dscf at 10-percent O_2 for existing lime kilns and 0.010 gr/dscf at 10-percent O_2 for new and reconstructed lime kilns.

3. Recovery Furnace and Lime Kiln Monitoring

This subsection discusses our review of the opacity and ESP monitoring provisions for recovery furnaces and lime kilns with ESPs or combined ESP and wet scrubber systems.

Continuous opacity monitoring. Subpart MM of 40 CFR part 63 requires continuous monitoring of opacity to demonstrate ongoing compliance with the PM concentration limits for ESP-controlled recovery furnaces and lime kilns. The current PM opacity limits under subpart MM are 35-percent opacity for existing recovery furnaces and 20-percent opacity for existing lime kilns, new lime kilns, and new recovery furnaces. Subpart MM contains an opacity monitoring allowance for existing sources where 6 percent of the 6-minute opacity averages during a quarter (excluding periods of SSM and periods when the facility is not operating) may exceed the 35-percent recovery furnace or 20-percent lime kiln opacity limit without being considered a violation. Subpart MM currently contains a corrective action threshold of 10 consecutive 6-minute averages above 20-percent opacity for new and existing recovery furnaces and lime kilns.

The EPA reviewed recovery furnace and lime kiln continuous opacity monitoring system (COMS) data for purposes of the technology review to evaluate the current 40 CFR part 63, subpart MM opacity limits and 6-percent monitoring allowance. The EPA performed a similar review of the COMS data for the subpart BBa NSPS review promulgated April 4, 2014 (79 FR 18952). The EPA's analysis of the recovery furnace COMS data for subpart MM is included in a memorandum in the docket.[37] Our conclusions from reviewing the opacity data in the context of subpart MM are consistent with the conclusions reached for the 2014 NSPS review.

The COMS data for 135 recovery furnaces show that the majority of existing recovery furnaces, regardless of design (DCE or NDCE), and with most controls, are meeting a 20-percent opacity limit based on a 6-minute average, with fewer than 2 percent of averaging periods exceeding 20-percent opacity, including periods of startup and shutdown. The EPA also reviewed state permits and found many recovery furnaces with permit limits of 20-percent opacity. Therefore, the EPA concludes that this information is evidence that there has been a development in existing recovery furnace operating practices that supports reducing the existing source opacity limit from 35-percent to 20-percent and revising the monitoring allowance for the 20-percent opacity limit from 6 percent to a 2-percent monitoring allowance as part of the 40 CFR part 63, subpart MM technology review process.

The COMS data for 28 ESP-controlled lime kilns show that all of the existing lime kilns are meeting the 20-percent opacity limit based on a 6-minute average, with nearly all performing at a 1-percent monitoring allowance, including periods of startup and shutdown. The EPA considers this information as evidence that there has been a development in existing lime kiln operating practices and that this development supports revising the monitoring allowance from 6 percent to a 1-percent monitoring allowance for opacity as part of the 40 CFR part 63, subpart MM technology review process.

Subpart MM of 40 CFR part 63 currently requires that the opacity allowance be calculated based on the percent of the operating time in a quarter in which excess emissions are recorded. The Agency is proposing to change the reporting requirement frequency, as discussed in section IV.D.4, and, therefore, analyzed both quarterly and semiannual averaging periods when reviewing the proposed monitoring allowance discussed above.

The EPA considered the impacts of various opacity monitoring options as part of the technology review. The opacity regulatory options considered for kraft and soda recovery furnaces were:

Baseline Option 1: 35-percent opacity (existing) or 20-percent opacity (new), 20-percent corrective action level, 6-percent monitoring allowance, quarterly reporting.

Option 2: 35-percent opacity, 20-percent corrective action level, 2-percent monitoring allowance, semiannual reporting.

Option 3: 20-percent opacity, 6-percent monitoring allowance, quarterly reporting.

Option 4: 20-percent opacity, 2-percent monitoring allowance, semiannual reporting.

Option 5: 20-percent opacity, 2-percent monitoring allowance, quarterly reporting.

The opacity regulatory options considered for kraft and soda ESP-controlled lime kilns were:

Baseline Option 1: 20-percent opacity and corrective action level with 6-percent allowance, quarterly reporting.

Option 2: 20-percent opacity with a 1-percent monitoring allowance, semiannual reporting.

Option 3: 20-percent opacity with a 1-percent monitoring allowance, quarterly reporting.

For purposes of estimating costs and impacts of the regulatory options, we assumed that recovery furnaces and ESP-controlled lime kilns that did not meet the regulatory options in our COMS analysis would require ESP maintenance and testing to improve opacity performance, or an ESP upgrade. The EPA also reviewed PM performance levels (based on PM stack test data) for emission units not meeting the opacity limits under consideration in at least one reporting period. If the PM performance level achieved met the PM performance expected from an upgraded ESP (0.015 gr/dscf at 8-percent O_2 for recovery furnaces or 0.010 gr/dscf at 10-percent O_2 for lime kilns), then we assumed that the ESP would only require improved annual maintenance and testing to achieve the opacity options. Otherwise, we assumed that units would require an ESP upgrade to meet the opacity options.

Although we are not proposing any changes to the PM metal HAP limits as part of the technology review, ESP upgrades to meet a tighter opacity monitoring limit would have the effect of reducing PM emissions. We estimated recovery furnace upgrade costs for adding two parallel fields to an existing ESP resulting in a PM performance level of 0.015 gr/dscf at 8-percent O_2. For lime kilns, we estimated costs based on adding one field to the existing ESP to achieve a PM performance level of 0.01 gr/dscf at 10-percent O_2. For each emission unit expected to require an ESP upgrade, we estimated the potential reduction in PM emissions by subtracting the PM limit expected to be achieved by the upgraded ESP from the lower of the current PM permit limit or the actual PM performance level for the emission unit.

The EPA's full analysis of the cost and impacts associated with the regulatory options for opacity (including energy and secondary air impacts) is presented

[37] See memorandum titled, *Review of the Continuous Opacity Monitoring Data from the Pulp and Paper ICR Responses for Subpart MM Sources*, in the docket.

in a memorandum in the docket.[38] Table 5 summarizes the number of impacted facilities, estimated cost, PM reductions, and cost effectiveness of the opacity regulatory options.

TABLE 5—COSTS AND IMPACTS OF OPACITY REGULATORY OPTIONS

Option	Number of mills impacted	2015$ Capital costs, $million	2015$ Annualized costs, $million/yr	Incremental HAP reduction, tpy	Cost effectiveness $/ton PM[1]
Recovery Furnaces Opacity Monitoring Limit Options					
Baseline Option 1: No change. 35% opacity, 20% corrective action level (CAL), 6% monitoring allowance (MA), quarterly (Q) reporting.	0	0	0	0	NA
Option 2: 35% opacity, 20% CAL, 2% MA, semiannual (SA) reporting.	1	0	0.087	0	NA
Option 3: 20% opacity, 6% MA, Q reporting	7	27	5.4	188 (PM), 85 ($PM_{2.5}$)	28,400
Option 4: 20% opacity, 2% MA, SA reporting	12	42	8.7	235 (PM), 112 ($PM_{2.5}$)	36,800
Option 5: 20% opacity, 2% MA, Q reporting	19	74	15	364 (PM), 170 ($PM_{2.5}$)	41,000
Lime Kiln Opacity Monitoring Limit Options					
Option 1: No change. 20% opacity, 6% MA, Q reporting.	0	0	0	0	NA
Option 2: 20% opacity, 1% MA, SA reporting	2	0	0.068	0	NA
Option 3: 20% opacity, 1% MA, Q reporting	Same as option 2				

[1] HAP metals comprise less than 0.5-percent of the PM emissions (0.03-percent for recovery furnaces or 0.48-percent for lime kilns). Thus, the cost effectiveness specifically for HAP metals is orders of magnitude greater than that shown for PM (>$5.5 million per ton HAP metals).

After considering the costs and impacts of the regulatory options for opacity, we are proposing recovery furnace option 4 and lime kiln option 2 for opacity monitoring. These options are representative of the actual performance of 40 CFR part 63, subpart MM emission units based on our analysis of the COMS data, and also align closely with the opacity limits, monitoring allowances, and semiannual reporting requirements established for new sources through the 2014 NSPS review. The EPA is proposing to reduce the opacity limit for existing recovery furnaces from 35-percent to 20-percent opacity. Lowering the recovery furnace opacity limit to 20 percent eliminates the need for the 20-percent corrective action level. Specifying a 20-percent corrective action level is redundant where the opacity limit is already set at 20-percent; therefore, we are proposing to eliminate the subpart MM corrective action level in 40 CFR 63.864(k)(1)(i) by reserving this section. We are proposing a monitoring allowance of 2-percent for existing and new recovery furnaces. We are proposing to retain the 20-percent opacity limit and are proposing a monitoring allowance of 1 percent for opacity monitoring for lime kilns. We are also proposing to reduce the reporting frequency from quarterly to semiannually, as discussed in section IV.D.4 of this preamble. The proposed semiannual averaging period would be used for calculating the opacity monitoring allowance, providing flexibility for startup and shutdown periods. The cost effectiveness of recovery furnace option 4, $36,800 per ton PM, is within the range of other recent EPA regulations. There is no cost effectiveness value for lime kiln option 2 because no incremental HAP reductions were estimated. In addition to proposing the revisions described above, the EPA is requesting comment on all of the options presented in Table 5.

ESP parameter monitoring. The EPA is proposing to add an ESP parameter monitoring requirement for recovery furnaces and lime kilns equipped with ESPs. The purpose of this is to provide another indicator of ESP performance and enable affected sources to show continuous compliance with the HAP metal standards (surrogate PM emission limit) at all times, including periods when the opacity monitoring allowance is used. The EPA is proposing that these sources monitor the secondary voltage and secondary current (or, alternatively, total secondary power) of each ESP collection field. These ESP parameter monitoring requirements are in addition to opacity monitoring for recovery furnaces equipped with ESPs alone. The EPA is proposing that these ESP parameters be monitored, recorded every successive 15 minutes, and averaged over the same semiannual period as the opacity monitoring allowance. The semiannual average of the ESP parameters must remain above the minimum limits established during the PM performance test (*i.e.*, above the minimum secondary current and secondary voltage or above minimum total secondary power).

The EPA estimates that the nationwide costs associated with adding the proposed ESP parameter monitoring requirements would be $5.7 million capital and $1.4 million annualized costs for ESP parameter monitors. All mills with ESP-controlled recovery furnaces and lime kilns are estimated to be impacted.

Monitoring of ESPs followed by wet scrubbers. Because moisture in wet stacks interferes with opacity readings, opacity is not a suitable monitoring requirement for recovery furnaces or lime kilns with wet scrubber stacks. The EPA is therefore proposing to require ESP and wet scrubber parameter monitoring for emission units equipped with an ESP followed by a wet scrubber. The ESP parameters to be monitored are

[38] See memorandum titled, *Costs/Impacts of the Subpart MM Residual Risk and Technology Review*, in the docket.

secondary voltage and secondary current (or, alternatively, total secondary power), and the wet scrubber parameters are pressure drop and scrubber liquid flow rate. The EPA is proposing that ESP and wet scrubber parameters be recorded at least once every successive 15-minute period and reduced to 3-hour averages. The EPA estimates no incremental costs to be associated specifically with the proposed monitoring requirements for combined ESP-wet scrubber systems because the ESP parameter monitoring costs estimated above include ESPs in combined control systems, and wet scrubber parameter monitoring is already required under 40 CFR part 63, subpart MM.

4. Kraft and Soda Smelt Dissolving Tanks

Smelt dissolving tanks are covered vessels located below the recovery furnace to collect molten smelt, one of the main products from the combustion of black liquor. Smelt is comprised predominantly of Na_2S and Na_2CO_3 and is formed in the bottom of the recovery furnace. The smelt is continuously discharged through water-cooled smelt spouts into the SDT where it is mixed with weak wash water from the pulp mill recausticizing area to form green liquor, an aqueous solution of Na_2CO_3 and Na_2S. The green liquor is subsequently transferred to the recausticizing area for reprocessing into pulping liquor (*i.e.*, white liquor). In the soda pulping process, the molten smelt and green liquor is predominantly Na_2CO_3 because soda pulping is a non-sulfur process. Based on the 2011 Pulp and Paper Sector ICR data, there are 161 kraft and soda SDTs in the United States. Nearly all of the SDTs have wet scrubbers that control the particulate emissions, including HAP metals, from this process. A small number of SDTs use mist eliminators as the only means of emissions control. Some new sources were designed to vent emissions through the recovery furnace as an alternative to using wet scrubber control alone, but also have a wet scrubber for backup periods when venting to the recovery furnace is not feasible.

SDT PM. The current 40 CFR part 63, subpart MM PM emission limit (which is a surrogate for HAP metals) for existing SDTs is 0.20 lb/ton BLS. The subpart MM PM limit for new and reconstructed sources with initial startup in 2001 or later is 0.12 lb/ton BLS based on the use of a high-efficiency wet scrubber.

The EPA analyzed SDT PM stack test data collected with the 2011 Pulp and Paper Sector ICR for the NSPS review promulgated on April 4, 2014 (79 FR 18952). We reviewed this same dataset in the context of subpart MM for purposes of the 40 CFR part 63, subpart MM technology review. The stack test data show that nearly all SDTs have achieved the subpart MM existing source limit of 0.20 lb/ton BLS (with the exception of a few SDTs with mist eliminators and SDTs included in the PM bubble compliance option under subpart MM). There were many existing scrubber-controlled SDTs with emissions between the new source limit of 0.12 lb/ton BLS and the existing source limit of 0.20 lb/ton BLS. The practice of routing SDT emissions through the recovery furnace has an unquantified effect on PM emissions because no emission test data are available to differentiate SDT emissions from the recovery furnace emissions in these systems. The EPA has identified no practices, processes, or controls for SDTs beyond those identified at the time of subpart MM development, nor any incremental improvements in the ability of wet scrubbers to reduce PM. Therefore, the EPA is not proposing any changes to the current existing and new source PM limits in subpart MM for kraft and soda mill SDTs. The EPA has identified no regulatory options for SDTs for further consideration under the subpart MM technology review.

SDT parameter monitoring. Subpart MM specifies monitoring of scrubber liquid flow rate and pressure drop for SDTs equipped with wet scrubbers. Facilities may have difficulty meeting the minimum pressure drop requirement during startup and shutdown, as expected due to the reduced (and changing) volumetric flow of stack gases during startup and shutdown. The EPA is proposing to consider only scrubber liquid flow rate during these periods (*i.e.*, excess emissions would include any 3-hour period when BLS are fired that the scrubber flow rate does not meet the minimum parameter limits set in the initial performance test). This is discussed further in section IV.D.1.

Based on previous alternative monitoring requests for SDTs, the EPA is also proposing to allow operators to use SDT scrubber fan amperage as an alternative to pressure drop measurement for SDT dynamic scrubbers operating at ambient pressure or for low-energy entrainment scrubbers on SDTs where the fan speed does not vary.

5. Sulfite Combustion Units

When subpart MM was proposed in 1998, there were 15 sulfite pulp mills. Today there are only three sulfite mills, including one using the magnesium-based sulfite process and two mills using the ammonia (NH3)-based sulfite process. The EPA projects no new sulfite mills to come online in the United States in the next 5 years. Based on a review of permits and ICR data that the EPA has collected for these three sulfite mills, we determined that there are a total of eight sulfite combustion units currently operating in the United States.

Sulfite combustion unit PM. Subpart MM of 40 CFR part 63 requires existing sulfite combustion units to meet a PM emission limit of 0.040 gr/dscf at 8-percent O_2, based on the use of a fiber-bed demister system. Subpart MM requires new sulfite combustion units to meet a PM limit of 0.020 gr/dscf at 8-percent O_2, based on the combined use of a wet scrubber and fiber-bed demister system.[39] The PM emission limits are a surrogate for HAP metals.

For the 40 CFR part 63 subpart MM technology review, the EPA reviewed ICR data on sulfite processes and controls, title V permit limits, and PM stack test data for the three sulfite pulp mills currently operating in the United States. Each sulfite mill has a unique configuration of sulfite combustion units and corresponding site-specific limits. Two facilities with sulfite combustion units subject to a PM permit limit of 0.04 gr/dscf achieved this limit based on actual measurement data submitted (with the exception of one test above the limit that was superseded by a more recent test). Another facility (Cosmo Specialty Fibers in Cosmopolis, Washington) has a site-specific PM permit limit of 0.10 gr/dscf for its chemical recovery combustion units, and instead reduces PM emissions from the hog fuel dryer at the plant site. The chemical recovery combustion units (which have a combined stack) have achieved average PM emissions of 0.054 gr/dscf. The hog fuel dryer is permitted at 10 pounds per hour (lb/hr) of PM and has achieved PM emissions of 1.2 and 1.5 lb/hr in two tests. The EPA's technology review found no developments in practices, processes, or controls since the promulgation of subpart MM for PM emissions from sulfite combustion units. The EPA is proposing to retain the 0.040 and 0.020 gr/dscf at 8-percent O_2 PM limits for existing and new sulfite combustion units. The EPA has identified no

[39] Although any control system could be used to meet the emission limits for sulfite combustion units, the existing source limit is consistent with the performance of a fiber-bed demister system and the new source limit is consistent with the performance of a wet scrubber with a fiber-bed demister.

regulatory options for sulfite combustion units for further consideration under the subpart MM technology review.

Sulfite combustion unit parameter monitoring. Subpart MM of 40 CFR part 63 specifies monitoring of scrubber liquid flow rate and pressure drop for sulfite combustion units equipped with wet scrubbers. Facilities may have difficulty meeting the minimum pressure drop requirement during startup and shutdown, as expected due to the reduced (and changing) volumetric flow of stack gases during startup and shutdown. The EPA is proposing to consider only scrubber liquid flow rate during startup and shutdown periods (*i.e.*, excess emissions would include any 3-hour period when spent pulping liquor is fired that the scrubber flow rate does not meet the minimum parameter limits set in the initial performance test). The EPA is proposing no changes for parameter monitoring of the fiber-bed demister system, which is addressed under the alternative monitoring provisions of subpart MM.

6. Semichemical Combustion Units

When 40 CFR part 63, subpart MM, was originally proposed in 1998, there were 14 semichemical combustion units at 14 stand-alone semichemical pulp mills. Today, there are seven semichemical combustion units at seven mills in the United States, at six of which combustion units and mills are operating.[40] Semichemical combustion unit design types include: Fluidized-bed reactor (two units, one operating), recovery furnace (four units), and rotary liquor kiln (one unit).

Semichemical combustion unit total hydrocarbon (THC). The current 40 CFR part 63, subpart MM standards require existing and new semichemical combustion units to reduce total gaseous organic HAP emissions (measured as THC) by 90 percent or meet a total gaseous organic HAP emission limit (measured as THC) of 2.97 lb/ton of BLS fired.

For the 40 CFR part 63, subpart MM RTR, the EPA reviewed ICR data on processes and control configurations, title V permit limits, and THC stack test data for the stand-alone semichemical pulp mills currently operating in the United States. The review of permit limits indicated that all semichemical combustion units are subject to the 2.97 lb/ton BLS THC limit specified in subpart MM for existing and new units. Performance of the different semichemical combustion units varies considerably for THC. While most units achieve the 2.97 lb/ton BLS THC limit, at least one unit relied on the 90-percent reduction compliance option included in subpart MM to address variability. The EPA has identified no regulatory options for semichemical combustion units for purposes of the subpart MM RTR, given that no practices, processes, or controls beyond those considered during the original rule development have emerged.

Semichemical combustion unit parameter monitoring. Subpart MM of 40 CFR part 63 requires semichemical combustion units using RTOs to measure and record RTO operating temperature to demonstrate compliance with the standard for gaseous organic HAP (measured as THC). As noted previously, no practices, processes, or controls beyond those considered during the original rule development have emerged. Consequently, the EPA is proposing no changes for the current parameter monitoring requirements.

D. What other actions are we proposing?

In addition to the proposed actions described above, we are proposing additional revisions. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the court decision in *Sierra Club* v. *EPA*, 551 F.3d 1019 (D.C. Cir. 2008), which vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also are proposing various other changes, including 5-year periodic emissions testing for selected process equipment, semiannual electronic reporting for all excess emissions reports, electronic submittal of compliance reports (which include performance test reports), incorporation by reference, and various technical and editorial changes. Our analyses and proposed changes related to these issues are discussed in sections IV.D.1 through 6 of this preamble.

1. Startup, Shutdown, and Malfunction

In its 2008 decision in *Sierra Club* v. *EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAPs during periods of SSM. Specifically, the Court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously.

We are proposing the elimination of the SSM exemption in this rule. Consistent with *Sierra Club* v. *EPA*, we are proposing standards in this rule that apply at all times. We are also proposing several revisions to Table 1 (the General Provisions Applicability Table) as is explained in more detail below. For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop an SSM plan. We also are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as further described below.

The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether we have successfully done so.

Periods of startup and shutdown. In reviewing the standards in this rule, the EPA has taken into account startup and shutdown periods and, for the reasons explained below, is not proposing alternate standards for those periods.

Subpart MM of 40 CFR part 63 requires continuous opacity monitoring to indicate ongoing compliance with the PM emission limits. In developing proposed standards for subpart MM, the EPA reviewed numerous continuous opacity monitoring datasets that included periods of startup and shutdown, and concluded that the affected units will be able to comply with the proposed standards at all times. The proposed subpart MM also requires RTO operating temperature and ESP and wet scrubber parameter monitoring. Parameter limits apply at all times, including during startup and shutdown. The proposed subpart MM requires RTO operating temperature and wet scrubber and ESP operating parameters to be recorded at least once every 15 minutes. Subpart MM specifies corrective action levels in 40 CFR 63.864(k)(1) and violation levels in 40 CFR 63.864(k)(2) which would be reported as excess emissions under 40 CFR 63.867(c). For RTO temperature, subpart MM requires corrective action when any 1-hour temperature falls below the average temperature established during the performance test. Subpart MM considers any 3-hour RTO temperature that falls below the average established during the performance test to be a violation. Subpart MM requires the ESP and scrubber parameters to be averaged over a 3-hour block, except for ESPs with COMS, which would have

[40] One additional stand-alone semichemical pump mill ceased operation in late 2015.

ESP parameters averaged semiannually. The corrective action level for wet scrubber and ESP operating parameters (when opacity is not also measured) is triggered when any 3-hour average is outside of the limit established during the performance test. A violation would occur when six or more of the 3-hour average parameter values within a 6-month period are outside of the limits established during the performance test. Violations based on opacity would be considered over a semiannual period. For new or existing kraft or soda recovery furnaces, a violation would occur when any opacity is greater than 20 percent for 2 percent or more of the operating time when spent liquor is fired within a semiannual period. For new or existing lime kilns, a violation would occur when any opacity is greater than 20 percent for 1 percent or more of the operating time when lime mud is fired in a semiannual period. A violation would also occur when the recovery furnace or lime kiln ESP secondary voltage and secondary current (or total secondary power) averaged over the semiannual period are below the minimum operating limits established during the performance test, with the exception of secondary current (or total secondary power) during periods of startup and shutdown.

To address the need for ESPs to warm to a specified temperature (typically above 200 °F) before full power is applied to the transformer-rectifier set, the EPA is proposing to define excess emissions (*i.e.*, the corrective action and violation levels) as opacity and ESP parameter measurements below the minimum requirements during times when BLS or lime mud is fired (as applicable), based on several responses to the ICR indicating that mills with ESP minimum temperature requirements bring the ESP online before introducing BLS or lime mud into the recovery furnace or lime kiln, respectively. The EPA is also proposing language that would allow affected units to use wet scrubber liquid flow rate to demonstrate compliance during periods of startup and shutdown because pressure drop is difficult to achieve during these periods.

Periods of malfunction. Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process or monitoring equipment. (40 CFR 63.2) (Definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards. Under CAA section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the District of Columbia Circuit Court has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. A malfunction should not be treated in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting section CAA 112 standards.

Further, accounting for malfunctions in setting emission standards would be difficult, if not impossible, given the myriad of different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g.*, *Sierra Club* v. *EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' '') See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99-percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99-percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused in part by poor maintenance or careless operation. 40 CFR 63.2 (definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the Federal District Court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, CAA section 112 is reasonable and encourages practices that will avoid malfunctions. Administrative and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations.

a. General Duty

We are proposing to revise the General Provisions table (Table 1) entry for 40 CFR 63.6(e) by re-designating it as 40 CFR 63.6(e)(1)(i) and changing the ''yes'' in column 3 to a ''no.'' Section 63.6(e)(1)(i) describes the general duty to minimize emissions. Some of the language in that section is no longer necessary or appropriate in light of the elimination of the SSM exemption. We are proposing instead to add general duty regulatory text at 40 CFR 63.860(d) that reflects the general duty to minimize emissions while eliminating the reference to periods covered by an SSM exemption. The current language in 40 CFR 63.6(e)(1)(i) characterizes what the general duty entails during periods of SSM. With the elimination of the SSM exemption, there is no need to differentiate between normal operations and SSM events in describing the general duty. Therefore, the language the EPA is proposing for 40 CFR 63.860(d) does not include that language from 40 CFR 63.6(e)(1).

We are also proposing to revise the General Provisions table (Table 1) to add an entry for 40 CFR 63.6(e)(1)(ii) and include a ''no'' in column 3. Section 63.6(e)(1)(ii) imposes requirements that are not necessary with the elimination of the SSM exemption or are redundant with the general duty requirement being added at 40 CFR 63.860(d).

b. SSM Plan

We are proposing to revise the General Provisions table (Table 1) to add an entry for 40 CFR 63.6(e)(3) and include a ''no'' in column 3. Generally, the paragraphs under 40 CFR 63.6(e)(3) require development of an SSM plan and specify SSM recordkeeping and reporting requirements related to the SSM plan. As noted, the EPA is proposing to remove the SSM exemptions. Therefore, affected units will be subject to an emission standard during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance and, thus, the SSM plan requirements are no longer necessary.

c. Compliance With Standards

We are proposing to revise the General Provisions table (Table 1) entries for 40 CFR 63.6(f) and (h) by re-designating these sections as 40 CFR 63.6(f)(1) and (h)(1) and including a ''no'' in column 3. The current language of 40 CFR 63.6(f)(1) and (h)(1) exempts sources from non-opacity and opacity standards during periods of SSM. As discussed above, the court in *Sierra Club* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standard apply continuously. Consistent with *Sierra Club*, the EPA is proposing to revise standards in this rule to apply at all times.

d. Performance Testing

We are proposing to revise the General Provisions table (Table 1) entry for 40 CFR 63.7(e) by re-designating it as 40 CFR 63.7(e)(1) and including a ''no'' in column 3. Section 63.7(e)(1) describes performance testing requirements. The EPA is instead proposing to add a performance testing requirement at 40 CFR 63.865. The proposed performance testing provisions require testing under representative operating conditions, excluding periods of startup and shutdown. As in 40 CFR 63.7(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. The EPA is proposing to add language that requires the owner or operator to record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Section 63.7(e) requires that the owner or operator make available to the Administrator such records ''as may be necessary to determine the condition of the performance test'' available to the Administrator upon request, but does not specifically require the information to be recorded. The regulatory text the EPA is proposing to add to this provision builds on that requirement and makes explicit the requirement to record the information.

e. Monitoring

We are proposing to revise the General Provisions table (Table 1) by re-designating 40 CFR 63.8(c) as 40 CFR 63.8(c)(1), adding entries for 40 CFR 63.8(c)(1)(i) through (iii) and including ''no'' in column 3 for paragraphs (i) and (iii). The cross-references to the general duty and SSM plan requirements in those subparagraphs are not necessary in light of other requirements of 40 CFR 63.8 that require good air pollution control practices (40 CFR 63.8(c)(1)) and that set out the requirements of a quality control program for monitoring equipment (40 CFR 63.8(d)).

We are also proposing to revise the General Provisions table (Table 1) by adding an entry for 40 CFR 63.8(d)(3) and including a ''no'' in column 3. The final sentence in 40 CFR 63.8(d)(3) refers to the General Provisions' SSM plan requirement which is no longer applicable. The EPA is proposing to add to the rule at 40 CFR 63.864(f) text that is identical to 40 CFR 63.8(d)(3) except that the final sentence is replaced with the following sentence: ''The program of corrective action should be included in the plan required under 40 CFR 63.8(d)(2).''

f. Recordkeeping

We are proposing to revise the General Provisions table (Table 1) by adding an entry for 40 CFR 63.10(b)(2)(i) and including a ''no'' in column 3. Section 63.10(b)(2)(i) describes the recordkeeping requirements during startup and shutdown. These recording provisions are no longer necessary because the EPA is proposing that recordkeeping and reporting applicable to normal operations will apply to startup and shutdown. Special provisions applicable to startup and shutdown, such as a startup and shutdown plan, have been removed from the rule (with exceptions discussed below) thereby reducing the need for additional recordkeeping for startup and shutdown periods.

Records of startup and shutdown periods are proposed to be required under 40 CFR 63.866(c)(8) to help characterize minor exceptions to reporting. The EPA is proposing no reporting of wet scrubber pressure drop or ESP secondary current (or total secondary power) during periods of startup and shutdown because it is not feasible to meet operating limits established under normal operation for these parameters during startup and shutdown. Instead, the EPA is proposing that wet scrubber liquid flow rate (or fan amperage) and ESP secondary voltage be monitored during startup and shutdown.

We are also proposing to revise the General Provisions table (Table 1) by adding an entry for 40 CFR 63.10(b)(2)(ii) and including a ''no'' in column 3. Section 63.10(b)(2)(ii) describes the recordkeeping requirements during a malfunction. The EPA is proposing to add such requirements to 40 CFR 63.866(d). The regulatory text we are proposing to add differs from the General Provisions it is replacing in that the General Provisions requires the creation and retention of a record of the occurrence and duration of each malfunction of process, air pollution control, and monitoring equipment. The EPA is proposing that this requirement apply to any failure to meet an applicable standard and is requiring that the source record the date, time, and duration of the failure rather than the ''occurrence.'' The EPA is also proposing to add to 40 CFR 63.866(d) a requirement that sources keep records that include a list of the affected source or equipment and actions taken to minimize emissions, an estimate of the quantity of each regulated pollutant emitted over the emission limit for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing to require that sources keep records of this information to ensure that there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

We are also proposing to revise the General Provisions table (Table 1) by adding an entry for 40 CFR 63.10(b)(2)(iv) and (v) and including a ''no'' in column 3. When applicable, the provision requires sources to record actions taken during SSM events when actions were inconsistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required. The requirement previously applicable under 40 CFR 63.10(b)(2)(iv)(B) to record actions to minimize emissions and record corrective actions is now applicable by reference to 40 CFR 63.866(d).

We are also proposing to revise the General Provisions table (Table 1) by adding an entry for 40 CFR 63.10(c)(15) and including a ''no'' in column 3. The EPA is proposing that 40 CFR 63.10(c)(15) no longer apply. When applicable, the provision allows an owner or operator to use the affected source's SSM plan or records kept to satisfy the recordkeeping requirements of the SSM plan, specified in 40 CFR 63.6(e), to also satisfy the requirements of 40 CFR 63.10(c)(10) through (12). The EPA is proposing to eliminate this requirement because SSM plans would no longer be required, and, therefore, 40 CFR 63.10(c)(15) no longer serves any useful purpose for affected units.

g. Reporting

We are proposing to revise the General Provisions table (Table 1) entry for 40 CFR 63.10(d)(5) by re-designating it as 40 CFR 63.10(d)(5)(i) and changing the ''yes'' in column 3 to a ''no.'' Section 63.10(d)(5)(i) describes the periodic reporting requirements for startups, shutdowns, and malfunctions. To replace the General Provisions reporting requirement, the EPA is proposing to add reporting requirements to 40 CFR 63.867(c). The replacement language differs from the General Provisions requirement in that it eliminates periodic SSM reports as a stand-alone report. We are proposing language that requires sources that fail to meet an applicable standard at any time to report the information concerning such events in the semiannual report to be required under the proposed rule. We are proposing that the report must contain the number, date, time, duration, and the cause of such events (including unknown cause, if applicable), a list of the affected source or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions.

Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing this requirement to ensure that there is adequate information to determine compliance, to allow the EPA to determine the severity of the failure to meet an applicable standard, and to provide data that may document how the source met the general duty to minimize emissions during a failure to meet an applicable standard.

We will no longer require owners or operators to determine whether actions taken to correct a malfunction are consistent with an SSM plan, because plans would no longer be required. The proposed amendments, therefore, eliminate the cross reference to 40 CFR 63.10(d)(5)(i) that contains the description of the previously required SSM report format and submittal schedule from this section. These specifications are no longer necessary because the events will be reported in otherwise required reports with similar format and submittal requirements.

We are also proposing to revise the General Provisions table (Table 1) to add an entry for 40 CFR 63.10(d)(5)(ii) and include a ''no'' in column 3. Section 63.10(d)(5)(ii) describes an immediate report for startups, shutdown, and malfunctions when a source failed to meet an applicable standard, but did not follow the SSM plan. We will no longer require owners and operators to report when actions taken during a startup, shutdown, or malfunction were not consistent with an SSM plan, because plans would no longer be required.

2. 5-Year Periodic Emissions Testing

As part of an ongoing effort to improve compliance with various federal air emission regulations, the EPA reviewed the testing and monitoring requirements of 40 CFR part 63, subpart MM and is proposing the following change. The EPA is proposing to require facilities complying with the standards for chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills to conduct periodic air emissions performance testing, with the first of the periodic performance tests to be conducted within 3 years of the effective date of the revised standards and thereafter before the facilities renew their 40 CFR part 70 operating permits, but no longer than 5 years following the previous performance test. Periodic performance tests are already required by permitting authorities for some facilities. Further, the EPA believes that requiring periodic performance tests will help to ensure that control systems are properly maintained over time, thereby reducing the potential for acute emissions episodes. This proposal would require periodic air emissions testing for filterable PM once every 5 years for existing and new kraft and soda recovery furnaces, SDTs, and lime kilns and sulfite combustion units. In addition, this proposal would require air emissions testing for methanol once every 5 years for new kraft and soda recovery furnaces. This proposal would also require periodic air emissions testing for THC for existing and new semichemical combustion units.

3. Continuous Parameter Monitoring System (CPMS) Operating Limits

We are proposing to specify procedures for establishing operating limits based on data recorded by CPMS. The 40 CFR part 63, subpart MM emission standards are comprised of numerical emission limits, with compliance demonstrated through periodic performance tests, and operating limits such as opacity limits or continuously monitored parameter limits used to demonstrate ongoing compliance in between performance tests. Currently, the subpart MM regulatory text refers extensively to operating parameter ranges and is not as specific as more recent NESHAPs in specifying how operating limits are to be determined. Therefore, we are proposing language to clarify the procedures for establishing parameter limits.

As noted previously, we are proposing ESP parameter monitoring requirements for recovery furnaces and lime kilns with ESPs or combined ESP and wet scrubber controls. This proposal would require ESP parameters be recorded at least once every successive 15-minute period, and the recorded readings be reduced to semiannual averages for ESPs (i.e., where opacity monitoring requirements also apply) or 3-hour averages for ESPs followed by a wet scrubber. Similarly, this proposal would require wet scrubber parameters, including pressure drop across the scrubber (or fan amperage for certain SDT scrubbers) and scrubbing liquid flow rate, be recorded at least every 15-minutes and reduced to 3-hour averages. This proposal would require RTO temperature be recorded every 15 minutes and reduced to a 1-hour average for purposes of assessing when corrective action is required under 40 CFR 63.864(k)(1), and reduced to a 3-hour average under 40 CFR 63.864(k)(2) for purposes of assessing violations.

We are proposing that the ESP and wet scrubber operating limits be established as the average of the parameter values associated with each performance test run. For example, the proposal would require the recorded readings during each test run be averaged to arrive at the parameter value associated with three test runs, and the three values be averaged to arrive at the operating limit. The proposal would require these revised procedures be used beginning with the first periodic performance test proposed to be required under 40 CFR 63.865. Wet scrubbers and ESPs have minimum operating limits, such that the EPA would consider 3-hour average values below the minimum operating limit to be a monitoring exceedance to be reported under 40 CFR 63.867(c). Also, in the spirit of ensuring continuous compliance, we are proposing to eliminate the language in 40 CFR 63.864(k)(3) that allowed no more than one non-opacity monitoring exceedance to be attributed to any 24-hour period.

4. Reporting Frequency

Subpart MM of 40 CFR part 63 currently requires owners and operators of subpart MM facilities to submit quarterly excess emissions reports for monitoring exceedances and periods of noncompliance and semiannual reports when no excess emissions have occurred during the reporting period. These excess emission reports are typically submitted as a hard copy to the delegated authority, and reports in this form usually are not readily available for the EPA and public to analyze. The Agency is proposing that semiannual electronic reporting would provide ample data to assess a facility's performance with regard to the emission standards in subpart MM. The EPA is proposing that all excess emissions reports be submitted on a semiannual basis, to conform to the semiannual reporting frequency employed by the electronic reporting system discussed in the following section. The EPA requests comment on maintaining quarterly reporting for reports of monitoring exceedances and periods of noncompliance.

5. Electronic Reporting

The EPA is proposing that owners and operators of 40 CFR part 63, subpart MM facilities submit electronic copies of compliance reports, which include performance test reports, semiannual reports, and notifications, through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). Specifically, we are proposing that owners and operators submit performance test reports through the Electronic Reporting Tool (ERT) and submit notifications and semiannual reports through CEDRI. The EPA believes that the electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability, will further assist in the protection of public health and the environment, and will ultimately result in less burden on the regulated community. Under current requirements, paper reports are often stored in filing cabinets or boxes, which make the reports more difficult to obtain and use for data analysis and sharing. Electronic storage of such reports would make data more accessible for review, analyses, and sharing. Electronic reporting can also eliminate paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public.

In 2011, in response to Executive Order 13563, the EPA developed a plan [41] to periodically review its regulations to determine if they should be modified, streamlined, expanded, or repealed in an effort to make regulations more effective and less burdensome. The plan includes replacing outdated paper reporting with electronic reporting. In keeping with this plan and the White House's Digital Government Strategy,[42] in 2013 the EPA issued an agency-wide policy specifying that new regulations will require reports to be electronic to the maximum extent possible. By requiring electronic submission of specified reports in this proposed rule, the EPA is taking steps to implement this policy.

The EPA Web site that stores the submitted electronic data, WebFIRE, will be easily accessible to everyone and will provide a user-friendly interface that any stakeholder could access. By making data readily available, electronic reporting increases the amount of data that can be used for many purposes. One example is the development of emissions factors. An emissions factor is a representative value that attempts to relate the quantity of a pollutant released to the atmosphere with an activity associated with the release of that pollutant (e.g., kilograms of particulate emitted per megagram of coal burned). Such factors facilitate the estimation of emissions from various sources of air pollution and are an important tool in developing emissions inventories, which in turn are the basis for numerous efforts, including trends analysis, regional, and local scale air quality modeling, regulatory impact assessments, and human exposure modeling. Emissions factors are also widely used in regulatory applicability determinations and in permitting decisions.

The EPA has received feedback from stakeholders asserting that many of the EPA's emissions factors are outdated or not representative of a particular industry emission source. While the EPA believes that the emissions factors are suitable for their intended purpose, we recognize that the quality of emissions factors varies based on the extent and quality of underlying data. We also recognize that emissions profiles on different pieces of equipment can change over time due to

[41] *Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations,* August 2011. Available at *https://www.epa.gov/sites/roduction/files/2015-09-/documents/eparetroreviewplan-aug2011_0.pdf.*

[42] *Digital Government: Buildiing a 21st Century Platform to Better Serve the American People,* May 2012. Available at *http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy/pdf.*

a number of factors (fuel changes, equipment improvements, industry work practices), and it is important for emissions factors to be updated to keep up with these changes. The EPA is currently pursuing emissions factor development improvements that include procedures to incorporate the source test data that we are proposing be submitted electronically. By requiring the electronic submission of the reports identified in this proposed action, the EPA would be able to access and use the submitted data to update emissions factors more quickly and efficiently, creating factors that are characteristic of what is currently representative of the relevant industry sector. Likewise, an increase in the number of test reports used to develop the emissions factors will provide more confidence that the factor is of higher quality and representative of the whole industry sector.

Additionally, by making the records, data and reports addressed in this proposed rulemaking readily available, the EPA, the regulated community and the public will benefit when the EPA conducts periodic reviews of its rules. As a result of having performance test reports and air emission reports readily accessible, our ability to carry out comprehensive reviews will be increased and achieved within a shorter period of time. These data will provide useful information on control efficiencies being achieved and maintained in practice within a source category and across source categories for regulated sources and pollutants. These reports can also be used to inform the technology-review process by providing information on improvements to add-on control technology and new control technology.

Under an electronic reporting system, the EPA's Office of Air Quality Planning and Standards (OAQPS) would have air emissions and performance test data in hand; OAQPS would not have to collect these data from the EPA Regional offices or from delegated authorities or industry sources in cases where these reports are not submitted to the EPA Regional offices. Thus, we anticipate fewer or less substantial ICRs in conjunction with prospective CAA-required technology and risk-based reviews may be needed. We expect this to result in a decrease in time spent by industry to respond to data collection requests. We also expect the ICRs to contain less extensive stack testing provisions, as we will already have stack test data electronically. Reduced testing requirements would be a cost savings to industry. The EPA should also be able to conduct these required reviews more quickly, as OAQPS will not have to include the ICR collection time in the process or spend time collecting reports from the EPA Regional Offices. While the regulated community may benefit from a reduced burden of ICRs, the general public benefits from the Agency's ability to provide these required reviews more quickly, resulting in increased public health and environmental protection.

Electronic reporting could minimize submission of unnecessary or duplicative reports in cases where facilities report to multiple government agencies and the agencies opt to rely on the EPA's electronic reporting system to view report submissions. Where delegated authorities continue to require a paper copy of these reports and will accept a hard copy of the electronic report, facilities will have the option to print paper copies of the electronic reporting forms to submit to the delegated authorities, and, thus, minimize the time spent reporting to multiple agencies. Additionally, maintenance and storage costs associated with retaining paper records could likewise be minimized by replacing those records with electronic records of electronically submitted data and reports.

Delegated authorities could benefit from more streamlined and automated review of the electronically submitted data. For example, because the performance test data would be readily-available in a standard electronic format, delegated authorities would be able to review reports and data electronically rather than having to conduct a review of the reports and data manually. Having reports and associated data in electronic format will facilitate review through the use of software ''search'' options, as well as the downloading and analyzing of data in spreadsheet format. Additionally, delegated authorities would benefit from the reported data being accessible to them through the EPA's electronic reporting system wherever and whenever they want or need access (as long as they have access to the Internet). The ability to access and review air emission report information electronically will assist delegated authorities to more quickly and accurately determine compliance with the applicable regulations, potentially allowing a faster response to violations which could minimize harmful air emissions. This benefits both delegated authorities and the general public.

The proposed electronic reporting of data is consistent with electronic data trends (*e.g.,* electronic banking and income tax filing). Electronic reporting of environmental data is already common practice in many media offices at the EPA. The changes being proposed in this rulemaking are needed to continue the EPA's transition to electronic reporting.

As noted above, we are proposing that 40 CFR part 63, subpart MM performance test reports be submitted through the EPA's ERT. All of the test methods listed under subpart MM are currently supported by the ERT, with the exception of Method 308 in 40 CFR part 63, appendix A. The proposal would require that performance test results collected using test methods that are not supported by the ERT as listed on the EPA's ERT Web site at the time of the test be submitted in portable document format (PDF) using the attachment module of the ERT.

In addition to electronically reporting the results of performance tests, we are proposing the requirement to electronically submit notifications and the semiannual excess emissions report and/or summary report required in 40 CFR 63.867. The proposal would require the owner or operator use the appropriate electronic form or spreadsheet template in CEDRI for the subpart or an alternate electronic file format consistent with the form's extensible markup language (XML) schema. If neither the reporting form nor the spreadsheet template specific to the subpart are available at the time that the report is due, the owner or operator would upload an electronic copy of the report in CEDRI. The owner or operator would begin submitting reports electronically using the reporting form or spreadsheet template with the next report that is due, once the electronic form or template has been available for at least 90 days. The EPA is currently working to develop the forms and a spreadsheet template for subpart MM. We are specifically taking comment on the content, layout, and overall design of the forms and spreadsheet template, which are discussed in a memorandum in the docket titled *Electronic Reporting for Subpart MM Excess Emission Reports.*

As part of this review, we have specified in 40 CFR 63.867 the reporting requirements from the 40 CFR part 63 General Provisions for the excess emissions and summary reports. We believe that specifying the General Provision reporting requirements for the proposed semiannual reports in 40 CFR part 63, subpart MM, will help eliminate confusion as to which report is submitted (*e.g.*, full excess emissions report or summary report) and the content of the required report. Based on the criteria specified in the General Provisions, subpart MM requires a full excess emissions report under any of the following three conditions: (1) The total duration of monitoring exceedances is one percent or more of the total reporting period operating time, or (2) the total continuous monitoring system (CMS) downtime is five percent or more of the total reporting period operating time, or (3) any violations according to 40 CFR 63.864(k)(2) occurred. Subpart MM requires only an abbreviated summary report when none of the three conditions apply for the semiannual reporting period.

As stated in 40 CFR 63.867(a), the proposal also requires that notifications be reported electronically though CEDRI. Currently, there are no templates for notifications in CEDRI for this subpart. Therefore, the owner or operator must submit their notifications in PDF. Examples of such notifications include (but are not limited to) the following: Initial notifications, notifications of compliance status, notifications of a performance test, notifications of CMS performance evaluation, and notifications of opacity and visible emissions observations.

6. Incorporation by Reference Under 1 CFR part 51

The EPA is proposing regulatory text that includes incorporation by reference (IBR). In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the following document described in the amendments to 40 CFR 63.14:

- EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, September 1997, IBR approved for 40 CFR 63.864(e).

This document provides guidance on the use of triboelectric monitors as fabric filter bag leak detectors. The document includes fabric filter and monitoring system descriptions; guidance on monitor selection, installation, setup, adjustment, and operation; and quality assurance procedures. The EPA has made, and will continue to make, this document generally available electronically through *http://www.regulations.gov* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information). In addition, this document is available on the EPA Technical Air Pollution Resources Emission Measurement Center Web page (*https://www.epa.gov/emc*) under Continuous Emission Monitoring.

7. Technical and Editorial Changes

The following lists additional changes that address technical and editorial corrections:

- Made revisions throughout 40 CFR part 63, subpart MM, to clarify the location in 40 CFR part 60 of applicable EPA test methods;
- Made revisions throughout 40 CFR part 63, subpart MM, to update the facility name for Cosmo Specialty Fibers;
- Revised the definitions section in 40 CFR 63.861 to:
  - Remove the definition for ''black liquor gasification'' and remove reference to black liquor gasification in the definitions for ''kraft recovery furnace,'' ''recovery furnace,'' ''semichemical combustion unit,'' and ''soda recovery furnace'';
  - Remove the SSM exemption from the definition for ''modification'';
  - Clarify that the definition for ''particulate matter'' refers to filterable PM;
  - Removed reference to use of one-half of the method detection limit for non-detect Method 29 measurements within the definition of ''hazardous air pollutant (HAP) metals'' because the full detection limit in emission measurements is now typically used for compliance determination in NESHAPs, with the limited exception of TEQ determination for dioxins and furans; and
  - Remove the definition for ''startup'' that pertains to the former black liquor gasification system at Georgia-Pacific's facility in Big Island, Virginia.
- Corrected misspelling in 40 CFR 63.862(c).
- Revised multiple sections (40 CFR 63.863, 63.866, and 63.867) to remove reference to the former smelters and former black liquor gasification system at Georgia-Pacific's facility in Big Island, Virginia.
- Revised the monitoring requirements section in 40 CFR 63.864 to:
  - Add reference to Performance Specification 1 (PS–1) in COMS monitoring provisions;
  - Add IBR for bag leak detection systems;
  - Specify written procedures for CMS recording frequency and reducing data into averages; and
  - Clarify ongoing compliance provisions to address startup and shutdown periods when certain parameters cannot be met.
- Revised the performance test requirements section in 40 CFR 63.865 to specify the conditions for conducting performance tests and to revise the ambient O_2 concentration in Equations 7 and 8 from 21 percent to 20.9 percent to bring 40 CFR part 63, subpart MM, in line with the rest of the NESHAPs.
- Revised the recordkeeping requirements section in 40 CFR 63.866 to include the requirement to record information on failures to meet the applicable standard.
- Revised the terminology in the delegation of authority section in 40 CFR 63.868 to match the definitions in 40 CFR 63.90.
- Revised the General Provisions applicability table (Table 1 to subpart MM of part 63) to align with those sections of the General Provisions that have been amended or reserved over time.

E. What compliance dates are we proposing?

The compliance date for the revisions we are proposing here is 1 year after the date of publication of the final rule in the **Federal Register**, with the exception of the following: (1) Facilities must conduct the first of the 5-year periodic performance tests within 3 years of the effective date of the standards (that is, the date 3 years after the date of publication of the final rule in the **Federal Register**), and must conduct the subsequent periodic performance tests before renewing the facility's 40 CFR part 70 operating permit, but no longer than 5 years following the previous performance test; and (2) facilities must submit performance test data through the ERT within 60 days after the date of completing each performance test.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

There are currently 108 major source pulp and paper mills operating in the United States that conduct chemical recovery combustion operations, including 97 kraft pulp mills, 1 soda pulp mill, 3 sulfite pulp mills, and 7 stand-alone semichemical pulp mills. The 40 CFR part 63, subpart MM, affected source regulated at kraft or soda pulp mills is each existing chemical recovery system, defined as all existing DCE and NDCE recovery furnaces, SDTs, and lime kilns. The DCE recovery furnace system is defined as the DCE recovery furnace and any BLO system, if present, at the pulp mill. New affected sources at kraft or soda pulp mills include each new NDCE or DCE recovery furnace and associated SDT, and each new lime kiln. Subpart MM affected sources also include each new or existing chemical recovery combustion unit located at a sulfite pulp mill or at a stand-alone semichemical pulp mill.

B. What are the air quality impacts?

At the current level of control, emissions of HAPs (HAP metals, acid gases, and gaseous organic HAP) are approximately 11,600 tpy. Current emissions of PM (a surrogate pollutant for HAP metals) and TRS (emitted by the same mechanism as gaseous organic HAP) are approximately 23,200 tpy and 3,600 tpy, respectively.

The proposed amendments will require an estimated 108 mills to conduct periodic testing for their chemical recovery combustion operations, 96 mills equipped with ESP controls to meet more stringent opacity limits and monitoring allowances and conduct ESP parameter monitoring, and all 108 major sources with equipment subject to the 40 CFR part 63, subpart MM standards to operate without the SSM exemption. The EPA estimates that the proposed changes to the opacity limits and monitoring allowances will reduce PM emissions by approximately 235 tpy and $PM_{2.5}$ emissions by approximately 112 tpy. We were unable to quantify the specific emissions reductions associated with periodic emissions testing or eliminating the SSM exemption, and we expect no emissions reductions with ESP parameter monitoring. However, periodic testing will tend to reduce emissions by providing incentive for facilities to maintain their control systems and make periodic adjustments to ensure peak performance. Eliminating the SSM exemption will reduce emissions by requiring facilities to meet the applicable standard during SSM periods.

Indirect or secondary air emissions impacts are impacts that would result from the increased electricity usage associated with the operation of control devices (i.e., increased secondary emissions of criteria pollutants from power plants). Energy impacts consist of the electricity and steam needed to operate control devices and other equipment that would be required under this proposed rule. The EPA estimates that the proposed changes to the opacity limits and monitoring allowances will result in energy impacts of 106,000 million British thermal units per year and criteria pollutant emissions of 29 tpy (which includes PM, carbon monoxide, nitrogen oxides, and sulfur dioxide). The EPA expects no secondary air emissions impacts or energy impacts from the other proposed requirements.

Section IV.C of this preamble presents estimates of the air quality impacts associated with the regulatory options that were not selected for inclusion in this proposed rule. For further information, see the memorandum titled, Costs/Impacts of the *Subpart MM Residual Risk and Technology Review*, in the docket for this action.

C. What are the cost impacts?

Subpart MM of 40 CFR part 63 mills will incur costs to meet more stringent opacity limits and monitoring allowances, conduct periodic testing, and perform new ESP parameter monitoring. Costs associated with elimination of the startup and shutdown exemption were estimated as part of the reporting and recordkeeping costs and include time for re-evaluating previously developed SSM record systems. The EPA estimates the nationwide capital costs associated with the new testing and monitoring requirements to be $48 million. The EPA estimates the total nationwide annualized costs associated with these new requirements to be $13 million per year. Section IV.C of this preamble presents cost estimates associated with the regulatory options that were not selected for inclusion in this rule. For further information, see the memorandum titled *Costs/Impacts of the Subpart MM Residual Risk and Technology Review,* in the docket for this action.

D. What are the economic impacts?

The economic impact analysis is designed to inform decision makers about the potential economic consequences of a regulatory action. For the current proposal, the EPA performed a partial-equilibrium analysis of national pulp and paper product markets to estimate potential paper product market and consumer and producer welfare impacts of the proposed regulatory options.

Across proposed regulatory options, the EPA estimates market-level changes in the paper and paperboard markets to be insignificant. For the proposed option, the EPA predicts national-level weighted average paper and paperboard prices to increase about 0.01 percent, but predicts total quantities to decrease less than 0.01 percent.

In addition, the EPA performed a screening analysis for impacts on small businesses by comparing estimated annualized engineering compliance costs at the firm-level to firm sales. The screening analysis found that the ratio of compliance cost to firm revenue falls below 1-percent for the three small companies likely to be affected by the proposal. For small firms, the minimum and maximum cost-to-sales ratios are less than 1 percent.

More information and details of this analysis is provided in the technical document titled *Economic Impact Analysis for Proposed Revisions to the National Emissions Standards for Hazardous Air Pollutants, Subpart MM, for the Pulp and Paper Industry*, which is available in the docket for this proposed rule (Docket ID No. EPA–HQ–OAR–2014–0741).

E. What are the benefits?

The EPA estimates the proposed changes to the opacity limits and monitoring allowances at the 16 impacted mills will reduce PM emissions by approximately 235 tpy and $PM_{2.5}$ emissions by approximately 112 tpy. Because these proposed amendments are not considered economically significant, as defined by Executive Order 12866, we did not monetize the benefits of reducing these emissions. This does not mean that there are no benefits associated with the reduction in metal HAPs from this rule. We expect that these avoided emissions will reduce health effects associated with exposure to air pollution, and we provide below a qualitative description of benefits associated with reducing $PM_{2.5}$. In addition, we anticipate the specific control technologies associated with these proposed amendments will result in minor disbenefits from additional energy consumption.

Directly emitted particles are precursors to secondary formation of $PM_{2.5}$. Controls installed to reduce HAP emissions would also reduce ambient concentrations of $PM_{2.5}$. Reducing exposure to $PM_{2.5}$ is associated with significant human health benefits, including avoiding mortality and morbidity from cardiovascular and respiratory illnesses. Researchers have associated $PM_{2.5}$ exposure with adverse health effects in numerous toxicological, clinical, and epidemiological studies (U.S. EPA, 2009).[43] When adequate data and resources are available and a regulatory impact analysis is required, the EPA generally quantifies several health effects associated with exposure to $PM_{2.5}$ (*e.g.*, U.S. EPA, 2012).[44] These

[43] U.S. Environmental Protection agency (U.S. EPA). 2009. *Integrated Science Assessment for Particulate Matter (Final Report).* EPA–600–R–08–139F. National Center for Environmental Assessment—RTP Division. Available on the Internet at *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=216546.*

[44] U.S. Environmental Protection Agency (U.S. EPA). 2012. *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter.* Office of Air and Radiation, Research Triange Park, NC. Available on the Internet at *https://www3.epa.gov/thn/ecas/regdata/RIAs/finalria.pdf* and *https://www3.epa.gov/ttnecas1/regdata/RIAs/PMRIACombinedFile_Bookmarked.pdf.*

health effects include premature mortality for adults and infants, cardiovascular morbidities such as heart attacks, hospital admissions, and respiratory morbidities such as asthma attacks, acute bronchitis, hospital and emergency department visits, work loss days, restricted activity days, and respiratory symptoms. The scientific literature also suggests that exposure to $PM_{2.5}$ is associated with adverse effects on birth weight, pre-term births, pulmonary function, and other cardiovascular and respiratory effects (U.S. EPA, 2009), but the EPA has not quantified these impacts in its benefits analyses.

VI. Request for Comments

We solicit comments on all aspects of this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR Web site at: *http://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR Web site, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.*, commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.*, performance test reports, material balance calculations, etc.).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2014–0741 (through one of the methods described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the RTR Web site at: *http://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

VIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was therefore not submitted to OMB for review.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The ICR document that the EPA prepared has been assigned EPA ICR number 1805.08. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The information collection requirements are not enforceable until OMB approves them. The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are essential in determining compliance and mandatory for all operators subject to national emissions standards. These recordkeeping and reporting requirements are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart B.

We are proposing changes to the paperwork requirements for 40 CFR part 63, subpart MM, in the form of eliminating the SSM reporting and SSM plan requirements, adding periodic emissions testing for selected process equipment, revising opacity monitoring provisions, adding parameter monitoring for ESPs, changing the frequency of all excess emissions reports to semiannual, and requiring electronic submittal of all compliance reports (including performance test reports).

Respondents/affected entities: Respondents include chemical pulp mills operating equipment subject to 40 CFR part 63, subpart MM.

Respondent's obligation to respond: Mandatory (authorized by section 114 of the CAA).

Estimated number of respondents: 108.

Frequency of response: The frequency of responses varies depending on the burden item. Responses include initial notifications, reports of periodic performance tests, and semiannual compliance reports.

Total estimated burden: The annual recordkeeping and reporting burden for this information collection, averaged over the first 3 years of this ICR, is estimated to total 139,600 labor hours per year. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $17.7 million per year, including $14.4 million per year in labor costs and $3.29 million per year in annualized capital and operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov*, Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than January 30, 2017. The EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. The EPA estimates that all affected small entities will have annualized costs of less than 1 percent of their sales. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities. For more information on the small entity impacts associated with this proposed rule, please refer to the Economic Impact and Small Business Analyses in the public docket.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. This rule imposes requirements on owners and operators of kraft, soda, sulfite, and stand-alone semichemical pulp mills and not tribal governments. The EPA does not know of any pulp mills owned or operated by Indian tribal governments, or located within tribal lands. However, if there are any, the effect of this rule on communities of tribal governments would not be unique or disproportionate to the effect on other communities. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections III and IV of this preamble and further documented in the risk report, titled *Residual Risk Assessment for Pulp Mill Combustion Sources in Support of the December 2016 Risk and Technology Review Proposed Rule*, in the docket for this action.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR part 51

This action involves technical standards. While the EPA identified ASTM D6784–02 (Reapproved 2008), ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)'' as being potentially applicable, the Agency does not propose to use it. The use of this voluntary consensus standard would be impractical because this standard is only acceptable as an alternative to the portion of Method 29 for mercury, and mercury is not regulated under 40 CFR part 63, subpart MM.

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

The EPA believes that this action will not have potential disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in section IV.B of this preamble and the technical report titled *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Pulp Mill Combustion Sources*, which is located in the public docket for this action.

We examined the potential for any EJ issues that might be associated with the source category, by performing a demographic analysis of the population close to the facilities. In this analysis, we evaluated the distribution of HAP-related cancer and non-cancer risks from the 40 CFR part 63, subpart MM source category across different social, demographic, and economic groups within the populations living near facilities identified as having the highest risks. The methodology and the results of the demographic analyses are included in a technical report, *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Pulp Mill Combustion Sources*, available in the docket for this action.

The results of the 40 CFR part 63, subpart MM source category demographic analysis indicate that emissions from the source category expose approximately 7,600 people to a cancer risk at or above 1-in-1 million and no one exposed to a chronic non-cancer TOSHI greater than 1. The specific demographic results indicate that the percentage of the population potentially impacted by emissions is greater than its corresponding national percentage for the minority population (33 percent for the source category compared to 28 percent nationwide), the African American population (28 percent for the source category compared to 13 percent nationwide) and for the population over age 25 without a high school diploma (18 percent for the source category compared to 15 percent nationwide). The proximity results (irrespective of risk) indicate that the population percentages for certain demographic categories within 5 km of source category emissions are greater than the corresponding national percentage for those same demographics. The following demographic percentages for populations residing within close proximity to facilities with pulp mill combustion sources are higher than the corresponding nationwide percentage: African American, ages 65 and up, over age 25 without a high school diploma, and below the poverty level.

The risks due to HAP emissions from this source category are low for all populations (*e.g.*, inhalation cancer risks are less than 4-in-1 million for all populations and non-cancer hazard indices are less than 1). Furthermore, we do not expect this proposal to achieve significant reductions in HAP emissions. Therefore, we conclude that this proposal will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. However, this proposal, if finalized, will provide additional benefits to these demographic groups by improving the compliance, monitoring, and implementation of the NESHAP.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Pulp and paper mills, Reporting and recordkeeping requirements.

Dated: December 13, 2016.

Gina McCarthy,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

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

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

Subpart A—[Amended]

■ 2. Section 63.14 is amended by revising paragraph (m)(3) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(m) * * *

(3) EPA–454/R–98–015, Office of Air Quality Planning and Standards (OAQPS), Fabric Filter Bag Leak Detection Guidance, September 1997, IBR approved for §§ 63.548(e), 63.864(e), 63.7525(j), 63.8450(e), 63.8600(e), and 63.11224(f).

Subpart MM—[Amended]

■ 3. Section 63.860 is amended by revising paragraphs (b)(5) and (7) and adding paragraph (d) to read as follows:

§ 63.860 Applicability and designation of affected source.

* * * * *

(b) * * *

(5) Each new or existing sulfite combustion unit located at a sulfite pulp mill, except such existing units at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. AP–10).

* * * * *

(7) The requirements of the alternative standard in § 63.862(d) apply to the hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14).

* * * * *

(d) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. The general duty to minimize emissions does not require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether a source is operating in compliance with operation and maintenance requirements will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

■ 4. Section 63.861 is amended by:

■ a. Removing the definitions for ''Black liquor gasification'' and ''Startup'';

■ b. Revising the definitions for ''Hazardous air pollutants (HAP) metals,'' ''Hog fuel dryer,'' ''Kraft recovery furnace,'' ''Modification,'' ''Particulate matter (PM),'' ''Recovery furnace,'' ''Semichemical combustion unit,'' ''Soda recovery furnace,'' and ''Total hydrocarbons (THC).''

The revisions read as follows:

§ 63.861 Definitions.

* * * * *

Hazardous air pollutants (HAP) metals means the sum of all emissions of antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, and selenium as measured by EPA Method 29 (40 CFR part 60, appendix A–8).

Hog fuel dryer means the equipment that combusts fine particles of wood waste (hog fuel) in a fluidized bed and directs the heated exhaust stream to a rotary dryer containing wet hog fuel to be dried prior to combustion in the hog fuel boiler at Cosmo Specialty Fibers' Cosmopolis, Washington facility. The hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility is Emission Unit no. HD–14.

* * * * *

Kraft recovery furnace means a recovery furnace that is used to burn black liquor produced by the kraft pulping process, as well as any recovery furnace that burns black liquor produced from both the kraft and semichemical pulping processes, and includes the direct contact evaporator, if applicable.

* * * * *

Modification means, for the purposes of § 63.862(a)(1)(ii)(E)(1), any physical change (excluding any routine part replacement or maintenance) or operational change that is made to the air pollution control device that could result in an increase in PM emissions.

* * * * *

Particulate matter (PM) means total filterable particulate matter as measured by EPA Method 5 (40 CFR part 60, appendix A–3), EPA Method 17 (§ 63.865(b)(1)) (40 CFR part 60, appendix A–6), or EPA Method 29 (40 CFR part 60, appendix A–8).

* * * * *

Recovery furnace means an enclosed combustion device where concentrated black liquor produced by the kraft or soda pulping process is burned to recover pulping chemicals and produce steam.

* * * * *

Semichemical combustion unit means any equipment used to combust or pyrolyze black liquor at stand-alone semichemical pulp mills for the purpose of chemical recovery.

* * * * *

Soda recovery furnace means a recovery furnace used to burn black liquor produced by the soda pulping process and includes the direct contact evaporator, if applicable.

* * * * *

Total hydrocarbons (THC) means the sum of organic compounds measured as carbon using EPA Method 25A (40 CFR part 60, appendix A–7).

■ 5. Section 63.862 is amended by revising paragraphs (c)(1) and (d) to read as follows:

§ 63.862 Standards.

* * * * *

(c) *Standards for gaseous organic HAP.* (1) The owner or operator of any new recovery furnace at a kraft or soda pulp mill must ensure that the concentration or gaseous organic HAP, as measured by methanol, discharged to the atmosphere is no greater than 0.012 kg/Mg (0.025 lb/ton) of black liquor solids fired.

* * * * *

(d) *Alternative standard.* As an alternative to meeting the requirements of paragraph (a)(2) of this section, the owner or operator of the existing hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14) must ensure that the mass of PM in the exhaust gases discharged to the atmosphere from the hog fuel dryer is less than or equal to 4.535 kilograms per hour (kg/hr) (10.0 pounds per hour (lb/hr)).

■ 6. Section 63.863 is amended by revising paragraph (c) to read as follows:

§ 63.863 Compliance dates.

* * * * *

(c) The owner or operator of an existing or new affected source or process unit must comply with the revised requirements published on [insert date of publication of final rule in the **Federal Register**] no later than [insert date 1 year after date of publication of final rule in the **Federal Register**], with the exception of the following:

(1) The first of the 5-year periodic performance tests must be conducted within 3 years of the effective date of the revised standards, by [insert date 3 years after date of publication of final rule in the **Federal Register**], and thereafter before renewing the facility's 40 CFR part 70 operating permit, but no longer than 5 years following the previous performance test; and

(2) The date to submit performance test data through the ERT is within 60 days after the date of completing each performance test.

■ 7. Section 63.864 is revised to read as follows:

§ 63.864 Monitoring requirements.

(a)–(c) [Reserved]

(d) *Continuous opacity monitoring system (COMS).* The owner or operator of each affected kraft or soda recovery furnace or lime kiln equipped with an ESP must install, calibrate, maintain, and operate a COMS in accordance with Performance Specification 1 (PS–1) in appendix B to 40 CFR part 60 and the provisions in §§ 63.6(h) and 63.8 and paragraphs (d)(1) through (5) of this section.

(1)–(2) [Reserved]

(3) As specified in § 63.8(c)(4)(i), each COMS must complete a minimum of one cycle of sampling and analyzing for each successive 10-second period and one cycle of data recording for each successive 6-minute period.

(4) As specified in § 63.8(g)(2), each 6-minute COMS data average must be calculated as the average of 36 or more data points, equally spaced over each 6-minute period.

(5) As specified in § 63.8(g)(4), each 6-minute COMS data average should be rounded to the nearest 1-percent opacity.

(e) *Continuous parameter monitoring system (CPMS).* For each CPMS required in this section, the owner or operator of each affected source or process unit must meet the requirements in paragraphs (e)(1) through (14) of this section.

(1) For any kraft or soda recovery furnace or lime kiln using an ESP emission control device, the owner or operator must use the continuous parameter monitoring devices specified in paragraphs (e)(1)(i) and (ii) of this section to determine and record parameters at least once every successive 15-minute period.

(i) A monitoring device for the continuous measurement of the secondary voltage of each ESP collection field.

(ii) A monitoring device for the continuous measurement of the secondary current of each ESP collection field.

(iii) Total secondary power may be calculated as the product of the secondary voltage and secondary current measurements for each ESP collection field and used to demonstrate compliance as an alternative to the secondary voltage and secondary current measurements.

(2) For any kraft or soda recovery furnace or lime kiln using an ESP followed by a wet scrubber, the owner or operator must use the continuous parameter monitoring devices specified in paragraphs (e)(1) and (10) of this section. The opacity monitoring system specified in paragraph (d) of this section is not required for combination ESP/wet scrubber control device systems.

(3)–(9) [Reserved]

(10) The owner or operator of each affected kraft or soda recovery furnace, kraft or soda lime kiln, sulfite combustion unit, or kraft or soda smelt dissolving tank equipped with a wet scrubber must install, calibrate, maintain, and operate a CPMS that can be used to determine and record the pressure drop across the scrubber and the scrubbing liquid flow rate at least once every successive 15-minute period using the procedures in § 63.8(c), as well as the procedures in paragraphs (e)(10)(i) and (ii) of this section:

(i) A monitoring device used for the continuous measurement of the pressure drop of the gas stream across the scrubber must be certified by the manufacturer to be accurate to within a gage pressure of ±500 pascals (±2 inches of water gage pressure); and

(ii) A monitoring device used for continuous measurement of the scrubbing liquid flow rate must be certified by the manufacturer to be accurate within ±5 percent of the design scrubbing liquid flow rate.

(iii) As an alternative to pressure drop measurement under paragraph (e)(3)(i) of this section, a monitoring device for measurement of fan amperage may be used for smelt dissolving tank dynamic scrubbers that operate at ambient pressure or for low-energy entrainment scrubbers where the fan speed does not vary.

(11) The owner or operator of each affected semichemical combustion unit equipped with an RTO must install, calibrate, maintain, and operate a CPMS that can be used to determine and record the operating temperature of the RTO at least once every successive 15-minute period using the procedures in § 63.8(c). The monitor must compute and record the operating temperature at the point of incineration of effluent gases that are emitted using a temperature monitor accurate to within ±1 percent of the temperature being measured.

(12) The owner or operator of the affected hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14) must meet the requirements in paragraphs (e)(12)(i) through (xi) of this section for each bag leak detection system.

(i) The owner or operator must install, calibrate, maintain, and operate each triboelectric bag leak detection system according to EPA–454/R–98–015, ''Fabric Filter Bag Leak Detection Guidance'' (incorporated by reference—see § 63.14). This document is available from the U.S. Environmental Protection Agency (U.S. EPA); Office of Air Quality Planning and Standards; Emissions, Monitoring and Analysis Division; Emission Measurement Center, MD–D205–02, Research Triangle Park, NC 27711. This document is also available on the EPA Technical Air Pollution Resources Emission Measurement Center Web page under Continuous Emission Monitoring. The owner or operator must install, calibrate, maintain, and operate other types of bag leak detection systems in a manner consistent with the manufacturer's written specifications and recommendations.

(ii) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(iii) The bag leak detection system sensor must provide an output of relative PM loadings.

(iv) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor.

(v) The bag leak detection system must be equipped with an audible alarm system that will sound automatically when an increase in relative PM emissions over a preset level is detected. The alarm must be located where it is easily heard by plant operating personnel.

(vi) For positive pressure fabric filter systems, a bag leak detector must be installed in each baghouse compartment or cell.

(vii) For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(ix) The baseline output must be established by adjusting the range and the averaging period of the device and establishing the alarm set points and the alarm delay time according to section 5.0 of the ''Fabric Filter Bag Leak Detection Guidance'' (incorporated by reference—see § 63.14).

(x) Following initial adjustment of the system, the sensitivity or range, averaging period, alarm set points, or alarm delay time may not be adjusted except as detailed in the site-specific monitoring plan. In no case may the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless such adjustment follows a complete fabric filter inspection which demonstrates that the fabric filter is in good operating condition, as defined in section 5.2 of the ''Fabric Filter Bag Leak Detection Guidance,'' (incorporated by reference—see § 63.14). Record each adjustment.

(xi) The owner or operator must record the results of each inspection, calibration, and validation check.

(13) The owner or operator of each affected source or process unit that uses an ESP, wet scrubber, RTO, or fabric filter may monitor alternative control device operating parameters subject to prior written approval by the Administrator. The request for approval must also include the manner in which the parameter operating limit is to be set.

(14) The owner or operator of each affected source or process unit that uses an air pollution control system other than an ESP, wet scrubber, RTO, or fabric filter must provide to the Administrator an alternative monitoring request that includes the site-specific monitoring plan described in paragraph (a) of this section, a description of the control device, test results verifying the performance of the control device, the appropriate operating parameters that will be monitored, how the operating limit is to be set, and the frequency of measuring and recording to establish continuous compliance with the standards. The alternative monitoring request is subject to the Administrator's approval. The owner or operator of the affected source or process unit must install, calibrate, operate, and maintain the monitor(s) in accordance with the alternative monitoring request approved by the Administrator. The owner or operator must include in the information submitted to the Administrator proposed performance specifications and quality assurance procedures for the monitors. The Administrator may request further information and will approve acceptable test methods and procedures. The owner or operator must monitor the parameters as approved by the Administrator using the methods and procedures in the alternative monitoring request.

(f) *Data quality assurance.* The owner or operator shall keep CMS data quality assurance procedures consistent with the requirements in § 63.8(d)(1) and (2) on record for the life of the affected source or until the affected source is no longer subject to the provisions of this part, to be made available for inspection, upon request, by the Administrator. If the performance evaluation plan in § 63.8(d)(2) is revised, the owner or operator shall keep previous (*i.e.,* superseded) versions of the performance evaluation plan on record to be made available for inspection, upon request, by the Administrator, for a period of 5 years after each revision to the plan. The program of corrective action should be included in the plan required under § 63.8(d)(2).

(g) *Gaseous organic HAP.* The owner or operator of each affected source or process unit complying with the gaseous organic HAP standard of § 63.862(c)(1) through the use of an NDCE recovery furnace equipped with a dry ESP system is not required to conduct any continuous monitoring to demonstrate compliance with the gaseous organic HAP standard.

(h) *Monitoring data.* As specified in § 63.8(g)(5), monitoring data recorded during periods of unavoidable CMS breakdowns, out-of-control periods, repairs, maintenance periods, calibration checks, and zero (low-level) and high level adjustments must not be included in any data average computed under this part.

(i) [Reserved]

(j) *Determination of operating limits.* (1) During the initial or periodic performance test required in § 63.865, the owner or operator of any affected source or process unit must establish operating limits for the monitoring parameters in paragraphs (e)(1) and (2) and (e)(10) through (14) of this section, as appropriate; or

(2) The owner or operator may base operating limits on values recorded during previous performance tests or conduct additional performance tests for the specific purpose of establishing operating limits, provided that test data used to establish the operating limits are or have been obtained using the test methods required in this subpart. The owner or operator of the affected source or process unit must certify that all control techniques and processes have not been modified subsequent to the testing upon which the data used to establish the operating parameter limits were obtained.

(3) The owner or operator of an affected source or process unit may establish expanded or replacement operating limits for the monitoring parameters listed in paragraphs (e)(1) and (2) and (e)(10) through (14) of this section and established in paragraph (j)(1) or (2) of this section during subsequent performance tests using the test methods in § 63.865.

(4) The owner or operator of the affected source or process unit must continuously monitor each parameter and determine the arithmetic average value of each parameter during each performance test. Multiple performance tests may be conducted to establish a range of parameter values.

(5) New, expanded, or replacement operating limits for the monitoring parameter values listed in paragraphs (e)(1) and (2) and (e)(10) through (14) of this section should be determined as described in paragraphs (j)(5)(i) through (iii) below.

(i) The owner or operator of an affected source or process unit that uses a wet scrubber must set a minimum scrubber pressure drop operating limit as the average of the pressure drop values associated with each test run.

(A) For a smelt dissolving tank dynamic wet scrubber operating at ambient pressure or for low-energy entrainment scrubbers where fan speed does not vary, the minimum fan amperage operating limit must be set as the average of the fan amperage values associated with each test run.

(B) [Reserved]

(ii) The owner operator of an affected source equipped with an ESP must set the minimum operating secondary current and secondary voltage as the average of the values associated with each test run.

(iii) The owner operator of an affected source equipped with an RTO must set the minimum operating temperature of the RTO as the average of the values associated with each test run.

(6) [Reserved]

(k) *On-going compliance provisions.* (1) Following the compliance date, owners or operators of all affected sources or process units are required to implement corrective action if the monitoring exceedances in paragraphs (k)(1)(ii) through (vii) of this section occur during times when spent pulping liquor or lime mud is fired (as applicable). Corrective action can include completion of transient startup and shutdown conditions as expediently as possible.

(i) [Reserved]

(ii) For a new or existing kraft or soda recovery furnace, kraft or soda smelt dissolving tank, kraft or soda lime kiln, or sulfite combustion unit equipped with a wet scrubber, when any 3-hour average parameter value is below the minimum operating limit established in paragraph (j) of this section, with the exception of pressure drop during periods of startup and shutdown.

(iii) For a new or existing kraft or soda recovery furnace or lime kiln equipped with an ESP followed by a wet scrubber, when:

(A) Any 3-hour average scrubber parameter value is below the minimum operating limit established in paragraph (j) of this section, with the exception of pressure drop during periods of startup and shutdown; and

(B) Any 3-hour average ESP secondary voltage and secondary current (or total secondary power) values are below the minimum operating limits established during performance testing, with the exception of secondary current (or total secondary power) during periods of startup and shutdown.

(iv) For a new or existing semichemical combustion unit equipped with an RTO, when any 1-hour average temperature falls below the minimum temperature operating limit established in paragraph (j) of this section.

(v) For the hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14), when the bag leak detection system alarm sounds.

(vi) For an affected source or process unit equipped with an ESP, wet scrubber, RTO, or fabric filter and monitoring alternative operating parameters established in paragraph (e)(13) of this section, when any 3-hour average value does not meet the operating limit established in paragraph (j) of this section.

(vii) For an affected source or process unit equipped with an alternative air pollution control system and monitoring operating parameters approved by the Administrator as established in paragraph (e)(14) of this section, when any 3-hour average value does not meet the operating limit established in paragraph (j) of this section.

(2) Following the compliance date, owners or operators of all affected sources or process units are in violation of the standards of § 63.862 if the monitoring exceedances in paragraphs (k)(2)(i) through (ix) of this section occur during times when spent pulping liquor or lime mud is fired (as applicable):

(i) For a new or existing kraft or soda recovery furnace equipped with an ESP, when opacity is greater than 20 percent for 2 percent or more of the operating time within any semiannual period;

(ii) For a new or existing kraft or soda lime kiln equipped with an ESP, when opacity is greater than 20 percent for 1 percent or more of the operating time within any semiannual period;

(iii) For a new or existing kraft or soda recovery furnace or lime kiln equipped with an ESP, when the ESP secondary voltage and secondary current (or total secondary power) averaged over the semiannual period are below the minimum operating limits established during the performance test, with the exception of secondary current (or total secondary power) during periods of startup and shutdown;

(iv) For a new or existing kraft or soda recovery furnace, kraft or soda smelt dissolving tank, kraft or soda lime kiln, or sulfite combustion unit equipped with a wet scrubber, when six or more 3-hour average parameter values within any 6-month reporting period are below the minimum operating limits established in paragraph (j) of this section, with the exception of pressure drop during periods of startup and shutdown;

(v) For a new or existing kraft or soda recovery furnace or lime kiln equipped with an ESP followed by a wet scrubber, when:

(A) Six or more 3-hour average scrubber parameter values within any 6-month reporting period are outside the range of values established in paragraph (j) of this section, with the exception of pressure drop during periods of startup and shutdown; and

(B) Six or more 3-hour average ESP secondary voltage and secondary current (or total secondary power) values within any 6-month reporting period are below the minimum operating limits established during performance testing, with the exception of secondary current (or total secondary power) during periods of startup and shutdown;

(vi) For a new or existing semichemical combustion unit equipped with an RTO, when any 3-hour average temperature falls below the temperature established in paragraph (j) of this section;

(vii) For the hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14), when corrective action is not initiated within 1 hour of a bag leak detection system alarm and the alarm is engaged for more than 5 percent of the total operating time in a 6-month block reporting period. In calculating the operating time fraction, if inspection of the fabric filter demonstrates that no corrective action is required, no alarm time is counted; if corrective action is required, each alarm is counted as a minimum of 1 hour; if corrective action is not initiated within 1 hour, the alarm time is counted as the actual amount of time taken to initiate corrective action;

(viii) For an affected source or process unit equipped with an ESP, wet scrubber, RTO, or fabric filter and monitoring alternative operating parameters established in paragraph (e)(13) of this section, when six or more 3-hour average values within any 6-month reporting period do not meet the operating limits established in paragraph (j) of this section; and

(ix) For an affected source or process unit equipped with an alternative air pollution control system and monitoring operating parameters approved by the Administrator as established in paragraph (e)(14) of this section, when six or more 3-hour average values within any 6-month reporting period do not meet the operating limits established in paragraph (j) of this section.

(3) [Reserved]

■ 8. Section 63.865 is amended by revising the introductory text and paragraphs (b)(1) through (5), (c)(1), and (d)introductory text to read as follows:

§ 63.865 Performance test requirements and test methods.

The owner or operator of each affected source or process unit subject to the requirements of this subpart is required to conduct an initial performance test and periodic performance tests using the test methods and procedures listed in § 63.7 and paragraph (b) of this section. The owner or operator must conduct the first of the periodic performance tests within 3 years of the effective date of the revised standards and thereafter before renewing their 40 CFR part 70 operating permit but at intervals no longer than 5 years following the previous performance test. Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Representative conditions exclude periods of startup and shutdown. The owner or operator may not conduct performance tests during periods of malfunction. The owner or operator must record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

* * * * *

(b) * * *

(1) For purposes of determining the concentration or mass of PM emitted from each kraft or soda recovery furnace, sulfite combustion unit, smelt dissolving tank, lime kiln, or the hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14), Method 5 in appendix A–3 of 40 CFR part 60 or Method 29 in appendix A–8 of 40 CFR part 60 must be used, except that Method 17 in appendix A–6 of 40 CFR part 60 may be used in lieu of Method 5 or Method 29 if a constant value of 0.009 g/dscm (0.004 gr/dscf) is added to the results of Method 17, and the stack temperature is no greater than 205 °C (400 °F). For Methods 5, 29, and 17, the sampling time and sample volume for each run must be at least 60 minutes and 0.90 dscm (31.8 dscf), and water must be used as the cleanup solvent instead of acetone in the sample recovery procedure.

(2) For sources complying with § 63.862(a) or (b), the PM concentration must be corrected to the appropriate oxygen concentration using Equation 7 of this section as follows:

$$C_{corr} = C_{meas} \times (20.9-X)/(20.9-Y) \qquad \text{(Eq. 7)}$$

Where:

C_{corr} = the measured concentration corrected for oxygen, g/dscm (gr/dscf);

C_{meas} = the measured concentration uncorrected for oxygen, g/dscm (gr/dscf);

X = the corrected volumetric oxygen concentration (8 percent for kraft or soda recovery furnaces and sulfite combustion units and 10 percent for kraft or soda lime kilns); and

Y = the measured average volumetric oxygen concentration.

(3) Method 3A or 3B in appendix A–2 of 40 CFR part 60 must be used to determine the oxygen concentration. The voluntary consensus standard ANSI/ASME PTC 19.10–1981—Part 10 (incorporated by reference—see § 63.14) may be used as an alternative to using Method 3B. The gas sample must be taken at the same time and at the same traverse points as the particulate sample.

(4) For purposes of complying with of § 63.862(a)(1)(ii)(A), the volumetric gas flow rate must be corrected to the appropriate oxygen concentration using Equation 8 of this section as follows:

$$Q_{corr} = Q_{meas} \times (20.9-Y)/(20.9-X) \qquad \text{(Eq. 8)}$$

Where:

Q_{corr} = the measured volumetric gas flow rate corrected for oxygen, dscm/min (dscf/min).

Q_{meas} = the measured volumetric gas flow rate uncorrected for oxygen, dscm/min (dscf/min).

Y = the measured average volumetric oxygen concentration.

X = the corrected volumetric oxygen concentration (8 percent for kraft or soda recovery furnaces and 10 percent for kraft or soda lime kilns).

(5)(i) For purposes of selecting sampling port location and number of traverse points, Method 1 or 1A in appendix A–1 of 40 CFR part 60 must be used;

(ii) For purposes of determining stack gas velocity and volumetric flow rate, Method 2, 2A, 2C, 2D, or 2F in appendix A–1 of 40 CFR part 60 or Method 2G in appendix A–2 of 40 CFR part 60 must be used;

(iii) For purposes of conducting gas analysis, Method 3, 3A, or 3B in appendix A–2 of 40 CFR part 60 must be used. The voluntary consensus standard ANSI/ASME PTC 19.10–1981—Part 10 (incorporated by reference—see § 63.14) may be used as an alternative to using Method 3B; and

(iv) For purposes of determining moisture content of stack gas, Method 4 in appendix A–3 of 40 CFR part 60 must be used.

* * * * *

(c) * * *

(1) The owner or operator complying through the use of an NDCE recovery furnace equipped with a dry ESP system is required to conduct periodic performance testing using Method 308 in appendix A of this part, as well as the methods listed in paragraphs (b)(5)(i) through (iv) of this section to demonstrate compliance with the gaseous organic HAP standard. The requirements and equations in paragraph (b)(2) of this section must be met and utilized, respectively.

* * * * *

(d) The owner or operator seeking to determine compliance with the gaseous organic HAP standards in § 63.862(c)(2) for semichemical combustion units must use Method 25A in appendix A–7 of 40 CFR part 60, as well as the methods listed in paragraphs (b)(5)(i) through (iv) of this section. The sampling time for each Method 25A run must be at least 60 minutes. The calibration gas for each Method 25A run must be propane.

* * * * *

■ 9. Section 63.866 is revised to read as follows:

§ 63.866 Recordkeeping requirements.

(a) [Reserved]

(b) The owner or operator of an affected source or process unit must maintain records of any occurrence when corrective action is required under § 63.864(k)(1), and when a violation is noted under § 63.864(k)(2). Record the time corrective action was initiated and completed, and the corrective action taken.

(c) In addition to the general records required by § 63.10(b)(2)(iii) and (vi) through (xiv), the owner or operator must maintain records of the information in paragraphs (c)(1) through (8) of this section:

(1) Records of black liquor solids firing rates in units of Mg/d or ton/d for

all recovery furnaces and semichemical combustion units;

(2) Records of CaO production rates in units of Mg/d or ton/d for all lime kilns;

(3) Records of parameter monitoring data required under § 63.864, including any period when the operating parameter levels were inconsistent with the levels established during the performance test;

(4) Records and documentation of supporting calculations for compliance determinations made under § 63.865(a) through (d);

(5) Records of parameter operating limits established for each affected source or process unit;

(6) Records certifying that an NDCE recovery furnace equipped with a dry ESP system is used to comply with the gaseous organic HAP standard in § 63.862(c)(1);

(7) For the bag leak detection system on the hog fuel dryer fabric filter at Cosmo Specialty Fibers' Cosmopolis, Washington facility (Emission Unit no. HD–14), records of each alarm, the time of the alarm, the time corrective action was initiated and completed, and a brief description of the cause of the alarm and the corrective action taken; and

(8) Records of the date, time, and duration of each startup and/or shutdown period, recording the periods when the affected source was subject to the standard applicable to startup and shutdown.

(d)(1) In the event that an affected unit fails to meet an applicable standard, including any emission limit or operating limit, record the number of failures. For each failure record the date, start time, and duration of each failure along with a brief explanation of the cause.

(2) For each failure to meet an applicable standard, record and retain a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit and a description of the method used to estimate the emissions.

(3) Record actions taken to minimize emissions in accordance with § 63.860(d) and any corrective actions taken to return the affected unit to its normal or usual manner of operation.

■ 10. Section 63.867 is revised to read as follows:

§ 63.867 Reporting requirements.

(a) *Notifications.* (1) The owner or operator of any affected source or process unit must submit the applicable notifications from subpart A of this part, as specified in Table 1 of this subpart.

(2) [Reserved]

(3) In addition to the requirements in subpart A of this part, the owner or operator of the hog fuel dryer at Cosmo Specialty Fibers' Cosmopolis, Washington, facility (Emission Unit no. HD–14) must include analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 63.864(e)(12) in the Notification of Compliance Status.

(b) *Additional reporting requirements for HAP metals standards.* (1) Any owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) must submit the PM emissions limits determined in § 63.865(a) for each affected kraft or soda recovery furnace, smelt dissolving tank, and lime kiln to the Administrator for approval. The emissions limits must be submitted as part of the notification of compliance status required under subpart A of this part.

(2) Any owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) must submit the calculations and supporting documentation used in § 63.865(a)(1) and (2) to the Administrator as part of the notification of compliance status required under subpart A of this part.

(3) After the Administrator has approved the emissions limits for any process unit, the owner or operator of a process unit must notify the Administrator before any of the actions in paragraphs (b)(3)(i) through (iv) of this section are taken:

(i) The air pollution control system for any process unit is modified or replaced;

(ii) Any kraft or soda recovery furnace, smelt dissolving tank, or lime kiln in a chemical recovery system at a kraft or soda pulp mill complying with the PM emissions limits in § 63.862(a)(1)(ii) is shut down for more than 60 consecutive days;

(iii) A continuous monitoring parameter or the value or range of values of a continuous monitoring parameter for any process unit is changed; or

(iv) The black liquor solids firing rate for any kraft or soda recovery furnace during any 24-hour averaging period is increased by more than 10 percent above the level measured during the most recent performance test.

(4) An owner or operator of a group of process units in a chemical recovery system at a mill complying with the PM emissions limits in § 63.862(a)(1)(ii) and seeking to perform the actions in paragraph (b)(3)(i) or (ii) of this section must recalculate the overall PM emissions limit for the group of process units and resubmit the documentation required in paragraph (b)(2) of this section to the Administrator. All modified PM emissions limits are subject to approval by the Administrator.

(c) *Excess emissions report.* The owner or operator must submit semiannual excess emissions reports containing the information specified in paragraphs (c)(1) through (5) of this section. The owner or operator must submit semiannual excess emission reports following the procedure specified in paragraph (d)(2) of this section.

(1) If the total duration of excess emissions or process control system parameter exceedances for the reporting period is less than 1-percent of the total reporting period operating time, and CMS downtime is less than 5-percent of the total reporting period operating time, only the summary report is required to be submitted in accordance with § 63.10(e)(3)(vii). This report will be titled ''Summary Report—Gaseous and Opacity Excess Emissions and Continuous Monitoring System Performance'' in accordance with § 63.10(e)(3)(vi) and must contain the information required in § 63.10(e)(3), as specified in paragraphs (c)(1)(i) through (x) of this section. When no exceedances of parameters have occurred, the owner or operator must submit the summary report stating that no excess emissions occurred during the reporting period. In addition to a statement verifying that no excess emissions occurred during the reporting period, this report must contain the information required in § 63.10(e)(3) only as specified in paragraphs (c)(1)(i) through (x) of this section. The summary report must be submitted following the procedure specified in paragraph (d)(2) of this section.

(i) The company name and address and name of the affected facility.

(ii) Beginning and ending dates of the reporting period.

(iii) An identification of each process unit with the corresponding air pollution control device, being included in the semiannual report, including the pollutants monitored at each process unit, and the total operating time for each process unit.

(iv) An identification of the applicable emission limits, operating parameter limits, and averaging times.

(v) An identification of the monitoring equipment used for each process unit and the corresponding model number.

(vi) Date of the last CMS certification or audit.

(vii) An emission data summary, including the total duration of excess emissions (recorded in minutes for opacity and hours for gases), the duration of excess emissions expressed as a percent of operating time, and reason for the excess emissions (*e.g.,* startup/shutdown, control equipment problems, other known reasons, or other unknown reasons).

(viii) A CMS performance summary, including the total duration of CMS downtime, the duration of downtime expressed as a percent of operating time, and reason for the downtime (e.g., monitoring equipment malfunction, non-monitoring equipment malfunction, quality assurance, quality control calibrations, other known causes, or other unknown causes).

(ix) A description of changes to CMS, processes, or controls since last reporting period.

(x) A certification by a certifying official of truth, accuracy and completeness. This will state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) [Reserved]

(3) If measured parameters meet any of the conditions specified in § 63.864(k)(1) or (2), the owner or operator of the affected source must submit a semiannual report describing the excess emissions that occurred. If the total duration of monitoring exceedances for the reporting period is 1-percent or greater of the total reporting period operating time, or the total CMS downtime for the reporting period is 5-percent or greater of the total reporting period operating time, or any violations according to § 63.864(k)(2) occurred, information from both the summary report and the excess emissions and continuous monitoring system performance report must be submitted. This report will be titled ''Excess Emissions and Continuous Monitoring System Performance Report'' and must contain the information specified in paragraphs (c)(1)(i) through (x) of this section, in addition to the information required in § 63.10(c)(5) through (14), as specified in paragraphs (c)(3)(i) through (vi) of this section. Reporting monitoring exceedances does not constitute a violation of the applicable standard unless the criteria in § 63.864(k)(2) are reached.

(i) An identification of the date and time identifying each period during which the CMS was inoperative except for zero (low-level) and high-level checks.

(ii) An identification of the date and time identifying each period during which the CMS was out of control, as defined in § 63.8(c)(7).

(iii) The specific identification of each period of excess emissions and parameter monitoring exceedances as described in paragraphs (c)(3)(iii)(A) through (C) of this section.

(A) For opacity:

(*1*) The total number of 6-minute averages in the reporting period (excluding process unit downtime).

(*2*) The number of 6-minute averages in the reporting period removed due to invalid readings.

(*3*) The number of 6-minute averages in the reporting period that exceeded the 20-percent opacity limit.

(*4*) The percent of 6-minute averages in the reporting period that exceed the 20-percent opacity limit.

(*5*) An identification of each exceedance by start time, date, and cause of exceedance (including startup/shutdown, control equipment problems, other known reasons, or other unknown reasons).

(B) For ESP operating parameters:

(*1*) The type of operating parameters monitored for compliance (total secondary power, or secondary voltage and secondary current).

(*2*) The operating limits established during the performance test.

(*3*) For systems only controlled with an ESP, the operating parameters averaged over the semiannual reporting period.

(*4*) For combined ESP and wet scrubber control systems, the number of 3-hour ESP and wet scrubber parameter averages below the minimum operating limit established during the performance test.

(*5*) An identification of each exceedance by start time, date, and cause of exceedance (including startup/shutdown, control equipment problems, other known reasons, or other unknown reasons).

(C) For wet scrubber operating parameters:

(*1*) The operating limits established during the performance test for scrubbing liquid flow rate and pressure drop across the scrubber (or fan amperage if used for smelt dissolving tank scrubbers).

(*2*) The number of 3-hour wet scrubber parameter averages below the minimum operating limit established during the performance test, if applicable.

(*3*) An identification of each exceedance by start time, date, and cause of exceedance (including startup/shutdown, control equipment problems, other known reasons, or other unknown reasons).

(D) For RTO operating temperature:

(*1*) The operating limit established during the performance test.

(*2*) The number of 1-hour and 3-hour temperature averages below the minimum operating limit established during the performance test.

(*3*) An identification of each exceedance by start time, date, and cause of exceedance including startup/shutdown, control equipment problems, other known reasons, or other unknown reasons).

(iv) The nature and cause of any malfunction (if known).

(v) The corrective action taken or preventative measures adopted.

(vi) The nature of repairs and adjustments to the CMS that was inoperative or out of control.

(4) If a source fails to meet an applicable standard, report such events in the semiannual excess emissions report. Report the number of failures to meet an applicable standard. For each instance, report the date, time and duration of each failure. For each failure the report must include a list of the affected sources or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions.

(5) The owner or operator of an affected source or process unit subject to the requirements of this subpart and subpart S of this part may combine excess emissions and/or summary reports for the mill.

(d) *Electronic reporting.* (1) Within 60 days after the date of completing each performance test (as defined in § 63.2) required by this subpart, the owner or operator must submit the results of the performance test following the procedure specified in either paragraph (d)(1)(i) or (ii) of this section.

(i) For data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT Web site (*https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert*) at the time of the test, the owner or operator must submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*).) Performance test data must be submitted in a file format generated through the use of the EPA's ERT or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the EPA's ERT Web site. If the owner or operator claims that some of the performance test information being submitted is confidential business information (CBI), the owner or operator must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT Web site, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAPQS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (d)(1)(i).

(ii) For data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT Web site at the time of the test, the owner or operator must attach an electronic copy of the complete performance test report containing the methods not included in the ERT in the attachment module of the ERT in portable document format (PDF) and submit the results of the performance test to the EPA via CEDRI.

(2) The owner or operator must submit notification and semiannual reports to the EPA via the CEDRI. (CEDRI can be accessed through the EPA's CDX (*https://cdx.epa.gov*).) The owner or operator must use the appropriate electronic report in CEDRI for this subpart or an alternative electronic file format consistent with the XML schema listed on the CEDRI Web site (*https://www.epa.gov/electronic-reporting-air-emissions/compliance-and-emissions-data-reporting-interface-cedri*). If neither the reporting form nor the spreadsheet template specific to this subpart are available in CEDRI at the time that the report is due, you must upload an electronic copy of the report in CEDRI. Once the form or spreadsheet template has been available in CEDRI for at least 90 calendar days, you must begin submitting all subsequent reports via CEDRI using the form or spreadsheet template. The reports must be submitted by the deadlines specified in this subpart, regardless of the method in which the reports are submitted.

■ 11. Section 63.868 is amended by revising paragraphs (b)(2) through (4) to read as follows:

§ 63.868 Delegation of authority.

* * * * *

(b) * * *

(2) Approval of a major change to test method under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(3) Approval of a major change to monitoring under § 63.8(f) and as defined in § 63.90.

(4) Approval of a major change to recordkeeping/reporting under § 63.10(f) and as defined in § 63.90.

■ 12. Table 1 to subpart MM of part 63 is revised to read as follows:

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
63.1(a)(1)	General applicability of the General Provisions.	Yes	Additional terms defined in § 63.861; when overlap between subparts A and MM of this part, subpart MM takes precedence.
63.1(a)(2)–(14)	General applicability of the General Provisions.	Yes.	
63.1(b)(1)	Initial applicability determination	No	Subpart MM specifies the applicability in § 63.860.
63.1(b)(2)	Title V operating permit—see 40 CFR part 70	Yes	All major affected sources are required to obtain a title V permit.
63.1(b)(3)	Record of the applicability determination	No	All affected sources are subject to subpart MM according to the applicability definition of subpart MM.
63.1(c)(1)	Applicability of subpart A of this part after a relevant standard has been set.	Yes	Subpart MM clarifies the applicability of each paragraph of subpart A of this part to sources subject to subpart MM.
63.1(c)(2)	Title V permit requirement	Yes	All major affected sources are required to obtain a title V permit. There are no area sources in the pulp and paper mill source category.
63.1(c)(3)	[Reserved]	No.	
63.1(c)(4)	Requirements for existing source that obtains an extension of compliance.	Yes.	
63.1(c)(5)	Notification requirements for an area source that increases HAP emissions to major source levels.	Yes.	
63.1(d)	[Reserved]	No.	
63.1(e)	Applicability of permit program before a relevant standard has been set.	Yes.	
63.2	Definitions	Yes	Additional terms defined in § 63.861; when overlap between subparts A and MM of this part occurs, subpart MM takes precedence.
63.3	Units and abbreviations	Yes.	
63.4	Prohibited activities and circumvention	Yes.	
63.5(a)	Construction and reconstruction—applicability	Yes.	
63.5(b)(1)	Upon construction, relevant standards for new sources.	Yes.	
63.5(b)(2)	[Reserved]	No.	
63.5(b)(3)	New construction/reconstruction	Yes.	
63.5(b)(4)	Construction/reconstruction notification	Yes.	
63.5(b)(5)	Construction/reconstruction compliance	Yes.	
63.5(b)(6)	Equipment addition or process change	Yes.	

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM—Continued

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
63.5(c)	[Reserved]	No.	
63.5(d)	Application for approval of construction/reconstruction.	Yes.	
63.5(e)	Construction/reconstruction approval	Yes.	
63.5(f)	Construction/reconstruction approval based on prior State preconstruction review.	Yes.	
63.6(a)(1)	Compliance with standards and maintenance requirements—applicability.	Yes.	
63.6(a)(2)	Requirements for area source that increases emissions to become major.	Yes.	
63.6(b)	Compliance dates for new and reconstructed sources.	Yes.	
63.6(c)	Compliance dates for existing sources	Yes, except for sources granted extensions under § 63.863(c).	Subpart MM specifically stipulates the compliance schedule for existing sources.
63.6(d)	[Reserved]	No.	
63.6(e)(1)(i)	General duty to minimize emissions	No	See § 63.860(d) for general duty requirement.
63.6(e)(1)(ii)	Requirement to correct malfunctions ASAP	No.	
63.6(e)(1)(iii)	Operation and maintenance requirements enforceable independent of emissions limitations.	Yes.	
63.6(e)(2)	[Reserved]	No.	
63.6(e)(3)	Startup, shutdown, and malfunction plan (SSMP).	No.	
63.6(f)(1)	Compliance with nonopacity emissions standards except during SSM.	No.	
63.6(f)(2)–(3)	Methods for determining compliance with nonopacity emissions standards.	Yes.	
63.6(g)	Compliance with alternative nonopacity emissions standards.	Yes.	
63.6(h)(1)	Compliance with opacity and visible emissions (VE) standards except during SSM.	No.	
63.6(h)(2)–(9)	Compliance with opacity and VE standards	Yes	Subpart MM does not contain any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.6(i)	Extension of compliance with emission standards.	Yes.	
63.6(j)	Exemption from compliance with emissions standards.	Yes.	
63.7(a)(1)	Performance testing requirements—applicability.	Yes.	
63.7(a)(2)	Performance test dates	Yes.	
63.7(a)(3)	Performance test requests by Administrator under CAA section 114.	Yes.	
63.7(a)(4)	Notification of delay in performance testing due to force majeure.	Yes.	
63.7(b)(1)	Notification of performance test	Yes.	
63.7(b)(2)	Notification of delay in conducting a scheduled performance test.	Yes.	
63.7(c)	Quality assurance program	Yes.	
63.7(d)	Performance testing facilities	Yes.	
63.7(e)(1)	Conduct of performance tests	No	See § 63.865.
63.7(e)(2)–(3)	Conduct of performance tests	Yes.	
63.7(e)(4)	Testing under section 114	Yes.	
63.7(f)	Use of an alternative test method	Yes.	
63.7(g)	Data analysis, recordkeeping, and reporting	Yes.	
63.7(h)	Waiver of performance tests	Yes	§ 63.865(c)(1) specifies the only exemption from performance testing allowed under subpart MM.
63.8(a)(1)	Monitoring requirements—applicability	Yes	See § 63.864.
63.8(a)(2)	Performance Specifications	Yes.	
63.8(a)(3)	[Reserved]	No.	
63.8(a)(4)	Monitoring with flares	No	The use of flares to meet the standards in subpart MM is not anticipated.
63.8(b)(1)	Conduct of monitoring	Yes	See § 63.864.
63.8(b)(2)–(3)	Specific requirements for installing and reporting on monitoring systems.	Yes.	
63.8(c)(1)	Operation and maintenance of CMS	Yes	See § 63.864.
63.8(c)(1)(i)	General duty to minimize emissions and CMS operation.	No.	

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM—Continued

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
63.8(c)(1)(ii)	Reporting requirements for SSM when action not described in SSMP.	Yes.	
63.8(c)(1)(iii)	Requirement to develop SSM plan for CMS	No.	
63.8(c)(2)–(3)	Monitoring system installation	Yes.	
63.8(c)(4)	CMS requirements	Yes.	
63.8(c)(5)	Continuous opacity monitoring system (COMS) minimum procedures.	Yes.	
63.8(c)(6)	Zero and high level calibration check requirements.	Yes.	
63.8(c)(7)–(8)	Out-of-control periods	Yes.	
63.8(d)(1)–(2)	CMS quality control program	Yes	See § 63.864.
63.8(d)(3)	Written procedures for CMS	No	See § 63.864(f).
63.8(e)(1)	Performance evaluation of CMS	Yes.	
63.8(e)(2)	Notification of performance evaluation	Yes.	
63.8(e)(3)	Submission of site-specific performance evaluation test plan.	Yes.	
63.8(e)(4)	Conduct of performance evaluation and performance evaluation dates.	Yes.	
63.8(e)(5)	Reporting performance evaluation results	Yes.	
63.8(f)	Use of an alternative monitoring method	Yes.	
63.8(g)	Reduction of monitoring data	Yes.	
63.9(a)	Notification requirements—applicability and general information.	Yes.	
63.9(b)	Initial notifications	Yes.	
63.9(c)	Request for extension of compliance	Yes.	
63.9(d)	Notification that source subject to special compliance requirements.	Yes.	
63.9(e)	Notification of performance test	Yes.	
63.9(f)	Notification of opacity and VE observations	Yes	Subpart MM does not contain any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.9(g)(1)	Additional notification requirements for sources with CMS.	Yes.	
63.9(g)(2)	Notification of compliance with opacity emissions standard.	Yes	Subpart MM does not contain any opacity or VE emissions standards; however, § 63.864 specifies opacity monitoring requirements.
63.9(g)(3)	Notification that criterion to continue use of alternative to relative accuracy testing has been exceeded.	Yes.	
63.9(h)	Notification of compliance status	Yes.	
63.9(i)	Adjustment to time periods or postmark deadlines for submittal and review of required communications.	Yes.	
63.9(j)	Change in information already provided	Yes.	
63.10(a)	Recordkeeping requirements—applicability and general information.	Yes	See § 63.866.
63.10(b)(1)	Records retention	Yes.	
63.10(b)(2)(i)	Recordkeeping of occurrence and duration of startups and shutdowns.	No	See § 63.866(c)(8) for recordkeeping of the date, time, and duration of each startup and/or shutdown period.
63.10(b)(2)(ii)	Recordkeeping of failures to meet a standard	No	See § 63.866(d) for recordkeeping of (1) date, time and duration; (2) listing of affected source or equipment, and an estimate of the quantity of each regulated pollutant emitted over the standard; and (3) actions to minimize emissions and correct the failure.
63.10(b)(2)(iii)	Maintenance records	Yes.	
63.10(b)(2)(iv)–(v)	Actions taken to minimize emissions during SSM.	No.	
63.10(b)(2)(vi)	Recordkeeping for CMS malfunctions	Yes.	
63.10(b)(2)(vii)-(xiv)	Other CMS requirements	Yes.	
63.10(b)(3)	Records retention for sources not subject to relevant standard.	Yes	Applicability requirements are given in § 63.860.
63.10(c)(1)–(14)	Additional recordkeeping requirements for sources with CMS..	Yes.	
63.10(c)(15)	Use of SSM plan	No.	
63.10(d)(1)	General reporting requirements	Yes.	
63.10(d)(2)	Reporting results of performance tests	Yes.	

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM—Continued

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
63.10(d)(3)	Reporting results of opacity or VE observations.	Yes	Subpart MM does not include any opacity or VE standards; however, § 63.864 specifies opacity monitoring requirements.
63.10(d)(4)	Progress reports	Yes.	
63.10(d)(5)(i)	Periodic startup, shutdown, and malfunction reports.	No	See § 63.867(c)(3) for malfunction reporting requirements.
63.10(d)(5)(ii)	Immediate startup, shutdown, and malfunction reports.	No	See § 63.867(c)(3) for malfunction reporting requirements.
63.10(e)	Additional reporting requirements for sources with CMS.	Yes.	
63.10(f)	Waiver of recordkeeping and reporting requirements.	Yes.	
63.11	Control device requirements for flares	No	The use of flares to meet the standards in subpart MM is not anticipated.
63.12	State authority and delegations	Yes.	
63.13	Addresses of State air pollution control agencies and EPA Regional Offices.	Yes.	
63.14	Incorporations by reference	Yes.	
63.15	Availability of information and confidentiality	Yes.	
63.16	Requirements for Performance Track member facilities.	Yes.	

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FEDERAL REGISTER

Vol. 81 Friday,

No. 251 December 30, 2016

Part VI

The President

Executive Order 13756—Adjustments of Certain Rates of Pay

Federal Register
Vol. 81, No. 251
Friday, December 30, 2016

Presidential Documents

Title 3—

The President

Executive Order 13756 of December 27, 2016

Adjustments of Certain Rates of Pay

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems.* The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303, are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7404; section 301(a) of Public Law 102–40) at Schedule 3.

Sec. 2. *Senior Executive Service.* The ranges of rates of basic pay for senior executives in the Senior Executive Service, as established pursuant to 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Certain Executive, Legislative, and Judicial Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5312–5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 4501) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a)) at Schedule 7.

Sec. 4. *Uniformed Services.* The rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services, as adjusted under section 601 of the National Defense Authorization Act for Fiscal Year 2017, [S. 2943, 114th Cong. (2016)], as signed by the President on December 23, 2016, and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

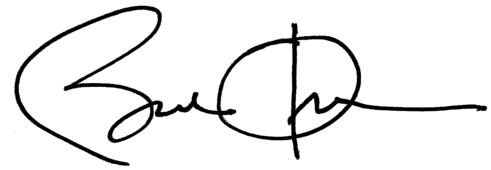
Sec. 5. *Locality-Based Comparability Payments.* (a) Pursuant to section 5304 of title 5, United States Code, and my authority to implement an alternative level of comparability payments under section 5304a of title 5, United States Code, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the *Federal Register*.

Sec. 6. *Administrative Law Judges.* Pursuant to section 5372 of title 5, United States Code, the rates of basic pay for administrative law judges are set forth on Schedule 10 attached hereto and made a part hereof.

Sec. 7. *Effective Dates.* Schedule 8 is effective January 1, 2017. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 2017.

Sec. 8. *Prior Order Superseded.* Executive Order 13715 of December 18, 2015, is superseded as of the effective dates specified in section 7 of this order.



THE WHITE HOUSE,
December 27, 2016.

Billing code 3295–F7–P

SCHEDULE 1--GENERAL SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

	1	2	3	4	5	6	7	8	9	10
GS-1	$18,526	$19,146	$19,762	$20,375	$20,991	$21,351	$21,960	$22,575	$22,599	$23,171
GS-2	20,829	21,325	22,015	22,599	22,853	23,525	24,197	24,869	25,541	26,213
GS-3	22,727	23,485	24,243	25,001	25,759	26,517	27,275	28,033	28,791	29,549
GS-4	25,514	26,364	27,214	28,064	28,914	29,764	30,614	31,464	32,314	33,164
GS-5	28,545	29,497	30,449	31,401	32,353	33,305	34,257	35,209	36,161	37,113
GS-6	31,819	32,880	33,941	35,002	36,063	37,124	38,185	39,246	40,307	41,368
GS-7	35,359	36,538	37,717	38,896	40,075	41,254	42,433	43,612	44,791	45,970
GS-8	39,159	40,464	41,769	43,074	44,379	45,684	46,989	48,294	49,599	50,904
GS-9	43,251	44,693	46,135	47,577	49,019	50,461	51,903	53,345	54,787	56,229
GS-10	47,630	49,218	50,806	52,394	53,982	55,570	57,158	58,746	60,334	61,922
GS-11	52,329	54,073	55,817	57,561	59,305	61,049	62,793	64,537	66,281	68,025
GS-12	62,722	64,813	66,904	68,995	71,086	73,177	75,268	77,359	79,450	81,541
GS-13	74,584	77,070	79,556	82,042	84,528	87,014	89,500	91,986	94,472	96,958
GS-14	88,136	91,074	94,012	96,950	99,888	102,826	105,764	108,702	111,640	114,578
GS-15	103,672	107,128	110,584	114,040	117,496	120,952	124,408	127,864	131,320	134,776

SCHEDULE 2--FOREIGN SERVICE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Step	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class 7	Class 8	Class 9
1	$103,672	$84,005	$68,069	$55,156	$44,693	$39,954	$35,718	$31,931	$28,545
2	106,782	86,525	70,111	56,811	46,034	41,153	36,790	32,889	29,401
3	109,986	89,121	72,214	58,515	47,415	42,387	37,893	33,876	30,283
4	113,285	91,795	74,381	60,270	48,837	43,659	39,030	34,892	31,192
5	116,684	94,548	76,612	62,079	50,302	44,969	40,201	35,939	32,128
6	120,184	97,385	78,911	63,941	51,811	46,318	41,407	37,017	33,091
7	123,790	100,306	81,278	65,859	53,366	47,707	42,649	38,127	34,084
8	127,503	103,316	83,716	67,835	54,967	49,138	43,929	39,271	35,107
9	131,329	106,415	86,228	69,870	56,616	50,613	45,246	40,449	36,160
10	134,776	109,607	88,815	71,966	58,314	52,131	46,604	41,663	37,245
11	134,776	112,896	91,479	74,125	60,064	53,695	48,002	42,913	38,362
12	134,776	116,283	94,223	76,349	61,866	55,306	49,442	44,200	39,513
13	134,776	119,771	97,050	78,639	63,722	56,965	50,925	45,526	40,698
14	134,776	123,364	99,962	80,998	65,633	58,674	52,453	46,892	41,919

SCHEDULE 3--VETERANS HEALTH ADMINISTRATION SCHEDULES
DEPARTMENT OF VETERANS AFFAIRS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Schedule for the Office of the Under Secretary for Health
(38 U.S.C. 7306)*
(Only applies to incumbents who are not physicians or dentists)

	Minimum	Maximum
Assistant Under Secretaries for Health		$163,665**
Service Directors	$121,588	$151,005
Director, National Center for Preventive Health	103,672	151,005

Physician and Dentist Base and Longevity Schedule***

Physician Grade	$101,967	$149,553
Dentist Grade	101,967	149,553

Clinical Podiatrist, Chiropractor, and Optometrist Schedule

Chief Grade	$103,672	$134,776
Senior Grade	88,136	114,578
Intermediate Grade	74,584	96,958
Full Grade	62,722	81,541
Associate Grade	52,329	68,025

Physician Assistant and Expanded-Function Dental Auxiliary Schedule****

Director Grade	$103,672	$134,776
Assistant Director Grade	88,136	114,578
Chief Grade	74,584	96,958
Senior Grade	62,722	81,541
Intermediate Grade	52,329	68,025
Full Grade	43,251	56,229
Associate Grade	37,219	48,388
Junior Grade	31,819	41,368

* This schedule does not apply to the Deputy Under Secretary for Health, the Associate Deputy Under Secretary for Health, Assistant Under Secretaries for Health who are physicians or dentists, Medical Directors, the Assistant Under Secretary for Nursing Programs, or the Director of Nursing Services.

** Pursuant to 38 U.S.C. 7404(d), the rate of basic pay payable to these employees is limited to the rate for level V of the Executive Schedule, which is $151,700.

*** Pursuant to section 3 of Public Law 108-445 and 38 U.S.C. 7431, Veterans Health Administration physicians and dentists may also be paid market pay and performance pay.

**** Pursuant to section 301(a) of Public Law 102-40, these positions are paid according to the Nurse Schedule in 38 U.S.C. 4107(b), as in effect on August 14, 1990, with subsequent adjustments.

SCHEDULE 4--SENIOR EXECUTIVE SERVICE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

	Minimum	Maximum
Agencies with a Certified SES Performance Appraisal System	$124,406	$187,000
Agencies without a Certified SES Performance Appraisal System	$124,406	$172,100

SCHEDULE 5--EXECUTIVE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Level I	$207,800
Level II	187,000
Level III	172,100
Level IV	161,900
Level V	151,700

SCHEDULE 6--VICE PRESIDENT AND MEMBERS OF CONGRESS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Vice President	$240,100
Senators	174,000
Members of the House of Representatives	174,000
Delegates to the House of Representatives	174,000
Resident Commissioner from Puerto Rico	174,000
President pro tempore of the Senate	193,400
Majority leader and minority leader of the Senate	193,400
Majority leader and minority leader of the House of Representatives	193,400
Speaker of the House of Representatives	223,500

SCHEDULE 7--JUDICIAL SALARIES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Chief Justice of the United States	$263,300
Associate Justices of the Supreme Court	251,800
Circuit Judges	217,600
District Judges	205,100
Judges of the Court of International Trade	205,100

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES
(Effective January 1, 2017)

Part I--MONTHLY BASIC PAY
YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
COMMISSIONED OFFICERS											
O-10*	-	-	-	-	-	-	-	-	-	-	-
O-9	-	-	-	-	-	-	-	-	-	-	-
O-8	$10,155.00	$10,487.70	$10,708.50	$10,770.00	$11,045.70	$11,505.90	$11,612.70	$12,049.80	$12,175.20	$12,551.70	$13,096.50
O-7	8,438.10	8,829.90	9,011.40	9,155.70	9,416.70	9,674.70	9,972.90	10,270.20	10,568.70	11,505.90	12,296.70
O-6**	6,398.70	7,029.90	7,491.30	7,491.30	7,519.80	7,842.30	7,884.60	7,884.60	8,332.50	9,124.80	9,589.80
O-5	5,334.30	6,009.30	6,424.80	6,503.40	6,763.20	6,918.30	7,259.70	7,510.50	7,834.20	8,329.80	8,565.00
O-4	4,602.60	5,327.70	5,683.50	5,762.40	6,092.40	6,446.40	6,887.40	7,230.30	7,468.50	7,605.60	7,684.80
O-3***	4,046.70	4,587.00	4,950.90	5,398.20	5,657.10	5,940.90	6,124.20	6,426.00	6,583.50	6,583.50	6,583.50
O-2***	3,496.50	3,982.20	4,586.10	4,741.20	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00
O-1***	3,034.80	3,159.00	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70
COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER OR WARRANT OFFICER****											
O-3E	-	-	-	$5,398.20	$5,657.10	$5,940.90	$6,124.20	$6,426.00	$6,680.70	$6,827.10	$7,026.00
O-2E	-	-	-	4,741.20	4,839.00	4,992.90	5,253.00	5,454.00	5,603.70	5,603.70	5,603.70
O-1E	-	-	-	3,818.70	4,077.60	4,228.50	4,382.40	4,533.90	4,741.20	4,741.20	4,741.20
WARRANT OFFICERS											
W-5	-	-	-	-	-	-	-	-	-	-	-
W-4	$4,182.00	$4,498.50	$4,627.50	$4,754.70	$4,973.40	$5,190.00	$5,409.30	$5,738.70	$6,027.90	$6,303.00	$6,528.30
W-3	3,819.00	3,978.30	4,141.50	4,195.20	4,365.90	4,702.50	5,052.90	5,218.20	5,409.00	5,605.50	5,959.20
W-2	3,379.50	3,699.00	3,797.40	3,864.90	4,084.20	4,424.70	4,593.60	4,759.50	4,962.90	5,121.60	5,265.60
W-1	2,966.40	3,285.60	3,371.40	3,552.90	3,767.40	4,083.60	4,231.20	4,437.30	4,640.40	4,800.30	4,947.00

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2017, which is $15,583.20 per month for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2017, which is $12,641.70 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member which are creditable toward reserve retirement also qualify for these rates.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 2)
(Effective January 1, 2017)

Part I--MONTHLY BASIC PAY
YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
					COMMISSIONED OFFICERS						
O-10*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*	$15,583.20*
O-9	14,352.00	14,559.30	14,857.80	15,378.60	15,378.60	15,583.20*	15,583.20*	15,583.20*	15,583.20*	15,583.20*	15,583.20*
O-8	13,598.70	13,933.80	13,933.80	13,933.80	13,933.80	14,282.70	14,282.70	14,639.70	14,639.70	14,639.70	14,639.70
O-7	12,296.70	12,296.70	12,296.70	12,359.70	12,359.70	12,606.90	12,606.90	12,606.90	12,606.90	12,606.90	12,606.90
O-6**	10,054.50	10,318.80	10,587.00	11,106.00	11,106.00	11,328.00	11,328.00	11,328.00	11,328.00	11,328.00	11,328.00
O-5	8,798.10	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70	9,062.70
O-4	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80	7,684.80
O-3***	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50	6,583.50
O-2***	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00	4,839.00
O-1***	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70	3,818.70
					COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER OR WARRANT OFFICER** **						
O-3E	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00	$7,026.00
O-2E	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70	5,603.70
O-1E	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20	4,741.20
					WARRANT OFFICERS						
W-5	$7,436.10	$7,813.20	$8,094.00	$8,405.10	$8,405.10	$8,826.00	$8,826.00	$9,266.70	$9,266.70	$9,730.80	$9,730.80
W-4	6,747.60	7,070.10	7,335.00	7,637.40	7,637.40	7,789.80	7,789.80	7,789.80	7,789.80	7,789.80	7,789.80
W-3	6,198.00	6,340.80	6,492.60	6,699.30	6,699.30	6,699.30	6,699.30	6,699.30	6,699.30	6,699.30	6,699.30
W-2	5,437.80	5,550.90	5,640.60	5,640.60	5,640.60	5,640.60	5,640.60	5,640.60	5,640.60	5,640.60	5,640.60
W-1	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80	5,125.80

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2017, which is $15,583.20 per month for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2017, which is $12,641.70 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member which are creditable toward reserve retirement also qualify for these rates.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 3)
(Effective January 1, 2017)

Part I--MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
					ENLISTED MEMBERS						
E-9*	-	-	-	-	-	-	$5,052.60	$5,166.90	$5,311.50	$5,481.00	$5,652.60
E-8	-	-	-	-	-	$4,136.10	4,318.80	4,432.20	4,567.80	4,715.10	4,980.30
E-7	$2,875.20	$3,138.00	$3,258.30	$3,417.30	$3,541.80	3,755.10	3,875.40	4,088.70	4,266.60	4,387.80	4,516.80
E-6	2,486.70	2,736.60	2,857.20	2,974.80	3,097.20	3,372.60	3,480.30	3,688.20	3,751.50	3,797.70	3,851.70
E-5	2,278.20	2,431.50	2,549.10	2,669.10	2,856.60	3,052.50	3,213.60	3,232.80	3,232.80	3,232.80	3,232.80
E-4	2,088.90	2,195.70	2,314.80	2,432.10	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60
E-3	1,885.80	2,004.30	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80
E-2	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40
E-1**	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90
E-1***	1,479.30	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is $8,165.10 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 4)
(Effective January 1, 2017)

Part I--MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
					ENLISTED MEMBERS						
E-9*	$5,926.50	$6,158.70	$6,402.60	$6,776.40	$6,776.40	$7,114.80	$7,114.80	$7,470.60	$7,470.60	$7,844.70	$7,844.70
E-8	5,114.70	5,343.60	5,470.50	5,782.80	5,782.80	5,898.90	5,898.90	5,898.90	5,898.90	5,898.90	5,898.90
E-7	4,566.60	4,734.60	4,824.60	5,167.50	5,167.50	5,167.50	5,167.50	5,167.50	5,167.50	5,167.50	5,167.50
E-6	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70	3,851.70
E-5	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80	3,232.80
E-4	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60	2,535.60
E-3	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80	2,125.80
E-2	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40	1,793.40
E-1**	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90	1,599.90
E-1***	-	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is $8,165.10 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 5)

Part II--RATE OF MONTHLY CADET OR MIDSHIPMAN PAY

The rate of monthly cadet or midshipman pay authorized by 37 U.S.C. 203(c) is $1,062.30.

Note: As a result of the enactment of sections 602–604 of Public Law 105–85, the National Defense Authorization Act for Fiscal Year 1998, the Secretary of Defense now has the authority to adjust the rates of basic allowances for subsistence and housing. Therefore, these allowances are no longer adjusted by the President in conjunction with the adjustment of basic pay for members of the uniformed services. Accordingly, the tables of allowances included in previous orders are not included here.

SCHEDULE 9--LOCALITY-BASED COMPARABILITY PAYMENTS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

Locality Pay Area*	Rate
Alaska	27.13%
Albany-Schenectady, NY	15.85%
Albuquerque-Santa Fe-Las Vegas, NM	15.36%
Atlanta—Athens-Clarke County—Sandy Springs, GA-AL	20.70%
Austin-Round Rock, TX	15.97%
Boston-Worcester-Providence, MA-RI-NH-CT-ME	26.73%
Buffalo-Cheektowaga, NY	18.66%
Charlotte-Concord, NC-SC	15.65%
Chicago-Naperville, IL-IN-WI	26.85%
Cincinnati-Wilmington-Maysville, OH-KY-IN	19.52%
Cleveland-Akron-Canton, OH	19.71%
Colorado Springs, CO	15.99%
Columbus-Marion-Zanesville, OH	18.49%
Dallas-Fort Worth, TX-OK	22.61%
Davenport-Moline, IA-IL	15.56%
Dayton-Springfield-Sidney, OH	17.59%
Denver-Aurora, CO	24.65%
Detroit-Warren-Ann Arbor, MI	25.68%
Harrisburg-Lebanon, PA	15.63%
Hartford-West Hartford, CT-MA	27.57%
Hawaii	17.92%
Houston-The Woodlands, TX	30.97%
Huntsville-Decatur-Albertville, AL	17.82%
Indianapolis-Carmel-Muncie, IN	15.85%
Kansas City-Overland Park-Kansas City, MO-KS	15.59%
Laredo, TX	16.68%
Las Vegas-Henderson, NV-AZ	15.93%
Los Angeles-Long Beach, CA	29.65%
Miami-Fort Lauderdale-Port St. Lucie, FL	22.13%
Milwaukee-Racine-Waukesha, WI	19.61%
Minneapolis-St. Paul, MN-WI	22.72%
New York-Newark, NY-NJ-CT-PA	31.22%
Palm Bay-Melbourne-Titusville, FL	15.48%
Philadelphia-Reading-Camden, PA-NJ-DE-MD	23.87%
Phoenix-Mesa-Scottsdale, AZ	18.57%
Pittsburgh-New Castle-Weirton, PA-OH-WV	17.86%
Portland-Vancouver-Salem, OR-WA	21.95%
Raleigh-Durham-Chapel Hill, NC	19.02%
Richmond, VA	18.19%
Sacramento-Roseville, CA-NV	24.14%
San Diego-Carlsbad, CA	26.98%
San Jose-San Francisco-Oakland, CA	38.17%
Seattle-Tacoma, WA	24.24%
St. Louis-St. Charles-Farmington, MO-IL	15.83%
Tucson-Nogales, AZ	15.66%
Washington-Baltimore-Arlington, DC-MD-VA-WV-PA	27.10%
Rest of U.S.	15.06%

* Locality Pay Areas are defined in 5 CFR 531.603.

SCHEDULE 10--ADMINISTRATIVE LAW JUDGES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2017)

AL-3/A	$108,100
AL-3/B	116,300
AL-3/C	124,700
AL-3/D	133,000
AL-3/E	141,500
AL-3/F	149,600
AL-2	157,900
AL-1	161,900

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